

TOWARDS A EUROPEAN "FAIR USE" GROUNDED IN FREEDOM OF EXPRESSION

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I. INTRODUCTION

In Europe, a growing chorus of voices is complaining about an E.U. copyright framework that falls short of the needs of modern information society. Despite all the aspirations and hopes that were associated with the recent E.U. copyright reform,¹ by now it is clear that the modernization of the legal framework will be much less ambitious than expected.² Certain aspects of the legislative initiative might even have the potential to further compromise an already disturbed balance between the far-reaching rights of copyright holders and the needs of the public to access cultural and informational content on fair terms and in a technology-friendly environment.³

1. Christophe Geiger et al., *The Resolution of the European Parliament of 9 July 2015: Paving the Way (Finally) for a Copyright Reform in the European Union?*, 37 EUR. INTELL. PROP. REV. 683, 683–84 (2015).

2. See Christophe Geiger, Giancarlo Frosio, & Oleksandr Bulayenko, *The EU Commission's Proposal to Reform Copyright Limitations: A Good but Far Too Timid Step in the Right Direction*, 40 EUR. INTELL. PROP. REV. 4, 4–6 (2018).

3. See, e.g., *General Opinion on the EU Copyright Reform Package*, EUR. COPYRIGHT

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One of the major problems commonly highlighted in this regard is the problem of imbalances – in other words, a narrow space the E.U. copyright law leaves to the so-called exceptions and limitations (E&Ls) to exclusive rights – the mechanisms inherent to copyright law aimed at ensuring that the sufficient breathing space is secured for future creativity and cultural exchanges.⁴ As it was deplored by a vast number of scholars,⁵ the 2001 E.U. Copyright Directive (also known as InfoSoc)⁶ defines exclusive rights broadly, while the copyright exceptions are made narrow, optional, exhaustive, and are further subjected to the so-called international “three-step test.”⁷ If wrongly applied, the latter can

SOC'Y 4–5 (Jan. 24, 2017), <https://europeancopyrightsocietydotorg.files.wordpress.com/2015/12/ecs-opinion-on-eu-copyright-reform-def.pdf>; *General Remarks*, in MODERNISATION OF THE EU COPYRIGHT RULES, MAX PLANCK INSTITUTE FOR INNOVATION AND COMPETITION 18 (Reto M. Hilty & Valentina Moscon eds., 2017); Christophe Geiger, Giancarlo Frosio, & Oleksandr Bulayenko, *The Introduction of a Neighbouring Right for Press Publisher at E.U. Level: the Unneeded (and Unwanted) Reform*, 34 EUR. INTELL. PROP. REV. 202, 204-06 (2017) [hereinafter Geiger, Frosio, & Bulayenko, *The Unneeded (and Unwanted) Reform*].

4. Christophe Geiger, *Promoting Creativity through Copyright Limitations: Reflections on the Concept of Exclusivity in Copyright Law*, 12 VAND. J. ENT. & TECH. L. 515 (2010). See generally Francisco Javier Cabrera Blázquez et al., Eur. Audiovisual Observatory, *Exceptions and Limitations to Copyright* (2017) (providing a recent overview of the state of exceptions and limitations in the E.U.).

5. See Jonathan Griffiths et al., *Limitations and Exceptions as Key Elements of the Legal Framework for Copyright in the European Union – Opinion on the Judgment of the CJEU in Case C-201/13 Deckmyn*, 45 EUR. INTELL. PROP. REV. 127 (2015); Christophe Geiger & Franciska Schönherr, *Limitations to Copyright in the Digital Age*, in RESEARCH HANDBOOK ON E.U. INTERNET LAW 110 (Andrej Savin & Jan Trzaskowski eds., 2014); Christophe Geiger & Franciska Schönherr, *Defining the Scope of Protection of Copyright in the EU: The Need to Reconsider the Acquis Regarding Limitations and Exceptions*, in CODIFICATION OF EUROPEAN COPYRIGHT LAW: CHALLENGES AND PERSPECTIVES 133 (Tatiana–Helene Synodinou ed., 2012) [hereinafter Geiger & Schönherr, *Defining the Scope of Protection of Copyright in the EU*].

6. Council Directive 2001/29 on the harmonisation of certain aspects of copyright and related rights in the information society (InfoSoc), 2001 O.J. (L 167) 10 (EC).

7. Berne Convention for the Protection of Literary and Artistic Works, art. 9(2), Sept. 9, 1886, 828 U.N.T.S. 221 [hereinafter Berne Convention] (providing laws on the right of reproduction); Agreement on Trade-Related Aspects of Intellectual Property Rights, Annex 1C, Part II, art. 13, Jan. 1, 1995, 1869 U.N.T.S. 3 (providing laws for all exclusive rights); World Intellectual Property Organization Copyright Treaty, art. 10, Dec. 20, 1996, 2186 U.N.T.S. 121, 155; World Intellectual Property Organization Performances and Phonograms Treaty, art. 6, Dec. 20, 1996, 2186 U.N.T.S. 203, 251. See Christophe Geiger, Daniel J. Gervais, and Martin Senftleben, *The Three-Step Test Revisited: How to Use the Test's Flexibility in National Copyright Law*, 29 AM. U. INT'L L. REV.

additionally narrow down an already small room for possible derogations from copyright protection.⁸ The European legislature's approach towards the narrow construction of copyright exceptions was further endorsed by the Court of Justice of the E.U. (C.J.E.U.), which has been repeatedly stating since its *Infopaq* decision that any exception to the general rule of copyright protection should be interpreted strictly.⁹ Finally, thereby attenuated exceptions can additionally be constrained by contract or application of the Technological Protection Measures (T.P.M.).¹⁰

Apart from the general problem of imbalances, another hurdle of E.U. copyright framework that naturally stems from the first problem is the copyright system's lack of flexibility.¹¹ As just mentioned, the current

581 (2014).

8. The E.U. incorporation of the test in Article 5(5) InfoSoc requires that any exception to copyright should meet the following criteria: 1) it should be introduced in certain special cases 2) that do not conflict with a normal exploitation of the work and that 3) do not unreasonably prejudice the legitimate interests of the rightholder. See Christophe Geiger, *From Berne to National Law, via the Copyright Directive: The Dangerous Mutations of the Three-Step Test*, 29 EUR. INTELL. PROP. REV. 486 (2007) (discussing the potential dangers of a wrong use of the three-step test as a restrictive mechanism for copyright limitations); Jonathan Griffiths, *The 'Three-Step Test' in European Copyright Law – Problems and Solutions*, 4 INTELL. PROP. Q. 428 (2009).

9. Case C-5/08, *Infopaq Int'l A/S v. Danske Dagblades Forening*, [2009] ECR, I-06569, ¶ 56. See also Case C-435/12, *ACI Adam BV and Others v. Stichting de Thuiscope*, 2014 EUR-Lex CELEX LEXIS ¶ 22 (Apr. 10, 2014). It has to be noted, however, that in recent years the Court of Justice took a more liberal stance, relying on a purposive interpretation of exceptions in light of fundamental rights. See, e.g., Case C-403/08 *Football Association Premier League Ltd and Others v. QC Leisure*, [2011] ECR, I-09083, ¶ 163; Case C-429/08, *Karen Murphy v. Media Protection Services Ltd*, [2011] ECR, I-09083, ¶ 163; Case C-145/10, *Painer v. Standard VerlagsGmbH and Others*, [2011] ECR, I-12533 ¶¶ 132–33; Case C-201/13, *Deckmyn et al. v. Vandersteen et al.*, 2014 EUR-Lex CELEX LEXIS ¶¶ 19–23 (Sept. 3, 2014); Case C-117/13, *Technische Universität Darmstadt v. Eugen Ulmer KG*, 2014 EUR-Lex CELEX LEXIS ¶¶ 27, 31 (Sept. 11, 2014). See Christophe Geiger, *The Role of the Court of Justice of the European Union: Harmonizing, Creating, and Sometimes Disrupting Copyright Law in the European Union*, in NEW DEVELOPMENTS IN E.U. AND INTERNATIONAL COPYRIGHT LAW 435 (I. Stamatoudi ed., 2016) (discussing these different and sometimes contradicting approaches).

10. Jonathan Griffiths, *Unsticking the Centre-Piece – the Liberation of European Copyright Law?*, 1 J. INTELL. PROP., INFO. TECH. AND ELEC. COM. L. 87, 87–88 (2010) [hereinafter *Unsticking the Centre-Piece*].

11. See P. Bernt Hugenholtz & Martin Senftleben, *Fair Use in Europe: In Search of Flexibilities* 1, 7 (Nov. 2011), <https://research.vu.nl/ws/portalfiles/portal/2943008/Fair+Use+in+Europe+In+Se>

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E.U. copyright framework defines copyright exceptions in a closed catalogue that does not allow, except in minor deviations, for the addition of any “free spaces,” which have not been envisaged by the legislature at the time of the Directive’s construction.¹² As commonly observed, this arrangement gives rise to a certain rigidity of the system.¹³ This rigidity is further exacerbated by the pace of development of the modern information society.¹⁴ In the light of rapidly evolving technologies, legislative amendments need to be introduced all the time to keep up with the fast-changing realities.¹⁵ An extremely slow legislative cycle in the E.U. coupled with the need to further transpose the Union legislation domestically only adds to this initial lack of flexibility, making the closed construction of the E.U. system of copyright limitations highly unpractical.¹⁶

Beside imbalances and rigidity, there is yet another disadvantage of the E.U. copyright framework – the lack of legal certainty. Unlike the lack of flexibility, this drawback is rarely named as a characteristic feature of the civil law copyright tradition and is more frequently associated with the common law world. Legal uncertainty in E.U. copyright *acquis* persists for several reasons, including the fact that only one InfoSoc exception¹⁷ is obligatory for all E.U. Members who are thus free to choose which exceptions they decide to transpose domestically.¹⁸ Furthermore, the

arch+of+Flexibilities.pdf [hereinafter *Fair Use in Europe*].

12. *See, e.g.*, Martin Senftleben, *Overprotection and Protection Overlaps in Intellectual Property Law – The Need for Horizontal Fair Use Defences*, in THE STRUCTURE OF INTELLECTUAL PROPERTY LAW: CAN ONE SIZE FIT ALL? 136, 142 (Annette Kur & Vytautas Mizaras eds., 2011) [hereinafter *Overprotection and Protection Overlaps*].

13. *See id.* at 140–41.

14. Griffiths, *Unsticking the Centre-Piece*, *supra* note 10, at 90.

15. *See* Geiger, Frosio, and Bulayenko, *The Unneeded (and Unwanted) Reform*, *supra* note 3, at 204–05.

16. Hugenholtz & Senftleben, *Fair Use in Europe*, *supra* note 11, at 7; Senftleben, *Overprotection and Protection Overlaps*, *supra* note 12, at 155; Christophe Geiger, *Flexibilising Copyright – Remedies to the Privatisation of Information by Copyright Law*, 39 INT’L REV. INTELL. PROP. & COMPETITION L. 178 (2008). It has to be noted, however, that the current wording of some of the limitations and exceptions of the InfoSoc have certainly some further potential for a flexible interpretation, for example the quotation exception of Art. 5.3(d) allowing quotations if the “use is in accordance with *fair practice*, and to the extent required by the specific purpose” (emphasis added). *See* Geiger & Schönherr, *Defining the Scope of Protection of Copyright in the E.U.*, *supra* note 5, at 133.

17. *See* Council Directive 2001/29, *supra* note 6, art. 5(1).

18. Council Directive 2001/29, *supra* note 6, art. 5(2)–6(4).

manner in which the Member States implement even the very same exceptions can vary considerably from country to country.¹⁹ Finally, the subjection of InfoSoc's list of exceptions to the three-step test does not add to the legal certainty when it comes to the question of which uses are permitted and which should be deemed infringing across the E.U.²⁰ Summing up, the E.U. system of exceptions and limitations appears to be in quite an unfavorable situation – one that Martin Senftleben aptly characterized as an “E.U. worst case scenario” – “a copyright system [. . .] that offers neither legal certainty [that could have been expected from the civil law legal tradition] nor sufficient flexibility [commonly found in the common law legal systems].”²¹

As a response to the above-sketched problems of E.U. copyright (imbalances, lack of flexibility, and legal uncertainty), several ways to fix the system and to re-establish the original balance between exclusive rights and permissible derogations from them²² have been suggested.²³ One of the recurring proposals is the introduction of the so-called “fair use” copyright exception into the E.U. legal framework.²⁴

Fair use is a distinctive feature of the U.S. legal tradition, which unlike that of the civil law countries (and hence largely of the E.U. itself), allows for a much greater flexibility in approaching exceptions and limitations to copyright law.²⁵ American fair use (codified in Section 107 of the U.S.

19. For example, a quotation exception has very different scope across Europe. See also Hugenholtz & Senftleben, *Fair Use in Europe*, *supra* note 11, at 15-17; Christophe Geiger & Franciska Schönherr, Eur. Union Intell. Prop. Off., *Frequently Asked Questions (FAQ) of Consumers in Relation to Copyright*, SUMMARY REPORT 6-8 (2017) (“Copyright law throughout the E.U. does not give unanimous answers to Consumers’ 15 Frequently Asked Questions . . . [t]he result is the following; even if a few common basic principles can certainly be identified, the exceptions to these principles as well as their implementation vary significantly.”). The study lists exceptions and limitations to copyright as one of the areas of major divergence in national copyright law.

20. See Senftleben, *Overprotection and Protection Overlaps*, *supra* note 12, at 152-53.

21. *Id.* at 156, 157.

22. See Alain Strowel, DROIT D'AUTEUR ET COPYRIGHT: DIVERGENCES ET CONVERGENCES. ÉTUDE DE DROIT COMPARÉ 149 (1993) (discussing how copyright law in civil law countries has lost its flexibility during the 20th century).

23. See Griffiths, *Unsticking the Centre-Piece*, *supra* note 10, at 89-90.

24. See *id.* at 90-91.

25. See generally, Pierre N. Leval, Commentaries, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105 (1990) (discussing further U.S. fair use standards).

in the very same country.¹⁹ Finally, the step test does not mention of which uses are made across the E.U.²⁰ The Senftleben aptly describes the copyright system [. . .] as not even expected from a system commonly found in

of E.U. copyright law in several ways to fix the gap between exclusive rights and limitations that have been suggested.²³ The so-called "fair use" clause.²⁴

ion, which unlike the E.U. itself), allows for exceptions and limitations on 107 of the U.S.

be across Europe. See Senftleben at 15-17; Christophe Schreier, *Frequently Asked Questions on Copyright for Consumers* 15 (2017) ("Copyright law is based on a few common principles as well as exceptions and limitations to copyright law." Senftleben at 12, at 152-53.

DIVERGENCES BETWEEN EUROPEAN AND U.S. COPYRIGHT LAW: HOW TO BRIDGE THE GAP (2017) at 90.

Fair Use Standard, 103 (2017) (p. 103).

Copyright Act²⁶) exists as a superstructure to the legislatively defined exceptions to copyright. It keeps the system open and permits, through the application of judicially developed fairness factors, for additional uses to be characterized as "fair," and thus non-infringing, even if those uses are not explicitly defined by the statute. Fair use is widely praised for its ability to adapt to new social developments, including technological changes, which cannot be envisaged by the legislature or to which the legislature is not able to react swiftly.²⁷

Despite its numerous advantages, a blind transposition of U.S. fair use on European ground has been historically strongly opposed in the E.U.²⁸ This is for many good reasons, ranging from the different philosophical foundations on which the common and civil law copyright traditions are built to the lack of legal certainty, a commonly named flip side of the openness and flexibility that U.S. fair use suggests.²⁹ In his recent opinion on the *Spiegel Online* case, the Advocate General of the C.J.E.U. has further considered that introduction of a sort of "fair use" clause into E.U. law would "transform[] any harmonization effort into wishful thinking."³⁰ Finally, the fact that fair use is always the use for free (i.e. no

26. Copyright Act of 1976, 17 U.S.C. § 107 (2019).

27. See, e.g., Carys J. Craig, *Globalizing User Rights—Talk: On Copyright Limits and Rhetorical Risks*, 33 AM. U. INT'L L. REV. 1, 27 (2017); Senftleben, *Overprotection and Protection Overlaps*, *supra* note 12, at 155; Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537, 2540 (2009); Matthew Sag, *God in the Machine: A New Structural Analysis of Copyright's Fair Use Doctrine*, 11 MICH. TELECOMM. & TECH. L. REV. 381, 384 (2005); Jessica Litman, *Copyright Legislation and Technological Change*, 68 OR. L. REV. 275, 332-33, 340 (1989).

28. See P. Bernt Hugenholtz, *Flexible Copyright, Can E.U. Author's Right Accommodate Fair Use?*, in COPYRIGHT LAW IN AN AGE OF LIMITATIONS AND EXCEPTIONS 275, 276-77 (Ruth Okediji ed., 2016) (providing a brief overview of the history of the fair use proposals in Europe).

29. In recent times, critics have convincingly challenged this assumption, suggesting that the fair use defense as it is applied by U.S. courts provides more legal security than it is sometimes assumed. See, e.g., Matthew Sag, *Predicting Fair Use*, 73 OHIO ST. L. J. 47, 48-49 (2012); Samuelson, *Unbundling Fair Uses*, *supra* note 27, at 2540; Neil Weinstock Netanel, *Making Sense of Fair Use*, 15 LEWIS & CLARK L. REV. 715, 740-43 (2011); Martin Senftleben, *Bridging the Differences between Copyright's Legal Traditions – The Emerging EC Fair Use Doctrine*, 57 J. COPYRIGHT SOC'Y OF THE U.S.A. 521, 530-32 (2010); Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005*, 156 U. OF PA. L. REV. 549, 575-81 (2008).

30. Opinion of Advocate General Szpunar in Case C-516/17, *Spiegel Online GmbH v. Beck*, 2019 EUR-Lex CELEX LEXIS ¶ 63 (Jan. 10, 2019). See, e.g., Tito Rendas, *Advocate General Szpunar in Spiegel Online (or Why We Need Fair Use in the EU)*, 14 J. INTELL.

remuneration is paid to the rightholders in case one particular use is ruled fair) can be viewed as a disadvantage of this solution,³¹ as the limitations-based remunerations can secure significant revenues for creators and can thus be considered important features of the copyright balances in author-centered legislative frameworks.³²

The literal transposition of the U.S. fair use has not, however, been viewed as the only way of opening up the E.U. copyright system. Over the years, a number of viable solutions were advanced in the literature to this end. Among the most developed is the proposal of keeping the best of two worlds by retaining the precisely defined list of exceptions based on the model of InfoSoc.³³ However, instead of delimiting the list of exceptions even further by virtue of the application of the three-step test, the proposal suggests using this same test in an enabling manner³⁴ – that

PROP. L. & PRAC. 265 (2019); Tatiana Synodinou, *Mirror, Mirror, Tell Me, is the Copyright Law Fair and Balanced? Reflection on AG's Conclusions on the Spiegel Online Case Part I*, KLUWER COPYRIGHT BLOG (Feb. 15, 2019), <http://copyrightblog.kluweriplaw.com/2019/02/15/mirror-mirror-tell-me-is-the-copyright-law-fair-and-balanced-reflection-on-ags-conclusions-on-the-spiegel-online-case-part-i/>; Tatiana Synodinou, *Mirror, Mirror, Tell Me, is the Copyright Law Fair and Balanced? Reflection on AG's Conclusions on the Spiegel Online Case (Part II)*, KLUWER COPYRIGHT BLOG (Feb. 21, 2019), <http://copyrightblog.kluweriplaw.com/2019/02/21/mirror-mirror-tell-me-is-the-copyright-law-fair-and-balanced-reflection-on-ags-conclusions-on-the-spiegel-online-case-part-ii/>.

31. See Jane C. Ginsburg, *Fair Use for Free, or Permitted—but—Paid?*, 29 BERKELEY TECH. L. J. 1383, 1385 (2014) (“Fair use is an on/off switch; either the challenged use is an infringement of copyright or it is a fair use, which section 107 declares ‘is not an infringement of copyright.’ As a result, either the copyright owner can stop the use, or the user is not only dispensed from obtaining permission, but also owes no compensation for the use.”).

32. See, e.g., Geiger, *Promoting Creativity Through Copyright Limitations*, *supra* note 4, at 528–30; see Christophe Geiger, *Statutory Licenses as Enabler of Creative Uses*, in REMUNERATION OF COPYRIGHT OWNERS, REGULATORY CHALLENGES OF NEW BUSINESS MODELS 305, 308–09 (Kung-Chung Liu & Reto M. Hilty eds., 2017).

33. See, e.g., Geiger, *Promoting Creativity Through Copyright Limitations*, *supra* note 4, at 527–33 (delineating one alternative as used in Germany).

34. See Martin Senftleben, *The International Three-Step Test: A Model Provision for EC Fair Use Legislation*, J. INTELL. PROP., INFO. TECH. & E-COM. L. 67 (2010) [hereinafter Senftleben, *The International Three-Step Test*]; Christophe Geiger, *The Role of the Three-Step Test in the Adaptation of Copyright Law to the Information Society*, U.N. EDUC., SCI. & CULTURAL ORG. E-COPYRIGHT BULL. 1 (2007) [hereinafter Geiger, *The Role of the Three-Step Test*], <https://unesdoc.unesco.org/ark:/48223/pf0000157848>; see also Christophe Geiger, *Implementing an International Instrument for Interpreting Copyright*

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is to say, as a test applied not to an already enumerated list of exceptions (the way it functions now) but as a threshold for the introduction of new exceptions to copyright. One of the embodiments of this proposal, a draft European Copyright Code advanced by Wittem Group,³⁵ further distinguishes between the “free-of-charge” exceptions and those which can only be granted subject to fair remuneration to rightholders.³⁶

A much less researched solution is to look at the model of flexibility that already exists in European law, notably at the test of proportionality, which represents a distinguished feature of the European human rights law.³⁷ This test is inherent to any qualified human right, such as the right to privacy, freedom of expression and information, freedom of thought, conscience and religion, or freedom of assembly.³⁸ In application to each of these rights, the test of proportionality has a rich set of balancing factors developed within the years of the European human rights law construction by judges of the European Court of Human Rights

Limitations and Exceptions, 40 INT'L REV. INTELL. PROP. & COMPETITION L. 627 (2009); Kamil J. Koelman, *Fixing the Three-Step Test*, 28 EUR. INTELL. PROP. REV. 407 (2006). *See generally* Christophe Geiger, Daniel J. Gervais, and Martin Senftleben, *Understanding the “Three-Step Test”*, in INTERNATIONAL INTELLECTUAL PROPERTY: A HANDBOOK OF CONTEMPORARY RESEARCH 167 (D. Gervais ed., 2015).

35. *European copyright code*, THE WITTEM PROJECT (April 2010), https://www.ivir.nl/publicaties/download/Wittem_European_copyright_code_21_april_2010.pdf.

36. *Id.* at 23-27.

37. *See generally* Jonas Christoffersen, *Human Rights and Balancing: The Principle of Proportionality*, in RESEARCH HANDBOOK ON HUMAN RIGHTS AND INTELLECTUAL PROPERTY 19 (Christophe Geiger ed., 2015); *see* Orit Fischman Afori, *Proportionality - A New Mega Standard in European Copyright Law*, 45 INT'L REV. INTELL. PROP. & COMPETITION L. 889 (2014) (discussing the role of the proportionality test in its application to copyright law in Europe); Caterina Sganga & Silvia Scalzini, *From Abuse of Right to European Copyright Misuse: A New Doctrine for E.U. Copyright Law*, 48 INT'L REV. INTELL. PROP. & COMPETITION L. 1 (2017); Peter Teunissen, *The Balance Puzzle: The ECJ's Method of Proportionality Review for Copyright Injunctions*, 40(9) EUROPEAN INTELLECTUAL PROPERTY REVIEW 579 (2018).

38. *See* Peggy Ducoulombier, *Interaction Between Human Rights: Are All Human Rights Equal?*, in RESEARCH HANDBOOK ON HUMAN RIGHTS AND INTELLECTUAL PROPERTY 39 (Christophe Geiger ed., 2015) (discussing the hierarchy of human rights).

(E.Ct.H.R. or Strasbourg Court),³⁹ C.J.E.U.,⁴⁰ and national courts.⁴¹ Considering that copyright law is, in essence, the law regulating expression and information flows, the question arises whether the proportionality inbuilt in the right to freedom of expression (FoE) suggests a viable model of flexibility that can be successfully applied to E.U. copyright, thereby serving as a European alternative to U.S. fair use.⁴²

This article is devoted to exploring this exact aspect of the issue. As will be demonstrated, the growing application of freedom of expression and information to copyright disputes in many E.U. countries makes “fair use” already a reality in the entirety of Europe. It is important to note at this stage that the term “fair use” is applied here to relate to the open-ended construction of copyright limitations. The term therefore should not be equated with U.S. fair use and is put in quotes throughout this article with the aim of highlighting the conventionality of its use.

39. See generally Christophe Geiger & Elena Izyumenko, *Intellectual Property Before the European Court of Human Rights*, in INTELLECTUAL PROPERTY AND THE JUDICIARY 9 (Christophe Geiger, et al. eds., 2018) [hereinafter Geiger & Izyumenko, *Intellectual Property Before the European Court of Human Rights*] (discussing I.P. and human rights in the case law of the Strasbourg Court).

40. See, e.g., Jonathan Griffiths, *Taking Power Tools to the Acquis – The Court of Justice, The Charter of Fundamental Rights and European Union Copyright Law*, in INTELLECTUAL PROPERTY AND THE JUDICIARY 144 (Christophe Geiger, et al. eds., 2018); see also Stijn van Deursen & Thom Snijders, *The Court of Justice at the Crossroads: Clarifying the Role for Fundamental Rights in the EU Copyright Framework*, 49 INT'L REV. INTEL. PROP. & COMPETITION L. 1080 (2018).

41. Christophe Geiger, “Fair Use” Through Fundamental Rights: When Freedom of Artistic Expression Allows Creative Appropriations and Opens up Statutory Copyright Limitations, in COMPARATIVE ASPECTS OF LIMITATIONS AND EXCEPTIONS IN COPYRIGHT LAW (Wee Loon Ng, Haochen Sun and Shyam Balganes, eds., forthcoming 2019).

42. Despite the fact that the E.C.H.R., pending the E.U. obligatory accession to it, has not been formally incorporated into E.U. law, Article 10 (freedom of expression) of the E.C.H.R. is applicable to E.U. law for several reasons. First, all E.U. Member States are also parties to the E.C.H.R. Second, Article 6(3) of the Treaty on European Union states that fundamental rights recognized by the E.C.H.R. constitute general principles of E.U. law. Finally, and most importantly, Article 52(3) of the E.U. Charter on Fundamental Rights provides that the rights contained in the Charter, which correspond to rights guaranteed by the E.C.H.R., are to have the same meaning and scope as those laid down by the E.C.H.R. Article 10 (freedom of expression) of the E.C.H.R., notably corresponds to Article 11 (freedom of expression and information) of the E.U. Charter. Furthermore, Article 1 of Protocol No. 1 (protection of property) of the E.C.H.R. corresponds to Article 17 (right to property) of the E.U. Charter.

national courts.⁴¹ The law regulating arises whether the expression (FoE) successfully applied to native to U.S. fair effect of the issue. As freedom of expression J. countries makes . It is important to ere to relate to the The term therefore quotes throughout nality of its use.

Coming back to the mentioned phenomenon of raised application of freedom of expression to copyright cases, this situation results from a spectacular uprising in recent years of fundamental rights application by civil courts both at European supranational (E.Ct.H.R. and C.J.E.U.) and national levels.⁴³ In the context of intellectual property law, scholars have often been interpreting it as a specific judicial response to existing imbalances of the current E.U. copyright framework.⁴⁴ Irrespective of the recent E.U. copyright reform that resulted in the adoption, among others, of the Directive on Copyright in the Digital Single Market (D.S.M.) declaring certain copyright exceptions mandatory,⁴⁵ the new reformed rules are not promising to solve the issue of copyright imbalances in the near future. In such a situation, European judges started having recourse to legal mechanisms outside of copyright law to allow for some flexibilities when applying copyright limitations. They did so either by interpreting the existing provisions in the light of their fundamental rights justifications (approach of the C.J.E.U.⁴⁶) or even

Intellectual Property Before the AND THE JUDICIARY 9 Izyumenko, Intellectual ? and human rights in

ius – The Court of Justice, law, in INTELLECTUAL ds., 2018); see also Stijn ds: Clarifying the Role for EV. INTELL. PROP. &

When Freedom of Artistic Copyright Limitations, in COPYRIGHT LAW (Wee g 2019).

ligatory accession to it, freedom of expression) First, all E.U. Member e Treaty on European H.R. constitute general (3) of the E.U. Charter n the Charter, which he same meaning and of expression) of sion and information) protection of property) the E.U. Charter.

43. Jonathan Griffiths, *Constitutionalising or Harmonising? The Court of Justice, the Right to Property and European Copyright Law*, 38 EUR. L. REV. 65 (2013) [hereinafter *Constitutionalising or Harmonising?*] (noting the C.J.E.U.'s recent "dramatic" constitutionalization of European copyright law in the interest of harmonization).

44. See, e.g., Christophe Geiger, "Constitutionalising" *Intellectual Property Law? The Influence of Fundamental Rights on Intellectual Property in the European Union*, 37 INT'L REV. INTELL. PROP. & COMPETITION L. 371 (2006) [hereinafter Geiger, "Constitutionalising" *Intellectual Property Law?*]; Hugenholtz & Senftleben, *Fair Use in Europe*, *supra* note 11; Griffiths, *Constitutionalising or Harmonising?*, *supra* note 43; Afori, *supra* note 37; Bernd Justin Jütte, *The Beginning of a (Happy?) Relationship: Copyright and Freedom of Expression in Europe*, 38 EUR. INTELL. PROP. REV. 11 (2016).

45. See Directive 2019/790 of the European Parliament and of the Council on Copyright and Related Rights in the Digital Market and Amending Directives 96/9/EC and 2001/29/EC, 2019 PE-CONS 51/19 [hereinafter Directive 2019/790]. The new Directive notably introduces four mandatory exceptions for text and data mining (TDM) for research purposes (Article 3); a general TDM exception for other purposes (Article 4); an exception for teaching and educational purposes (Article 5); and an exception for the preservation of cultural heritage (Article 6). See generally, Geiger, Frosio, and Bulayenko, *The EU Commission's Proposal to Reform Copyright Limitations*, *supra* note 2; Christophe Geiger, Giancarlo Frosio, and Oleksandr Bulayenko, *The Exception for Text and Data Mining (TDM) in the Proposed Directive on Copyright in the Digital Single Market—Legal Aspects*, CTR. FOR INT'L INTELL. PROP. STUD., Mar. 2018.

46. See, e.g., Case C-70/10, *Scarlet Extended SA v. Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)*, [2011] ECR, I-12006, ¶ 55; Case C-145/10, *Painer v. Standard VerlagsGmbH et al.*, [2011], ECR, I-12533, ¶¶ 132–33; Case C-360/10, *Belgische Vereniging van Auteurs v. Netlog NV*, 2012 EUR-Lex CELEX LEXIS ¶¶ 26–30 (Feb.16, 2012); Case C-314/12, *UPC Telekabel Wien GmbH v. Constantin Film Verleih GmbH et al.*, 2014 EUR-

sometimes more radically by using fundamental rights as an external limit on copyright law (approach of the E.Ct.H.R. and certain national courts in Europe⁴⁷). Such balancing tools were found by using the test of

Lex CELEX LEXIS ¶¶ 23–40 (Mar. 27, 2014); Case C-201/13, *Deckmyn, et al. v. Vandersteen, et al.*, 2014 EUR-Lex CELEX LEXIS ¶ 36 (Sept. 3, 2014); Case C-160/15, *GS Media BV v. Sanoma Media Netb. BV et al.*, 2016 EUR-Lex CELEX LEXIS ¶ 56 (Sept. 8, 2016); Case C-484/14, *McFadden v. Sony Music Entm't Ger. GmbH*, 2016 EUR-Lex CELEX LEXIS ¶ 102 (Sept. 15, 2016).

47. See *Asbby Donald v. France*, No. 36769/08, Eur. Ct. H.R. 1 (2013), <http://hudoc.echr.coe.int/eng?i=001-115845>; *Neij and Sunde Kolmisoppi v. Sweden*, No. 40397/12, Eur. Ct. H.R. 1 (2013), <http://hudoc.echr.coe.int/eng?i=001-117513>; Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Nov. 13, 2003, Bull. Civ. I, No. 01–14384 (Fr.); Oberster Gerichtshof [OGH] [Supreme Court] June 12, 2001, 4 Ob127/01g, https://www.ris.bka.gv.at/Dokumente/Justiz/JJT_20010612_OGH0002_0040OB00127_01G0000_000/JJT_20010612_OGH0002_0040OB00127_01G0000_000.pdf; *Ashdown v. Telegraph Group Ltd.* [2001] EWCA (Civ) 1142 (Eng.); *Scientology v. XS4ALL* [2003] NZCA 99/1040 at [¶ 6] (N.Z.); Supreme Court of the canton of Zurich, Sept. 9, 2004, Medialex 231 (2004); Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Jan. 30, 2007, Bull. Civ. I, No. 9 (Fr.); Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., May 15, 2015, Bull. Civ. I, No. 13–27391 (Fr.); BVerfG, 1 BvR 1585/13, May 31, 2016, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2016/05/rs20160531_1bvr158513.html [hereinafter 1 BvR 1585/13]. As it concerns the C.J.E.U., in the three recent judgments rendered in summer 2019, the C.J.E.U. pronounced that freedom of expression is not allowed for an external application to EU copyright. Case C-469/17, *Funke Medien NRW GmbH v. Bundesrepublik Deutschland*, 2019 EUR-Lex CELEX (July 29, 2019), ¶ 64; Case C-476/17, *Pelham GmbH and Others v. Ralf Hütter and Florian Schneider-Esleben*, 2019 EUR-Lex CELEX (July 29, 2019), ¶ 65; and Case C-516/17, *Spiegel Online GmbH v. Volker Beck*, 2019 EUR-Lex CELEX (July 29, 2019), ¶ 49. However, such a position of the C.J.E.U. might turn incompatible with the European legal order including the E.Ct.H.R. case law that mandates a case-by-case approach. Arguably, such a position will not be possible anymore when the E.U. accedes to the European Convention on Human Rights – a legal obligation that became binding on the E.U. with the entrance into force of the Treaty of Lisbon on 1 December 2009 (see Article 6(2) T.E.U. as amended by Article 1(8) of the Treaty of Lisbon and Article 59(2) E.C.H.R. as amended by Article 17 of Protocol No. 14 to the E.C.H.R.). After the accession, the C.J.E.U. would need to take into account the precedents from the E.Ct.H.R. case law. The C.J.E.U.'s categorical exclusion of any external freedom of expression exception to copyright law therefore raises the questions of the “constitutionality” of the Luxemburg Court's position in the sense of its compatibility with the E.U. treaties and the fundamental rights order in the E.U. See Christophe Geiger & Elena Izyumenko, *The Constitutionalization of IP Law in the EU and the Funke Medien, Pelham and Spiegel Online Decisions of the CJEU: Progress, but Still Some Way to Go!* (forthcoming 2020) (discussing further the C.J.E.U. judgments in *Funke Medien*, *Pelham* and *Spiegel Online*); see also Christophe Geiger & Elena Izyumenko, *Freedom of Expression*

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proportionality, a mechanism intrinsic to human rights law in general and the right to freedom of expression in particular.⁴⁸

This article discusses how the freedom of expression's test of proportionality has led to the opening of copyright exceptions in Europe. The paper is structured as follows: (II) it first gives some background information on the recent developments on European legislative and technological landscapes that brought the discussion on copyright limitations to a new level of urgency; (III) starting from the premise that opening of European copyright system has become a cultural (and technological) necessity, the article then proceeds to look more generally at whether "fair use," understood as a system of copyright limitations drafted in an open manner, can present a viable solution; (IV) concluding that it can, the article then focuses on examining whether using the freedom of expression's test of proportionality as a "fair use" clause in Europe can cure the disadvantages of other approaches and of the currently functioning system. It is argued that the test of proportionality has indeed the ability to serve this purpose by providing an already developed list of fairness factors analogous to those of U.S. fair use. This article explores each of these factors in detail, highlighting both their differences from and similarities with the U.S. fair use factors. Several conclusions are drawn at the end, including the proposal of a legislative introduction of the FoE-inspired opening provision in the E.U. copyright framework (V).

II. PROBLEMS OF E.U. COPYRIGHT FRAMEWORK: PRACTICAL EXAMPLES AND RECENT DEVELOPMENTS

In May 2015, when the European Commission announced its intention to reform the current set of E.U. copyright rules,⁴⁹ there existed

as an External Limitation to Copyright Law in the EU: The Advocate General of the CJEU Shows the Way, CTR. FOR INT'L INTELL. PROP. STD. (Dec. 2018).

48. Cf. Dominika Bychawska-Siniarska, *Protecting the Right of Freedom of Expression Under the European Convention on Human Rights*, in A HANDBOOK FOR LEGAL PRACTITIONERS (Council of Europe, 2017) [hereinafter Bychawska-Siniarska, *Protecting the Right of Freedom of Expression Under the European Convention on Human Rights*].

49. *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Digital Single Market Strategy for Europe*, at 2, COM (2015) 192 final (June 5, 2015), [https://eur-](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52015DC192&from=doctrines)

high expectations that the above-outlined problems of imbalances, inflexibility, and the lack of legal certainty would be solved at least to some reasonable degree.⁵⁰ These expectations were heightened because by that time, it was not only the academic community, the users, or the NGOs and civil rights organizations that were advocating a profound rethinking of European copyright system.⁵¹ The representatives of the Commission were themselves admitting that the E.U. copyright laws, InfoSoc foremost, were “ill-adapted,” “fragmented,” “inflexible,” “often irrelevant,” and not keeping up with the technological developments.⁵² However, the text of the new Directive on Copyright in the D.S.M. that has recently been adopted by the European Parliament does not promise to solve thereby identified problems.⁵³ As the European Copyright Society has highlighted:

Despite its ambitious overarching goal and key objectives, as stated (inter alia) in the preamble of the proposed D.S.M. Directive, the Commission's reform package does not seem to reflect an overall vision of the future of E.U. copyright law and fails to deliver on its promise of wholesale copyright reform. The copyright package proposes only piecemeal solutions, leaving the existing – already fragmented and partly outdated – copyright *acquis* intact.⁵⁴

In what follows, we outline a few practical examples of persisting

lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52015DC0192&from=EN.

50. *Id.*

51. See, e.g., Frederico Leva, *A Wikimedian Asks European Parliament Members for Copyright Reform*, WIKIMEDIA FOUNDATION (Apr. 24, 2015), <https://blog.wikimedia.org/2015/04/24/european-copyright-reform/> (recalling the meeting between European Parliament and a Wikimedia contributor and proponent regarding the need for copyright reform).

52. European Commission Press Release Speech/14/528, *Our Single Market is Crying Out for Copyright Reform* (July 2, 2014) [hereinafter Press Release] (referring to the then existing E.U. Copyright framework as dated).

53. See Directive 2019/790, *supra* note 45.

54. European Copyright Society (E.C.S.), *General Opinion on the EU Copyright Reform Package*, at 3 (Jan. 24, 2017), <https://europeancopyrightsocietydotorg.files.wordpress.com/2015/12/ecs-opinion-on-eu-copyright-reform-def.pdf>. Some positive dynamics reflected in the new Directive on Copyright in the Digital Single Market (D.S.M.), however, also need to be noted. Among those is an introduction of an exception for digital and cross-border teaching activities (Article 5 of the Directive on Copyright in the D.S.M.) and for text and data mining (Articles 3 and 4) as well as provisions securing the contractual positions of creators vis-à-vis derivative rightholders (Article 18 et seq.).

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problems associated with the present E.U. copyright system, which become more and more patent with the development of new technologies that the recent copyright reform did not solve. Of course, this list of topics is non-exhaustive; other issues could be addressed or are likely to emerge in the future due to new economic, social, or technological developments. We also point at certain new problems that can arise as a result of the new Directive on Copyright in the D.S.M.

A. SEARCH ENGINES

One example of the negative impact of restrictive construction of E.U. E&Ls is its effects on the operational infrastructure of the Internet: search engines in particular. A case widely cited in the literature is the suit brought against Google for the unlicensed use by the Google Image Search service of thumbnails of copyrighted images.⁵⁵ In the United States, the use was qualified as fair and thus permitted by the fair use limitation, as it was considered transformative (the use was for a different purpose than the original) and did not impact the potential market for the work.⁵⁶ In Europe however, the German Federal Supreme Court could not fit the use of thumbnails under any of the domestically existing exceptions⁵⁷ and, absent any authority to create a new limitation, had no other choice but to creatively stretch the concept of implied consent to achieve the result in the public's interest.⁵⁸ The Court held that by failing to protect the content of her website technically from access by search engines, the copyright owner implicitly consented to the reproduction of

55. *Perfect 10, Inc. v. Amazon.com*, 508 F.3d 1146, 1155–57 (9th Cir. 2007).

56. *Id.* at 1163–68.

57. BGH, Apr. 29, 2010, I ZR 69/08, <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=51998&pos=0&anz=>. Notably, quotation did not apply due to its construction in German law, which subjects this exception to the requirements of criticism or review – the context clearly absent in the case of an Image Search service.

58. *Id.*; see also BGH, Oct. 19, 2011, I ZR 140/10, <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=2011-10&Seite=4&nr=59857&pos=134&anz=292>; BGH, Sept. 21, 2017, I ZR 11/16, <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=2017-9&Seite=2&nr=80322&pos=72&anz=270> (subsequently finding that no copyright infringement results from the use of thumbnails by search engines).

her works as previews in image search engines.⁵⁹ The German Federal Supreme Court's decision was criticized in the literature for extending the concept of implied consent far beyond its original meaning and purpose with potential negative consequences for future instances of the concept's application.⁶⁰ At the same time, criticism of the decision goes hand-in-hand with the recognition that the judiciary is the last to blame and that it was for the legislature to ensure that the copyright system is sufficiently flexible to provide the common sense solutions without compromising other legal concepts.⁶¹ The Google Image case thus serves

59. Guido Westkamp, *Emerging Escape Clauses? Online Exhaustion, Consent, and European Copyright Law*, in INTELLECTUAL PROPERTY RIGHTS AT THE CROSSROADS OF TRADE 61 (Jan Rosen ed., 2012) (explaining that the Court established through the consent doctrine a general escape clause; "an additional limitation outside the enumeration of acceptable limitations under Article 5 E.U.C.D." According to this scholar, "this resonates with more expansive balancing approaches, such as the fair use rule under U.S. copyright law that incorporates a public interest test, a general recognition of communication freedom, and a directly applicable defense.").

60. See Matthias Leistner, *The German Federal Supreme Court's Judgment on Google's Image Search—A Topical Example of the "Limitations" of the European Approach to Exceptions and Limitations*, 42 INT'L REV. INTEL. PROP. & COMPETITION L. 417 (2011); Lucie Guibault, *Why Cherry-Picking Never Leads to Harmonisation: The Case of the Limitations on Copyright Under Directive 2001/29/EC*, 1 J. INTEL. PROP., INFO. TECH. AND E-COMM. L. 55, ¶¶ 10–12 (2010); Senftleben, *Bridging the Differences between Copyright's Legal Traditions*, *supra* note 29, at 536–38; Hugenholtz & Senftleben, *Fair Use in Europe*, *supra* note 11, at 12.

61. See Martin Senftleben, *The Perfect Match: Civil Law Judges and Open-Ended Fair Use Provisions*, 33 AM. U. INT'L L. REV. 231, 248–49 (2017) [hereinafter Senftleben, *The Perfect Match*] (stating that, while an "assumption of implicit consent creates additional flexibility, it does not solve the problem of insufficient flexibility within the system of copyright exceptions in the E.U. Moreover, it overstretches the general private law doctrine of implicit consent to solve a specific copyright problem. This, in turn, gives rise to new legal problems in other fields of private law where a comparably broad notion of implicit consent leads to unsatisfactory results." (emphasis added)); see also Tito Rendas, *Destereotyping the Copyright Wars: The "Fair Use vs. Closed List" Debate in the EU*, *Catolica Glob. Sch. Law, Portugal* 16 (2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2657482 ("[T]he closed catalogue [of E.U. exceptions to copyright] puts judges who want to harbor new and benign technology-enabled uses of copyrighted works between a rock and a hard place; either they arrogate to themselves an illegitimate authority, engaging in ample interpretations when it is not at all clear that they can do so, or they judge it infringing, hoping that the legislator will include them in future reviews of the catalogue. . . . [C]ourts frequently follow the first path. But when they do so, further problem arises [which is] . . . the risk of curtailing the principle of separation of powers.").

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as an example that, contrary to what has been sometimes claimed,⁶² the exhaustive list of exceptions *cannot* provide sufficient flexibility by being regularly fine-tuned.⁶³

B. MACHINE LEARNING

Another example is machine learning. As it has been emphasized, E.U. copyright framework poses obstacles to machine learning by creating bias in the way machines can be trained.⁶⁴ The E.U. copyright rules currently in force leave the question on whether copyrighted data can be used to train artificial intelligence in a legislative limbo.⁶⁵ By contrast, the new Directive on Copyright in the D.S.M. introduces the text and data mining exception that could potentially provide a solution to this problem.⁶⁶ Initially, the new mandatory exception targeted exclusively research institutions and was limited to the purposes of scientific research.⁶⁷ However later on, an additional exception for non-research

62. See, e.g., André Lucas, *For a Reasonable Interpretation of the Three-Step Test*, 32 EUR. INTEL. PROP. REV. 277, 282 (2010) (stating “[i]t is not true that the exhaustive legal list of exceptions, even interpreted strictly, would hinder any adaptation to new techniques and to new needs.”).

63. A vast number of scholars support more flexibility and criticize the closed list of E.U. copyright exceptions. See, e.g., Christophe Geiger & Franciska Schönherr, *The Information Society Directive*, in EU COPYRIGHT LAW: A COMMENTARY 395, ¶ 11.93 (Irina Stamatoudi & Paul Torremans, eds., 2014); Christophe Geiger, *The Future of Copyright in Europe: Striking a Fair Balance between Protection and Access to Information*, Report for the Committee on Culture, Science and Education, EUR. PARL. ASS., 6 (July 2009), https://www.unistra.fr/uploads/media/Report_Future_of_Copyright.pdf; *Overprotection and Protection Overlaps*, *supra* note 12, at 14.

64. Christophe Geiger, Giancarlo Frosio, and Oleksandr Bulayenko, *Crafting a Text and Data Mining Exception for Machine Learning and Big Data in the Digital Single Market*, in INTELLECTUAL PROPERTY AND DIGITAL TRADE IN THE AGE OF ARTIFICIAL INTELLIGENCE AND BIG DATA, 95 (Xavier Seuba et al. eds., 2018) [hereinafter Geiger, Frosio, and Bulayenko, *Crafting a Text and Data Mining Exception*]; M. Cedric Manara, *Copyright and Big Data—A View from the Industry*, UNIVERSITE DE STRASBOURG: CANAL 2 (Cedric Manara, May 4, 2017), <http://www.canalc2.tv/video/14517>.

65. Xavier Seuba et al., *Introduction*, INTELLECTUAL PROPERTY AND DIGITAL TRADE IN THE AGE OF ARTIFICIAL INTELLIGENCE AND BIG DATA, 11, 15–16 (Xavier Seuba et al. eds., 2018).

66. See Christophe Geiger, Giancarlo Frosio, and Oleksandr Bulayenko, *Text and Data Mining in the Proposed Copyright Reform: Making the EU Ready for an Age of Big Data?*, 49 INT’L REV. INTEL. PROP. & COMPETITION L. 814, 815–20 (2018) (detailing the new text and data mining exception).

67. *Id.* at 822.

organizations has also been introduced during the negotiations.⁶⁸ The latter exception was originally optional but was made mandatory during the parliamentary process, which is real progress, but it applies only on the condition that the use of works has not been expressly reserved by their rightholder.⁶⁹ As a result, any use of copyrighted information by businesses, including startups, to create algorithms on the basis of which artificial intelligence can be trained, can still be labeled infringing in certain Member States if rightholders decide to reserve the use of their work for text and data mining purposes, potentially overruling the granted permission to use by the Directive. In the United States, by contrast, such use would most likely rate as fair,⁷⁰ notably as a transformative use for a different purpose than the original (which pursues, moreover, a socially valuable goal⁷¹). In any event, the condition that the use should not be reserved by rightholders to benefit from the exception will most likely leave the practice of commercial text and data

68. See *Amendments adopted by the European Parliament on 12 September 2018 on the Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market*, at art. 3a, COM (2016) 593 (Sept. 12, 2018) (note that this provision is not anymore up to date (see the final text of Directive 2019/790, *supra* note 45)).

69. See Directive 2019/790, *supra* note 45. The final version of the Directive envisages, alongside a provision on text and data mining for the purposes of scientific research in Article 3, an additional “exception or limitation for text and data mining” in Article 4, which reads as follows (emphasis added): “(1.) Member States shall provide for an exception or limitation to the rights provided for in Article 5(a) and Article 7(1) of Directive 96/9/EC, Article 2 of Directive 2001/29/EC, Article 4(1)(a) and (b) of Directive 2009/24/EC and Article 15(1) of this Directive for reproductions and extractions of lawfully accessible works and other subject matter for the purposes of text and data mining; (2.) Reproductions and extractions made pursuant to paragraph 1 may be retained for as long as is necessary for the purposes of text and data mining; (3.) The exception or limitation provided for in paragraph 1 shall apply *on condition that the use of works and other subject matter referred to in that paragraph has not been expressly reserved by their rightholders* in an appropriate manner, such as machine readable means in the case of content made publicly available online; (4.) This Article shall not affect the application of Article 3 of this Directive.”

70. Reto M. Hilty, *Big Data: Ownership and Use in the Digital Age*, in *INTELLECTUAL PROPERTY AND DIGITAL TRADE IN THE AGE OF ARTIFICIAL INTELLIGENCE AND BIG DATA*, 85, 92–94 (Xavier Seuba, et al., eds., 2018); Geiger, Frosio, and Bulayenko, *Crafting a Text and Data Mining Exception*, *supra* note 64, at 110–11.

71. One example of such fair use could be the websites that fight fake news on the basis of machines trained to recognize fake data. See Mar Masson Maack, *Whoops! EU's copyright reforms might suck for AI startups*, TNW X (Mar. 21, 2017), https://thenextweb.com/eu/2017/03/21/whoops-eus-copyright-reforms-might-suck-for-ai-startups/#.tnw_rEMp0AMY.

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C. MISUSES OF COPYRIGHT FOR THE PURPOSES NOT CORRESPONDING TO ITS RATIONALES

Another problem of E.U. copyright concerns the fact that the current system allows for abusive uses of copyright-law mechanisms to achieve goals highly unrelated to the goals of fostering creativity and dissemination of expression.⁷³

The most recent example is the so-called *Afghanistan Papers* case decided by the C.J.E.U. in July 2019.⁷⁴ The case concerns unauthorized publication by a daily newspaper of military reports with confidential information held by the German government. Since, pursuant to the national law, the protection of confidential information in Germany was not a strong enough ground for restricting the newspaper's free speech rights, the German government instead decided to rely on its copyright over the reports to prevent the dissemination of sensitive information.

The Advocate General Szpunar, who had first stated his opinion on this case, expressed the view that although both copyright protection and protection of national security through non-disclosure of confidential military information constitute legitimate restrictions on the scope of free speech,⁷⁵ one cannot be used to substitute another.⁷⁶

72. See Geiger, Frosio, and Bulayenko, *The Exception for Text and Data Mining (TDM) in the Proposed Directive on Copyright in the Digital Single Market—Legal Aspects*, *supra* note 45, at 26–31 (analyzing, more broadly, the positive and negative impacts of the European Commission's Proposal to introduce a mandatory text and data mining exception).

73. See Sganga & Scalzini, *From Abuse of Right to European Copyright Misuse*, *supra* note 37 (discussing the notion of copyright misuse); CHRISTOPHE GEIGER, *DROIT D'AUTEUR ET DROIT DU PUBLIC A L'INFORMATION—APPROCHE DE DROIT COMPARÉ* 388 ET SEQ. (Litec, 2004); Lucie Guibault, *Copyright Limitations and Contracts: An Analysis of the Contractual Overridability of Limitations on Copyright* 184 (2002) (“[I]n continental Europe, one of the main instruments of control over the exercise of private rights is the doctrine of abuse of rights.”).

74. Case C-469/17, *Funke Medien NRW GmbH v. Bundesrepublik Deutschland*, 2019 EUR-Lex CELEX.

75. Opinion of Advocate General Szpunar in Case C-469/17, *Funke Medien NRW GmbH v. Germany*, 2018 EUR-Lex CELEX LEXIS ¶¶ 45-49 (Oct. 25, 2018). See Geiger & Izyumenko, *Freedom of Expression as an External Limitation*, *supra* note 47; Bernd Jütte, *Advocate General Suggests that Germany Cannot Rely on Copyright to Protect Confidential Information*, 14 J. INTELL. PROP. L. & PRAC. 83 (2019).

76. Opinion of Advocate General Szpunar in Case C-469/17, *Funke Medien NRW*

According to Advocate General, such a substitution of the public interest goal with the goal of protection of the State's copyright was inadmissible because "the Member State cannot invoke its copyright instead of the public interest."⁷⁷ Even if this were recognized as a legitimate aim of interference with free speech rights of others, such interference would have failed the test of necessity.⁷⁸ Notably, the "undisguised aim" of protecting the confidentiality of the information⁷⁹ fell "completely outside the scope of copyright . . . [which was] used here to pursue objectives that are entirely unrelated to it."⁸⁰ The Court of Justice did not deem it necessary to address the issue of copyright misuse; it relied instead on another Advocate General's observation⁸¹ in accordance with which the copyright law's requirement of originality was a sufficient safety valve insuring that purely informative documents such as those presumably at issue in the *Afghanistan Papers* case would not fall within the subject-matter of copyright protection.⁸²

National practice knows, however, other cases in which copyright, instead of serving as an engine of free expression, was used for the sole purpose of blocking access to information to either stifle unwelcome

GmbH v. Germany, 2018 EUR-Lex CELEX LEXIS ¶ 49 (Oct. 25, 2018).

77. *Id.* at ¶ 56.

78. *Id.* at ¶ 69.

79. *Id.* at ¶ 32.

80. *Id.* at ¶ 61.

81. *Id.* at ¶¶ 17-20.

82. Case C-469/17, *Funke Medien NRW GmbH v. Bundesrepublik Deutschland*, 2019 EUR-Lex CELEX, at ¶¶ 18-25.

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criticism⁸³ or protect one's privacy.⁸⁴ Similar trends can be traced in the trademark law too, where extensive protection against blurring and tarnishing often serves primarily not the original functions of trademark law (such as the prevention of consumer confusion) but the purpose of silencing (frequently legitimate) criticism of corporate policies.⁸⁵ It is still not uncommon for such cases to succeed⁸⁶ – the practice that, in full consideration of the social function of intellectual property (I.P.), should not subsist in the future.⁸⁷ This was also the position of the Advocate

83. See, e.g., Oberster Gerichtshof [OGH] [Supreme Court] June 12, 2001, 4 Ob127/01g, https://www.ris.bka.gv.at/Dokument.wxe?ResultFunctionToken=9b93c42f-f213-4c6e-a6f5-aaf8c91d1852&Position=1&Abfrage=Justiz&Gericht=&Rechtssatznummer=&Rechtssatz=&Fundstelle=&AenderungenSeit=Undefined&SucheNachRechtssatz=False&SucheNachText=True&GZ=&VonDatum=&BisDatum=03.08.2019&Norm=&ImRisSeitVonDatum=&ImRisSeitBisDatum=&ImRisSeit=Undefined&ResultPageSize=100&Suchworte=Medienprofessor&Dokumentnummer=JJT_20010612_OGH0002_0040OB00127_01G0000_000 (concerning the use by the rightholders of their copyright “with the sole objective of hindering any criticism towards their media campaign.”); *Michelin v. CAW-Canada*, [1997] 2 FC 306 (Can.) (finding that the use by the trade union of the Michelin's Bibendum logo in a campaign critical of the company's corporate policies infringed Michelin's copyright); *Scientology v. XS4ALL*, [2003] NZCA 99/1040 at ¶ 6 (N.Z.) (concerning unsuccessful attempts by the Church of Scientology to invoke copyright protection over its internal documents in order to prevent their publication on a website for the purposes of criticism).

84. *Salinger v. Random House, Inc.*, 811 F.2d 90, 90 (2nd Cir. 1987) (successfully invoking copyright in order to stop the publication of biography about Salinger and thereby preserve his privacy); see *Rosemont Enters. v. Random House, Inc.*, 366 F.2d 303, 304 (2nd Cir. 1966) (displaying attempts by Howard Hughes to use copyright in order to suppress the publication of his biography, which were ultimately prevented by the application of fair use); see also Pamela Samuelson, *Privacy as Intellectual Property*, 52 STAN. L. REV. 1125, 1128–30 (1999) (discussing the use of copyright to block access to information for the sake of personal privacy).

85. Cour d'appel [CA] [regional court of appeal] Paris, civ., Mar. 3, 2003, 2001/14371 and 2001/06682; Cour de cassation [Cass.] [supreme court for judicial matters] com., Apr. 8, 2008, Bull. civ. IV, No. 06–10961 (Fr.); Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Apr. 8, 2008, Bull. civ. I, No. 418 (Fr.). See Christophe Geiger, *Trade Marks and Freedom of Expression – The Proportionality of Criticism*, 38 INT'L REV. INTELL. PROP. & COMPETITION L. 317 (2007) [hereinafter Geiger, *Trade Marks and Freedom of Expression*].

86. See, e.g., the ex parte order of the Tribunal de Grande Instance de Paris, (May 25, 2008) (requesting an artist to seize the use of the painting critical of the modern culture of consumerism, which incorporated representation of the Louis Vuitton bag).

87. See Christophe Geiger, *The Social Function of Intellectual Property Rights, or How Ethics Can Influence the Shape and Use of IP Law*, in METHODS AND PERSPECTIVES IN

General, who rejected the practice of using copyright protection for the aims completely alien to this legal regime.⁸⁸

D. LACK OF LEGAL RECOGNITION OF CREATIVE REUSES AND THE SO-CALLED “DIGITAL REMIX CULTURE”

Finally, the lack of legal recognition of the so-called “digital remix culture,” including the persisting absence of the user-generated content exception in the E.U., creates another problematic area,⁸⁹ which nevertheless the recent copyright reform did not seek to regulate.⁹⁰ Nor is the C.J.E.U. always eager to solve the problem as demonstrated in the recent pronouncements of the C.J.E.U. and its Advocate General on the *Pelham* case that concerns music sampling.⁹¹ Albeit recognizing that the current list of copyright E&Ls in the E.U. “does not include a general exception permitting the use of works of others for the purposes of

INTELLECTUAL PROPERTY 153 (Graeme B. Dinwoodie ed., 2014) (discussing the social function of property in general and intellectual property in particular).

88. Opinion of Advocate General Szpunar in Case C-469/17, *Funke Medien NRW GmbH v. Germany*, 2018 EUR-Lex CELEX LEXIS ¶¶ 62–63 (Oct. 25, 2018).

89. See generally Bernd Justin Jutte, *The E.U.'s Trouble with Mashups: From Disabling to Enabling a Digital Art Form*, 5 J. INTELL. PROP., INFO. TECH. & ELEC. COM. 172 (2014) (analyzing the current European legal framework with regard to user generated content and identifying its insufficiencies in particular with regard to enabling a legal mashup culture); Christophe Geiger, *Freedom of Artistic Creativity and Copyright Law: A Compatible Combination?*, 8 U.C. IRVINE L. REV. 413 (2018); GIANCARLO FROSIO, RECONCILING COPYRIGHT WITH CUMULATIVE CREATIVITY: THE THIRD PARADIGM 30 (Edward Elgar Pub., 2018); Giancarlo Frosio, *Rediscovering Cumulative Creativity From the Oral Formulaic Tradition to Digital Remix: Can I Get a Witness?*, 13 J. MARSHALL REV. INTELL. PROP. L. 341 (2014); Leonhard Dobusch et al., *Digital Remix Culture: Five Contradictory Concurrences*, in PUBLIC DOMAIN 6–8 (Dominik Landwehr ed. 2015). See also Right to Remix: Initiative for a European Copyright Reform <https://right2remix.org/> (accessed September 2019).

90. See Martin Senftleben, *Bermuda Triangle - Licensing, Filtering and Privileging User-Generated Content Under the New Directive on Copyright in the Digital Single Market*, at 3 (Apr. 4, 2019) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3367219 (regarding the impact of the copyright reform on user-generated content); see also Geiger, *Freedom of Artistic Creativity and Copyright Law*, *supra* note 89, at 430 (regarding the different options available for European legislators and courts to secure creative uses in the context of derivative works).

91. Opinion of Advocate General Szpunar in Case C-476/17, *Pelham GmbH v. Hutter*, 2018 EUR-Lex CELEX LEXIS (Dec. 12, 2018); Judgment of the CJEU in Case C-476/17, *Pelham GmbH and Others v. Ralf Hütter and Florian Schneider-Esleben*, 2019 EUR-Lex CELEX (July 29, 2019).

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creating a new work,”⁹² neither the Advocate General nor the Court in its judgment find judicial construction of such an exception admissible.⁹³ Meanwhile in the United States, case law exists that allows amateur users, through the application of the fair use doctrine (and thus even absent legislative amendments), to contribute to the cultural development by building on pre-existing copyrighted material of others.⁹⁴

Summing up, the examples outlined above point to the urgent need for more flexibility in European copyright. This calls for a serious reconsideration of an idea of possible introduction of open-ended copyright limitation in E.U. copyright *acquis*.⁹⁵

92. Opinion of Advocate General Szpunar in Case C-476/17, *Pelham GmbH v. Hutter*, 2018 EUR-Lex CELEX LEXIS ¶ 54 (Dec. 12, 2018).

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93. *Id.* at ¶ 94; Judgment of the CJEU in Case C-476/17, *Pelham GmbH and Others v. Ralf Hütter and Florian Schneider-Esleben*, 2019 EUR-Lex CELEX (July 29, 2019), at ¶ 65. According to the C.J.E.U., notably, the reach of the right of reproduction and the interpretation of the quotation exception should be sufficient to ensure that the freedom of expression of samplers is appropriately safeguarded. More specifically, the exclusive right of reproduction should be interpreted as not extending towards non-recognizable derivative works made in the exercise of the freedom of arts, Judgment of the CJEU in Case C-476/17, *Pelham GmbH and Others v. Ralf Hütter and Florian Schneider-Esleben*, 2019 EUR-Lex CELEX (July 29, 2019), at ¶¶ 31, 37, 39, whereas the exception for the purposes of quotation should be understood as covering recognizable, but “dialogic,” use of the original work, subject to certain other conditions. *Id.* at ¶¶ 71, 72. Thus, a clearly recognizable sample can still be legitimate in the context of a creative use performed in the exercise of artistic freedom (and thus, arguably, a “dialogue”). It is to be feared, however, that the “dialogue” situation will be interpreted very restrictively by the C.J.E.U. in the light of Article 17(2) (protection of intellectual property) of the E.U. Charter of Fundamental Rights as the quotation in the case of unlicensed sampling comes without remuneration. In fact, the C.J.E.U., albeit arguably, adhering to a more liberal position with regards to music sampling than that taken by the Advocate General in his Opinion on this case (who advised that any music sampling, unless licensed, should not be permitted in the E.U., see Opinion of Advocate General Szpunar in Case C-476/17, *Pelham GmbH v. Hutter*, 2018 EUR-Lex CELEX LEXIS ¶ 96 (Dec. 12, 2018)), seems to nevertheless indicate that the sample in the *Pelham* case, a typical sample situation, is not permissible.

94. See, e.g., Senftleben, *The Perfect Match*, *supra* note 61, at 246 (citing *Warner Bros. Ent. v. RDR Books*, 575 F.Supp.2d 513, 545 (S.D.N.Y. 2003) (discussing that courts will find fair use when the secondary use produces a value that benefits the broader public interest even if the use is a commercial exploitation of original work)).

95. It needs to be noted that, despite the seriousness of the situation, the recent copyright reform did not introduce an open-ended limitation to copyright law.

III. "FAIR USE" AS A SOLUTION?

A. REBUTTING COMMON ARGUMENTS AGAINST THE "FAIR USE" INTRODUCTION IN EUROPE

In the following section, we consider whether an open-ended copyright limitation of the "fair use" type⁹⁶ can constitute a solution to the current rigidity of the E.U. copyright system. To this end, the most commonly advanced arguments against the "fair use" introduction in Europe are looked at in an attempt to unveil whether these arguments sustain a balanced evaluation.

1. *Legal Uncertainty*

One of the most frequent critiques of the fair use doctrine is its vagueness and lack of legal certainty.⁹⁷ Since the doctrine is largely construed judicially, the application of different fairness factors to each particular case has been considered at times controversial if not arbitrary.⁹⁸ This would lead, in the opinion of some authors, to a situation of legal uncertainty in which the users cannot be sure in advance which use is permissible.⁹⁹ Such a situation can, the argument unfolds, have chilling effects on certain uses that could have otherwise been ruled fair to the detriment of both ordinary users and Small-to-Medium Enterprises (in particular if one brings the high costs of litigation into equation).¹⁰⁰

96. As we have already stated in the introduction, the term "fair use" is applied here to reflect the need of opening up the currently closed list of copyright limitations in the E.U. The term should thus be understood simply as an open-ended copyright limitation by no means identical to U.S. fair use (as highlighted by bringing the term in quotes throughout this article).

97. See, e.g., David Nimmer, *Fairest of Them All and Other Fairy Tales of Fair Use*, 66 L. & CONTEMP. PROBS., 263, 282 (2003) ("[I]t is largely a fairy tale to conclude that the four factors determine resolution of concrete fair use cases."); Gideon Parchomovsky & Philip J. Weiser, *Beyond Fair Use*, 96 CORNELL L. REV. 91, 93 (2010) (calling the fair use doctrine "impossible to predict").

98. See Michael J. Madison, *A Pattern Oriented Approach to Fair Use*, 45 WM. & MARY L. REV. 1525, 1545-46 (2004) (showing that courts have seemingly arbitrarily applied standards to fair use issues).

99. *Id.* at 1558-59.

100. See, e.g., Paul Torremans, *The Perspective of the Introduction of a European Fair Use Clause*, in CODIFICATION OF EUROPEAN COPYRIGHT LAW: CHALLENGES AND PERSPECTIVES 319, 332-33 (Tatiana-Helene Synodinou ed., 2012) ("[U]ncertainty

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However, it must be noted that vague and open-ended legal concepts requiring further judicial interpretation exist in civil law systems as well. Those include a three-step test already mentioned above, which is itself an open norm with quite broad criteria (steps) of application.¹⁰¹ Other examples are the copyright law's originality criterion and the concept of "communication to the public" under Article 3(1) of the InfoSoc Directive.¹⁰² Furthermore, as it concerns the civil law systems' exceptions and limitations, those are never, as Christophe Geiger, Daniel Gervais, and Martin Senftleben note, "drafted so specifically as to be free from the need for interpretation or to be devoid of ambiguity as applied in the specific case."¹⁰³ Moreover, certain exceptions have additional internal balancing mechanisms requiring further judicial interpretation on a case-by-case basis. Thus, a quotation exception of Article 10 of the Berne Convention makes references to "fair practice" and the quotation's "purpose."¹⁰⁴ In trademark law too, open exceptions can be found – one only has to consider, for example, a due cause defense¹⁰⁵ or the reference to "honest practices in industrial or commercial matters,"¹⁰⁶ which serve as an additional constraint on the application of trademark limitations.

pushes particularly the smaller defendants with less deep pockets to settle, take a license, or change their behaviour, even in those circumstances where ultimately they had copyright law on their side in the sense that they did not step on the exclusive right of the copyright holder.").

101. See Martin Senftleben, *Copyright, Limitations and the Three-step Test: An Analysis of the Three-Step Test*, in INTERNATIONAL AND EC COPYRIGHT LAW 5 (2004); see also Geiger, *The Role of the Three-Step Test*, *supra* note 34, at 17 (stating that the "three-step test" is an instrument of flexibility similar to the fair use clause in the United States).

102. Council Directive 2001/29, *supra* note 6, at art. 3(1).

103. Geiger, Gervais, and Senftleben, *The Three-Step Test Revisited*, *supra* note 7, at 614.

104. See Lionel Bently & Tanya Aplin, *Whatever Became of Global Mandatory Fair Use? A Case Study in Dysfunctional Pluralism* (Univ. of Cambridge Legal Studies Research Paper Series, Paper No. 34/2018, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3119041 [hereinafter Bently & Aplin, *Whatever Became of Global Mandatory Fair Use?*]; see also Lionel Bently & Tanya Aplin, *Displacing the Dominance of the Three-Step Test: The Role of Global, Mandatory Fair Use* (Univ. of Cambridge Legal Studies Research Paper Series, Paper No. 33/2018, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3119056 [hereinafter Bently & Aplin, *Displacing the Dominance of the Three-Step Test*].

105. Council Directive 2015/2436, art. 10(2)(c), 2015 O.J. (L 336) 1, 11 (E.U.) (approximating the laws of the Member States relating to trade marks (Text with EEA relevance)).

106. Council Directive 2015/2436, art. 14(2), 2015 O.J. (L 336) 1, 12 (EU).

Many other provisions of trademark law are likewise open to interpretation, such as the ground of refusal of trademark registration based on the public policy or morals¹⁰⁷ or the requirement of unfairness in relation to the use of trademarks with a reputation.¹⁰⁸

It also must be kept in mind that I.P. laws frequently interact with other legal regimes, which likewise contain broad notions susceptible to diverse interpretations. Thus, open-ended concepts of the human rights law, including the test of proportionality, are already widely applied to intellectual property cases across the E.U.¹⁰⁹ Implied consent, abuse of right, fairness, reasonableness, legality, and effectiveness all stand in the same line of broad legal concepts vastly operated by European judges when resolving I.P. disputes.¹¹⁰

By contrast, there is a growing recognition in the literature of the fact that an elaborated list of fairness factors, endorsed by the solid body of case law, can indeed allow for sufficient clarity and legal certainty.¹¹¹ In Europe, this list can be found in the law on FoE and in the application within its framework of the principle of proportionality developed throughout the years of the human rights jurisprudence. Courts can therefore rely on a vast body of case law from the E.Ct.H.R. and several

107. Council Directive 2015/2436, art. 4(1)(f), 2015 O.J. (L 336) 1, 7 (EU).

108. Council Directive 2015/2436, art. 10(2)(c), at 11.

109. See Christophe Geiger & Elena Izyumenko, *Copyright on the Human Rights' Trial: Redefining the Boundaries of Exclusivity through Freedom of Expression*, 45 INT'L REV. INTELL. PROP. & COMPETITION L. 316 (2014) [hereinafter Geiger & Izyumenko, *Copyright on the Human Rights' Trial*]; see also Elena Izyumenko, *The Freedom of Expression Contours of Copyright in the Digital Era: A European Perspective* 19 J. WORLD INTELL. PROP. 115 (2016) [hereinafter Izyumenko, *The Freedom of Expression Contours of Copyright in the Digital Era*]; Geiger & Izyumenko, *Intellectual Property Before the European Court of Human Rights*, *supra* note 39.

110. Hugenholtz, *Flexible Copyright*, *supra* note 28, at 282–83.

111. See Leistner, *supra* note 60, at 437 (“[T]he factor-based fair use test in the U.S. has been developed by the courts into a body of *reasonably predictable case law*.” (emphasis added)); Griffiths, *Unsticking the Centre-Piece*, *supra* note 10, at 91 (“[T]he fair use doctrine has given rise to a detailed body of *sub-rules and sub-principles that exceed in precision* the tools employed to resolve similar problems in many jurisdictions with less flexible systems of exceptions.” (emphasis added)); Geiger, Gervais, and Senftleben, *The Three-Step Test Revisited*, *supra* note 7, at 614 (“With every court decision, a further ‘special case’ becomes known, particularized, and thus ‘certain’ in the sense of the three-step test. A *sufficient degree of legal certainty thus may follow from established case law, as well as in detailed legislation*.” (emphasis added)).

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decades-long judicial traditions.¹¹² In the United States, an increasing number of authors state likewise that fair use is more predictable than it is usually claimed.¹¹³

Against this background, the idea relied upon by the Advocate General of the C.J.E.U. in his recent opinion on the *Spiegel Online* case that any “fair use” clause project would be detrimental to the harmonization of copyright in E.U.¹¹⁴ is questionable at least. As previously stated, courts in the E.U., including the Court of Justice, are habitually relying on open-ended legal concepts, ensuring their predictability and harmonious application through the development of consistent case law surrounding such concepts.¹¹⁵ By contrast, *inconsistency* in interpreting even seemingly “straightforward” legal concepts is capable of undermining both legal certainty and any project of harmonization of European copyright law.¹¹⁶ However, this is arguably a separate problem, which should not be linked to the “fair use” project.

Finally, it has to be kept in mind that, as Jonathan Griffiths put it, “the search for a doctrine that is both perfectly flexible and perfectly foreseeable is doomed to failure,”¹¹⁷ and “[a]ny obstacles to the [European ‘fair use’] project should be viewed against the background of the dire situation in which we currently find ourselves.”¹¹⁸

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3. d fair use test in the U.S. *predictable case law.*” (emphasis 1 (“[T]he fair use doctrine that exceed in precision the tions with less flexible and Senftleben, *The Three– on, a further ‘special case’ e of the three-step test. A se law, as well as in detailed*

112. See Geiger & Izyumenko, *Intellectual Property Before the European Court of Human Rights, supra* note 39.

113. See, e.g., Beebe, *supra* note 29; see also Samuelson, *Unbundling Fair Uses, supra* note 27; Netanel, *supra* note 29; Sag, *Predicting Fair Use, supra* note 29.

114. Opinion of Advocate General Szpunar in Case C-516/17, *Spiegel Online GmbH v. Beck*, 2019 EUR-Lex CELEX LEXIS ¶ 63 (Jan. 10, 2019).

115. See Geiger, *The Role of the Court of Justice of the European Union, supra* note 9.

116. One has to only think, for example, of how the issue of injuncting non-liable Internet access providers has been dealt with recently in E.U., despite the seemingly “predictable” safe harbour provisions of the E-Commerce Directive and the prohibition therein of the general monitoring obligation. See Articles 12(3) and 15 of the Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (E-Commerce Directive), OJ No. L 178 of 17 July 2000, p. 1. See also Christophe Geiger & Elena Izyumenko, *The Role of Human Rights in Copyright Enforcement Online: Elaborating a Legal Framework for Website Blocking*, 32 AM. U. INT’L L. REV. 43 (2016) [hereinafter Geiger & Izyumenko, *The Role of Human Rights in Copyright Enforcement Online*]; Christophe Geiger & Elena Izyumenko, *Blocking Orders: Assessing Tensions with Human Rights*, CTR. FOR INT’L INTELL. PROP. STD., May 2019.

117. Griffiths, *Unsticking the Centre–Piece, supra* note 10, at 91.

118. *Id.*

2. *Problem of Civil Judges*

Another argument that is frequently advanced against the introduction of the open-ended exception in European copyright is that, unlike the judges in the United States, the civil law judges are presumably unfit to deal with open norms.¹¹⁹

However, as demonstrated above, open concepts are already continuously applied by judges across Europe, and civil judges hence cannot be regarded as having less expertise than their colleagues across the Atlantic.¹²⁰

A more valid argument seems to be the one suggesting that, considering the differences behind the legal regimes of each of the (currently) 28 E.U. Member States, the development of a coherent pan-European "fair use" doctrine might prove more difficult than in one country, such as the United States.¹²¹ However, this problem is to a good extent lifted when the European "fair use" is grounded in legal concept unifying all Europe. This is the case of fundamental rights, which are already being applied in a uniformed manner across Europe and on the application of which a wide consensus exists.¹²² This is evidenced among others by a vast body of supranational case law developed both on the levels of E.U. and the Council of Europe.

3. *Cultural and Philosophical Unfit*

Some scholars have expressed concerns that an idea of European "fair use" is alien to the continental legal thinking copyright tradition that puts the social good, and not the personality of the author, at the center of the copyright system.¹²³ According to these scholars, as in most of the

119. See Senftleben, *The Perfect Match*, *supra* note 61, at 231.

120. See *id.* at 252.

121. Torremans, *supra* note 100, at 332–33.

122. See Christophe Geiger, *Fundamental Rights as Common Principles of European (and International) Intellectual Property Law*, in COMMON PRINCIPLES OF EUROPEAN INTELLECTUAL PROPERTY LAW 223 (Ansgar Ohly ed., 2012); see also Christophe Geiger, *Reconceptualizing the Constitutional Dimension of Intellectual Property*, in INTELLECTUAL PROPERTY AND HUMAN RIGHTS 115 (Paul Torremans ed., 2015); Christophe Geiger, *Implementing Intellectual Property Provisions in Human Rights Instruments Towards a New Social Contract for the Protection of Intangibles*, in RESEARCH HANDBOOK ON HUMAN RIGHTS AND INTELLECTUAL PROPERTY 661 (Christophe Geiger ed., 2015).

123. Frederic Pollaud-Dulian, *The Dragon and the White Whale: Three Steps Test and Fair*

civil law countries, the copyright philosophy's emphasis is on the person who has created the work,¹²⁴ and the public interest is secondary – a legal thinking that lies at the basis of the narrow construction and interpretation of copyright exceptions in continental Europe in contrast to the common law systems.¹²⁵

It might be useful to recall, however, that the figure of the author has in practice long lost its center place in the civil law world, giving way to big corporate interests.¹²⁶ It is a common practice now in Europe that young or niche writers, musicians, or other creators who do not relate to the one percent of “super stars” or mainstream artists, assign their rights almost entirely to the big publishing houses or music labels. They do so for either the mere opportunity to get published, and hence acquire some publicity, or for a very minimum remuneration. It is not these creators (or not them mainly) who then participate in reaping the profits and in vigorously enforcing strong exclusive rights against a narrowly constructed public interest. Indeed, contrary to what the original philosophical foundations of the continental European copyright tradition might suggest, the author is often the great forgotten of the *droit d'auteur* system. A large majority of creators, in the absence of an effective author's contract law, frequently participate only insufficiently in the exploitation of their works.¹²⁷

Use, in INTELLECTUAL PROPERTY IN COMMON LAW AND CIVIL LAW 158, 167–68 (Toshiko Takenaka ed., 2013); Torremans, *supra* note 100, at 334; Leval, *supra* note 25, at 1128 (reminding that while the European copyright law evolved to consider the social good, the U.S. copyright law never had this idea in mind during its creation and interpretation and stating “[o]ur copyright law has developed over hundreds of years for a very different purpose and with rules and consequences that are incompatible with the *droit moral*.”).

124. In this “creator-centered” copyright tradition, the term “authors’ rights” is preferred to the term “copyright” to establish the clear link between the creator and the rights she owns. See Geiger, *Promoting Creativity Through Copyright Limitations*, *supra* note 4, at 515–16, 527.

125. Pollaud-Dulian, *supra* note 123, at 167–68; Hugenholtz & Senftleben, *Fair Use in Europe*, *supra* note 11, at 7; Hugenholtz, *Flexible Copyright*, *supra* note 28, at 280.

126. Ysolde Gendreau, *The Image of Copyright*, 28 EUR. INTEL. PROP. REV. 209, 211 (2006) (“The overall impression today is clearly not that of the solitary author who is shivering in an attic; an economic and corporate image dominates the scene and takes centre stage.”).

127. See generally Geiger, *Promoting Creativity Through Copyright Limitations*, *supra* note 4; Reto M. Hilty, *Verbotsrecht vs. Vergütungsanspruch: Suche nach Konsequenzen der tripolaren Interessenlage im Urheberrecht*, in PERSPEKTIVEN DES GEISTIGEN EIGENTUMS UND

Another point that should not be lost from the discussion is that, after all, the differences between common law and civil law countries should not be exaggerated. The internationalization of the subject has narrowed the gap considerably.¹²⁸ The reasons behind subordination of public good to corporate interests (the tendency which can be traced in the common law world alike) are largely political and not purely (and probably not primarily) ideological.

The final point that can be made on the subject of cultural "foreignness" of flexibly defined exceptions is that the idea of utilitarianism, which is said to be absent from the *droits d'auteur* tradition, is far from unusual in reality to European legal thinking. One of the reasons for the raise in application of human rights to copyright law in Europe is precisely the fact that the "non-utilitarian" idea of copyright finds itself more and more in conflict with the deeply utilitarian conception of human rights in Europe, which place the public good and the general interest at the center of balancing different conflicting interests.¹²⁹ It thus follows that, if only for the purpose of reconciling

WETTBEWERBSRECHTS, FESTSCHRIFT FÜR GERHARD SCHRICKER ZUM 70 GEBURTSTAG 325 (Ansgar Ohly et al. eds., 2005); Ginsburg, *Fair Use for Free*, *supra* note 31.

128. See Gillian Davies, *The Convergence of Copyright and Authors' Rights – Reality or Chimera?*, 26 INT'L REV. INTELL. PROP. & COPYRIGHT L. 964 (1995).

129. The E.U. copyright law's tendency towards narrow interpretation of copyright exceptions differs from not only the common law tradition but also from the "very European" principles underlying the human rights law. If one looks at the E.Ct.H.R. jurisprudence on Article 10 (freedom of expression) of the European Convention on Human Rights, Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, she will find that the Court treats copyright as an exception to this right which (as any exception to freedom of expression) must be "narrowly interpreted" and the "necessity" for which must be "convincingly established." *Observer and Guardian v. United Kingdom*, No. 13585/88, Eur. Ct. H.R. ¶ 59 (1991), <http://hudoc.echr.coe.int/eng?i=001-57705>; *Vogt v. Germany*, No. 17851/91, Eur. Ct. H.R. ¶ 52 (1995), <http://hudoc.echr.coe.int/eng?i=001-58012>; *Wille v. Liechtenstein*, No. 28396/95, Eur. Ct. H.R. ¶ 61 (1999), <http://hudoc.echr.coe.int/eng?i=001-58338>; *Rekényi v. Hungary*, No. 25390/94, Eur. Ct. H.R. ¶ 42 (1999), <http://hudoc.echr.coe.int/eng?i=001-163725> (emphasis added). European copyright law in its current evolutionary twist thus appears to be in a direct conflict with European human rights law; the E.Ct.H.R. states as a matter of settled case law that exceptions to the right to freedom of expression (including copyright and other intellectual property rights) must be narrowly interpreted, whereas the C.J.E.U., in its application of InfoSoc asserts, likewise as a matter of settled case law, something directly on the opposite –

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European copyright with European human rights tradition, the current approach to copyright exceptions in the E.U. needs to be reviewed.

4. No Remuneration

One of the frequent critiques of U.S. fair use is that it does not leave the space for fair remuneration of the rightholder – in other words, fair use in the United States is always the use for free.¹³⁰

In Europe, however, the construction of an open-ended limitation to copyright does not necessarily presuppose the lack of any equitable remuneration for the rightholder.¹³¹ This was the idea behind the Wittem group's project of the European Copyright Code,¹³² which conceived that certain exceptions to copyright can be provided only for against the payment of fair and adequate remuneration. Other models of flexibility under European law, including the principle of proportionality, likewise allow for a fair remuneration of rightholders.¹³³ We will return to this in more detail in the subsequent sections of this paper.¹³⁴

B. PROBLEMS OF THE CURRENTLY EXISTING SOLUTIONS

As already mentioned in the introduction, several solutions on how to "flexibilize" the European system of exceptions and limitations have been advanced in the literature (including the use of other provisions with open-ended wording, such as the three-step test in copyright law¹³⁵

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130. See Ginsburg, *Fair Use for Free*, *supra* note 31.

131. See generally P. Bernt Hugenholtz, *The Wittem Group's European Copyright Code*, at 349, https://www.ivir.nl/publicaties/download/ILS_29_chapter17.pdf (last visited Oct. 18, 2019) (explaining the flexibility involved in the European copyright system).

132. See *European copyright code*, *supra* note 35, at 11 (demonstrating a deliberate intent to achieve balance between authors' interests and freedom of access).

133. See Consolidated Version of the Treaty on European Union art. 5, Dec. 13, 2007, 2010 O.J. C 83/01 (establishing the principle of proportionality as fundamental to E.U. law and legal action).

134. See *infra* Part IV, Section D.

135. See Christophe Geiger, Jonathan Griffiths, and Reto M. Hilty, *Towards a Balanced Interpretation of the "Three-Step Test" in Copyright Law*, 30 EUR. INTEL. PROP. REV. 489, 491 (2008) [hereinafter Geiger, Griffiths, and Hilty, *Towards a Balanced Interpretation of the "Three-Step Test"*] (asserting that the three-step test was intended to be and is an innately flexible standard); Senftleben, *The International Three-Step Test*, *supra* note 34, at 69

or the balancing tests of certain copyright limitations – notably, quotation¹³⁶).

Without going much into the details of these proposals, for which a good deal of literature exists, we would only mention here that although all of such solutions make a valuable contribution to the search for improvements of European copyright, a systematic and coherent open clause potentially addressing all situations where important fundamental rights considerations can limit exclusive right is still to be developed.¹³⁷ Thus, the currently dominating proposal of using the three-step test in an open manner as a “fair use” clause in Europe¹³⁸ is sometimes criticized for the uncertainties surrounding the test’s meaning and the lack of interpretation of each of the test’s steps¹³⁹ (notably due to the scarcity of the case law on the test’s application¹⁴⁰). Although it is true that these

(holding that the open-ended wording of the test is intended to provide legal flexibility rather than legal uncertainty); Geiger, Gervais, and Senftleben, *The Three-Step Test Revisited*, *supra* note 7, at 626 (concluding that the abstract nature of the test’s criteria allows for flexible interpretation).

136. See Bently & Aplin, *Displacing the Dominance of the Three-Step Test*, *supra* note 104; Bently & Aplin, *Whatever Became of Global Mandatory Fair Use?*, *supra* note 104.

137. See also Griffiths, *Unsticking the Centre-Piece*, *supra* note 10, at 89 (stating that despite the value of existing proposals on opening up the European copyright system of exceptions and limitations, “none provides a comprehensive solution to the structural problem of inflexibility”).

138. See *European copyright code*, *supra* note 35, art. 5(5) (providing for an opening clause alongside the list of exceptions akin to those of InfoSoc (but made mandatory and drafted in a more open manner)). The clause of Article 5(5) of the Code allows the new uses that are (1) “compatible to the uses enumerated” and (2) comply with the 3-step test.

139. Pollaud-Dulian, *supra* note 123, at 165 (“[T]he three factors [of the three-step test] . . . seem very complicated and somewhat vague.”); André Lucas, *For a Reasonable Interpretation of the Three-Step Test*, 32 EUR. INTELL. PROP. REV. 277, 282 (2010) (stating “[i]t is not true that the exhaustive legal list of exceptions, even interpreted strictly, would hinder any adaptation to new techniques and to new needs.”).

140. See, e.g., Pollaud-Dulian, *supra* note 123, at 162, 163. The uncertainty in the test’s application has led to criticism raised by scholars both opposing and welcoming further flexibility in the system of copyright limitations. Concerns are also voiced that the three-step solution on exceptions would be directed only at legislators (national and E.U.). See, e.g., Griffiths, *Unsticking the Centre-Piece*, *supra* note 10, at 90; see Lucas, *supra* note 139, at 277. But cf., Geiger, Griffiths, and Hilty, *Towards a Balanced Interpretation of the Three-Step Test*, *supra* note 135, at 489 (“In some jurisdictions, [the three-step test] not only functions as a pre-legislative constraint but also governs the judicial interpretation of exceptions and limitations.”). The three-step test is also sometimes criticized for the exhaustive nature of its factors, see Pollaud-Dulian, “The Dragon and the White Whale,”

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uncertainties can be overcome through clear guidelines for balanced interpretation,¹⁴¹ admittedly the three-step test has not been drafted to serve as an open-ended provision, and the wording of the criteria set forth does not ideally reflect all concerns.¹⁴² Other potential solutions, such as implementing the clause analogous to U.S. fair use¹⁴³ or transplanting the latter almost without modifications,¹⁴⁴ have as their major flaws an absence of the relevant body of case law in Europe and/or their unnuanced nature, not taking particularities of the European legal tradition into account.¹⁴⁵

Finally, as it concerns the open-worded balancing tests inherent to certain exceptions to copyright, such as quotation, those tests are

supra note 123, at 163, the predominantly economic focus of the test (if one thinks of the W.T.O. interpretation), *see* Geiger, Gervais, & Senftleben, *The Three-Step Test Revisited*, *supra* note 7, at 597; Jane C. Ginsburg, *Toward Supranational Copyright Law? The WTO Panel Decision and the “Three-Step Test” for Copyright Exceptions*, REVUE INTERNATIONALE DU DROIT D'AUTEUR 3, 51-53 (2001), and the fact that the three-step test is not an obvious open-ended mechanism because it is constructed as a negative tool in international treaties with the original aim of further restricting (not opening) exceptions and limitations to copyright. *See* Griffiths, *Unsticking the Centre-Piece*, *supra* note 10, at ¶ 18; Pollaud-Dulian, *The Dragon and the White Whale*, *supra* note 123, at 166, 168-69; Lucas, *For a Reasonable Interpretation of the Three-Step Test*, *supra* note 139, at 280.

141. *See* Geiger, Griffiths, & Hilty, *Towards a Balanced Interpretation of the “Three-Step Test,” supra* note 135; Geiger, *Implementing an International Instrument for Interpreting Copyright Limitations and Exceptions*, *supra* note 34; Christophe Geiger, Daniel J. Gervais, and Martin Senftleben, *Understanding the “Three-Step Test”*, in INTERNATIONAL INTELLECTUAL PROPERTY: A HANDBOOK OF CONTEMPORARY RESEARCH 167 (Daniel Gervais ed., 2015).

142. *See* Geiger, Griffiths, and Hilty, *Towards a Balanced Interpretation of the “Three-Step Test,” in Copyright Law*, *supra* note 135, at 491; Griffiths, *Unsticking the Centre-Piece*, *supra* note 10, at 92-93 (“[A] ‘test’ . . . came into being as an intentionally vague political compromise formula and [its] meaning and requirements remain almost entirely uncertain.”).

143. *See, e.g.*, Global Network on Copyright User Rights, *Model Flexible Copyright Exception*, <http://infojustice.org/wp-content/uploads/2012/12/Model-Flexible-Copyright-Exception-Version-4.0.pdf> (last visited Jan. 2018) (proposing a flexible copyright exception suggestive of an open clause analogous to the U.S. concept of fair use).

144. On the different models of transplanting the U.S. fair use to other countries and on the complexities associated with such transplantation, *see* Peter K. Yu, *Customizing Fair Use Transplants 2* (Tex. A&M U. Sch. of L. Legal Stud. Res. Paper Series, Paper No. 17-78, Feb. 2018), <https://ssrn.com/abstract=3052158>.

145. *See id.* at 11-12 (discussing European efforts to adapt legal transplants to accommodate their legal traditions).

obviously tailored only at circumstances not extending the boundaries of a specific exception.¹⁴⁶ Thus, they cannot serve as a general crosscutting rule of fairness for all situations that might arise in the sphere of copyright application.

IV. NEW APPROACH: A EUROPEAN "FAIR USE" GROUNDED IN FREEDOM OF EXPRESSION

The search for possible theoretical models of an E.U. "fair use" construction might, however, be unnecessary. Surprising as it may seem, in Europe we might already have some sort of "fair use." In the course of the recent years, the courts have gradually shaped it through the application of the right to freedom of expression and information to copyright disputes.¹⁴⁷

The fundamental right to freedom of expression is characterized by a developed list of balancing factors that have been elaborated (just like American fair use factors) throughout the years of the human rights jurisprudence in Europe.¹⁴⁸ These factors include: 1) the character of expression (commercial or not, artistic, etc.); 2) the purpose and nature of expression/information at stake (political, cultural, entertaining, otherwise in the general interest); 3) the status of a counterbalanced interest and the degree of interference with it; 4) availability of alternative means of accessing the information; 5) the timing/"oldness" of speech;

146. See *id.* at 11 (considering the need to customize legal transplants, especially when dealing with case-by-case instances of balancing of fair dealing and fair use).

147. See *id.* (discussing the influence of the right to freedom of expression and information on European copyright law); see also Geiger & Izyumenko, *Intellectual Property Before the European Court of Human Rights*, *supra* note 39, at 29-30 (discussing the intersection of human rights and intellectual property in European law). **Christophe Geiger, L'utilisation jurisprudentielle des droits fondamentaux en Europe en matière de propriété intellectuelle: Quel apport? Quelles perspectives?, In la contribution de la jurisprudence à la construction de la propriété intellectuelle en Europe** 193 (Collection du CEIPI/Litec, Paris, 2013) (discussing the intersection of fundamental rights and intellectual property in the case law of the C.J.E.U.); Griffiths, *Taking Power Tools to the Acquis*, *supra* note 40, at 160; Stijn van Deursen & Thom Snijders, *The Court of Justice at the Crossroads: Clarifying the Role for Fundamental Rights in the EU Copyright Framework*, 49 INT'L REV. INTEL. PROP & COMPETITION L. 1080, 1086-87 (2018).

148. See Geiger & Izyumenko, *Intellectual Property Before the European Court of Human Rights*, *supra* note 39, at 29-30 (beginning an assessment of freedom of expression as both a counterweight to and basis for intellectual property rights).

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6) the status of the speaker/user (active or "passive," press, etc.); 7) the form of expression; 8) the medium of expression (notably, the Internet); 9) the nature and severity of the penalties; etc.¹⁴⁹

Although these factors have long been shaping the law on freedom of expression in Europe, it has not been until recently that the courts started applying them in the copyright context.¹⁵⁰ Viewed from this new perspective, these old-known factors reveal some striking similarities with the fairness factors to be found in the U.S. fair use doctrine.

U.S. fair use includes four factors which are non-exhaustive (meaning that new additional factors can be identified by the courts) and which split, in turn, into several important subfactors.¹⁵¹

Factor one is the purpose and character of the use.¹⁵² It encompasses the following subfactors: commerciality of the use; transformativeness; and correspondence of the use to one of the preambular purposes or the purposes analogous to them.¹⁵³ Preambular purposes include criticism, comment, news reporting, teaching, scholarship, and research.¹⁵⁴ Educational purpose is further identified in the wording of factor one itself.¹⁵⁵ Non-commercial transformative use for one of the purposes considered to be socially valuable would tilt towards the finding of fair

149. *Id.* at 34-37 (providing a case study of these factors informing the decision of a European court ruling on an intellectual property case).

150. See Griffiths, *Taking Power Tools to the Acquis*, *supra* note 40, at 158-59 (discussing the beginning of European courts applying these factors to copyright law).

151. See William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659, 1668-69 (1988) (listing four fundamental objectives of the test and beginning an analysis of their corresponding factors); Leval, *supra* note 25, at 1110 (listing the four factors); Beebe, *supra* note 29, at 594 (acknowledging subfactors within the four main factors); *Unbundling Fair Uses*, *supra* note 27, at 2542-44 (asserting that recognizing other factors in addition to the four statutory ones provides a "toolkit" for assessing a myriad of possible fair uses); Netanel, *supra* note 29, at 719-20 (quoting Section 107 of the Copyright Act of 1976 in defining the four statutory factors). *But see* Paul Goldstein, *Fair Use in Context*, 31 COLUM. J. L. & THE ARTS 433, 437 (2008) (criticizing the efforts of courts and jurists in trying to decide how the four factors should be weighted as undermining their efforts to establish a theory of fair use).

152. See Beebe, *supra* note 29, at 594, 597 (examining the nature and applicability of the first factor, "the purpose and character of the use").

153. See *id.* at 594, 597 (identifying the subfactors within the first of the main factors).

154. See *id.* at 609 (listing some of the various types of preambular purposes).

155. See *id.* at 594, 597 (identifying "educational purposes" as an explicit subfactor of the first factor).

use in American case law.¹⁵⁶

Factor two deals with the nature of the copyrighted work.¹⁵⁷ Here again, two important subfactors stand out: the published or unpublished nature of the work and its fictional or factual character.¹⁵⁸ More protection is usually given to creative/fictional works and to works that have not yet been published (although some case law to the contrary exists as well).¹⁵⁹

Factor three concerns itself with the amount and substantiality of the copyrighted work that has been used (quantitatively and qualitatively¹⁶⁰).

Finally, factor four looks at the effects of the use on the potential market for or value of the copyrighted work.¹⁶¹ Alongside transformativeness and commerciality, it is often claimed to be one of the most influential factors.¹⁶²

Some further factors have been identified in addition to the statutory ones.¹⁶³ Those include: the "oldness" of the copyrighted work; refusal to license; market failure; availability of alternative means (or, almost along the same lines, necessity or availability of a work to a user); custom; failure to utilize the technical protection measures; acknowledgement of source material; good faith or "propriety of the defendant's conduct;"¹⁶⁴ social desirability of the transfer of use to the defendant; and impact of

156. *See id.* at 605-06 (evaluating the significance of "transformativeness" as a subfactor of the first factor).

157. *See id.* at 610 (assessing the elements and significance of "the nature of the copyrighted work").

158. *See id.* at 610 (distinguishing the two subfactors of "the nature of the copyrighted work").

159. *See id.* at 611-12 (providing a statistical analysis of 306 opinions, which the article finds suggestive of, but not necessarily proving, causality).

160. *See, e.g., Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 600 (1985) (showing that taking even small parts of works can be found excessive if it is the "heart" of the work).

161. *See* Beebe, *supra* note 29, at 616.

162. *See id.* at 616-17 (noting that a distinct majority of court opinions from 1985 to 1994 asserted this proposition).

163. *See* Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 30 J. COPYRIGHT SOC'Y OF THE U.S.A. 253 (1983); Fisher, *supra* note 151; Beebe, *supra* note 29; Samuelson, *Unbundling Fair Uses*, *supra* note 27; Leval, *supra* note 25.

164. *See Harper & Row*, 471 U.S. at 549-50 (acknowledging good faith as a longstanding, non-statutory factor).

an award of fair use on the incentives to create of the plaintiff copyright owner.¹⁶⁵

In what follows, we compare U.S. fair use factors with Article 10 E.C.H.R. balancing criteria to identify the differences and commonalities between the two. In turn, this should help in identifying whether European freedom of expression balancing can serve as a basis for a European "fair use" construction.

A. CHARACTER OF EXPRESSION

1. Commerciality

The most obvious similarity between U.S. fair use and European freedom of expression balancing is the commerciality criterion; commercial or non-profit character of expression under European "fair use" mirrors the commerciality of the use subfactor under factor one of U.S. fair use.¹⁶⁶

In the United States, commerciality tilts against fair use but does not render it presumptively unfair. Thus, in a famous *Campbell v. Acuff-Rose Music* case, which concerned the commercial parody of Roy Orbison's "Oh, Pretty Woman" by the hip-hop band 2 Live Crew, the U.S. Supreme Court considered, "the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use."¹⁶⁷ It further noted, "[i]f, indeed, commerciality carried presumptive force against a finding of fairness, the presumption would swallow nearly all of the illustrative uses listed in the preamble paragraph of § 107, including news reporting, comment, criticism, teaching, scholarship, and research, since these activities 'are generally conducted for profit in this country.'"¹⁶⁸

In the same spirit, the level of protection under the FoE balancing is

165. See Leval, *supra* note 25, at 1126–29 (acknowledging the rationale for using two "false factors;" good faith and artistic integrity).

166. See Izyumenko, *The Freedom of Expression Contours of Copyright in the Digital Era*, *supra* note 109, at 116 (providing several cases in which European courts implicitly consider the commerciality of the expression in dispute to determine whether it constitutes fair use).

167. *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 579 (1994).

168. *Id.* at 584 (citing *Harper & Row v. Nation Enterprises*, 471 U.S. 539, 592 (1985) (Brennan, J., dissenting)).

generally lower for commercial speech,¹⁶⁹ but it is elevated when what is at stake is not a given individual's purely "commercial" expression but her participation in a debate affecting the general interest.¹⁷⁰ The E.Ct.H.R. judgment in *Hertel v. Switzerland* is instructive in this regard.¹⁷¹ Mr. Hertel was an engineer undertaking environmental biological research in his own laboratory. In 1991, he published a research report about the hazardous effects on health of microwave ovens. The Association of Electrical Appliances for Household and Trade in Switzerland filed a court action against Mr. Hertel claiming that his research and the subsequent publications thereof in the journals were untenable and amounted to unfair competition.¹⁷² The Swiss courts upheld the action, considering that although scientific statements did not as such fall within the framework of competition, they interfered with the latter if such statements were employed negatively to influence the sale of a particular product. As a result, Mr. Hertel was prohibited, under the threat of punishment, from stating that food that had been prepared in microwave ovens was hazardous to health. He then applied to the E.Ct.H.R. claiming that his right to freely express himself had been violated.

The Strasbourg Court first observed that a margin of appreciation of

169. See *Markt Intern Verlag GmbH and Klaus Beermann v. Federal Republic of Germany*, No. 10572/83, Eur. Ct. H.R. ¶ 33 (1989), <http://hudoc.echr.coe.int/eng?i=001-57648>; *Casado Coca v. Spain*, No. 15450/89, Eur. Ct. H.R. ¶ 50 (1994), <http://hudoc.echr.coe.int/eng?i=001-57866>; *Demuth v. Switzerland*, No. 38743/97, Eur. Ct. H.R. ¶ 42 (2002), <http://hudoc.echr.coe.int/eng?i=001-60724>; *Mouvement Raëlien Suisse v. Switzerland*, No. 16354/06, ¶ 61 (2012), <http://hudoc.echr.coe.int/eng?i=001-112165>.

170. See *Hertel v. Switzerland*, No. 25181/94, Eur. Ct. H.R. ¶ 47 (1998), <http://hudoc.echr.coe.int/eng?i=001-59366>; *(VgT) Verein Gegen Tierfabriken v. Switzerland*, No. 24699/94, Eur. Ct. H.R. ¶ 71 (2001), <http://hudoc.echr.coe.int/eng?i=001-59535>; *Asby Donald and Others v. France*, No. 36769/08, Eur. Ct. H.R. ¶ 39 (2013), <http://hudoc.echr.coe.int/eng?i=001-115845>.

171. *Hertel v. Switzerland*, No. 25181/94, Eur. Ct. H.R. (1998), <http://hudoc.echr.coe.int/eng?i=001-59366>.

172. The relevant provisions of the Federal Unfair Competition Act of 1986 on which the Association relied did not concern solely economic agents; the Act contained a general provision, in which were defined as "unfair and illegal," not only any commercial practice but also any conduct that was "deceptive or in any other way offend[ed] the principle of good faith and [...] affect[ed] relations between competitors or between suppliers and customers." See *Hertel v. Switzerland*, No. 25181/94, Eur. Ct. H.R. ¶ 25 (1998), <http://hudoc.echr.coe.int/eng?i=001-59366>.

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the Member States was "particularly essential in commercial matters, especially in an area as complex and fluctuating as that of unfair competition."¹⁷³ It was necessary to reduce the extent of that margin in the applicant's case since it could not be denied that his participation in a debate over public health affected the general interest.¹⁷⁴ Taking into account the other circumstances of the case,¹⁷⁵ the E.Ct.H.R. thus held that the measure at issue could not be considered "necessary in a democratic society" and that there had consequently been a violation of Article 10 (freedom of expression) of the European Convention on Human Rights (E.C.H.R.).¹⁷⁶

In the copyright context, to the contrary, the Court did not establish a violation of Article 10 when it decided two cases where the expression at stake was considered *both* primarily commercial and at the same time not in the public interest.

One case concerned the "commercially run" Pirate Bay file-sharing service,¹⁷⁷ and the other case concerned an unauthorized publication of photographs of designers' clothes "with the specific aim of selling [those photographs] or providing access in return for payment."¹⁷⁸ In line with *Hertel* logic, the finding of no violation of FoE in these cases rested on a consideration that the information at stake (music, films, computer games, and pictures from the fashion shows) fell outside the sphere of

Federal Republic of Germany,
 coe.int/eng?i=001-57648;
 H.R. ¶ 50 (1994),
Switzerland, No. 38743/97, Eur.
 Ct. H.R. No. 60724; *Mouvement Raëlien*
 coe.int/eng?i=001-

Ct. H.R. ¶ 47 (1998),
Gegen Tierfabriken v.
 ¶ 71 (2001),
and Others v. France, No.
 coe.int/eng?i=001-115845.
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 [ed] relations between
Hertel v. Switzerland, No.
 coe.int/eng?i=001-59366.

173. *Id.* at ¶ 47.

174. *Id.*

175. Notably, Mr. Hertel had nothing to do with editing or writing the publication in question (he merely sent his research to the journal who then published an article on its basis); statements definitely attributable to Mr. Hertel were on whole qualified, and nothing suggested that such statements had any substantial impact on the plaintiff's interests; etc.

176. *Hertel v. Switzerland*, No. 25181/94, Eur. Ct. H.R. ¶ 51 (1998),
<http://hudoc.echr.coe.int/eng?i=001-59366>.

177. *Neij and Sunde Kolmisoppi v. Sweden*, No. 40397/12, Eur. Ct. H.R. (2013),
<http://hudoc.echr.coe.int/eng?i=001-117513>.

178. *Ashby Donald and Others v. France*, No. 36769/08, Eur. Ct. H.R. ¶ 39 (2013),
<http://hudoc.echr.coe.int/eng?i=001-115845>. See Geiger & Izyumenko, *The Role of Human Rights in Copyright Enforcement Online*, *supra* note 116 (discussing in further depth the *Ashby Donald* and "*The Pirate Bay*" cases); see generally Alain Strowel, *Ponderation entre liberte d'expression et droit d'auteur sur internet: de la reserve des juges de Strasbourg a une concordance pratique par les juges de Luxembourg*, 100 REV. TRIM. DR. H. no. 2014/100, 889 (2014); Dick Voorhoof, *Freedom of Expression and the Right to Information: Implications for Copyright*, in RESEARCH HANDBOOK ON HUMAN RIGHTS AND INTELLECTUAL PROPERTY 331 (Christophe Geiger, ed. 2015).

general interest, and the commercial nature of the applicants' expression only reinforced this finding.

A contrario, both under the FoE balancing and the U.S. fair use doctrine, commerciality usually loses its significance if the borrowing expression is artistic or otherwise socially valuable.

2. *Transformativeness: Artistic or Otherwise in the "General Interest"*

Alongside commerciality, another highly influential subfactor defining the character of use under factor one of the U.S. fair use doctrine is transformativeness. Transformativeness includes both an artistic use of the work and its use for a different purpose than the original.¹⁷⁹ For example, the *Campbell* parody analyzed above stands for artistic transformativeness, whereas the Google Image Search case discussed in the beginning stands for transformativeness associated with a different purpose than the original work and the general public good achieved by such use.¹⁸⁰

In the law on FoE, these two types of transformativeness (which Peter Yu characterized as "transformative *works* and transformative *uses*"¹⁸¹) are reflected in the elevated protection given to artistic expression¹⁸² and in the public interest in imparting and receiving socially valuable

179. See Sag, *Predicting Fair Use*, *supra* note 29, at 57 (arguing that "the term transformative use should be confined to expressive uses of copyrighted works and that nonexpressive use should be recognized as a distinct category of preferred use"); Samuelson, *Unbundling Fair Uses*, *supra* note 27, at 2557 (suggesting calling these two types of uses, respectively, transformative *per se* and "orthogonal"); see also Matthew Sag, *Copyright and Copy-Reliant Technology*, 103 NW. U. L. REV. 1607, 1647 (2009) (stating that nonexpressive use should be considered equivalent but not identical to transformative uses of copyrighted work).

180. See *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 580 (1994) (discussing parody as an artistic work that transforms the original into a comedic or otherwise imitative work that is original in its own right); *Perfect 10, Inc. v. Amazon.com*, 508 F.3d 1146, 1165 (9th Cir. 2007) (stating that the public benefit of the transformative nature of Google's search engine outweighs the superseding and commercial uses of the thumbnails).

181. See Peter K. Yu, *Can the Canadian UGC Exception be Transplanted Abroad?*, 26 INTELL. PROP. J. 175, 189 (2014) (emphasis in the original).

182. See *Karatas v. Turkey*, No. 23168/94, Eur. Ct. H.R. ¶¶ 51-52 (1999), <http://hudoc.echr.coe.int/eng?i=001-58274> (finding that the fact that the statements had been made through poetry rather than in the mass media had led to the conclusion that the interference with the FoE was not justifiable by the national security context otherwise existing in the case).

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194) (discussing parody as
 otherwise imitative work
 508 F.3d 1146, 1165 (9th
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 thumbnails).
 ? *Transplanted Abroad?*, 26

H.R. ¶¶ 51-52 (1999),
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In application to copyright law, a good example of artistic
 "transformativeness" and of the role it takes under the FoE "fair use" is
 the case on music sampling decided recently in Germany.¹⁸³ The
 applicants in that case objected to the regular court's finding that the use
 of a two-second sequence of rhythms from the soundtrack of the song
 "Metall auf Metall" by the band Kraftwerk in their own music
 composition constituted an infringement of the right of phonogram
 producers. Finding in favor of the applicants, the German Constitutional
 Court held that:

In the legal assessment of use of copyright-protected works, the interest of
 the copyright holders to prevent the exploitation of their works without
 permission for others' commercial purposes stands in opposition to the *interest*
of other artists, which is protected under artistic freedom, to be able to enter into an artistic
dialogue with existing works without financial risk or restrictions on content
 within a creative process.¹⁸⁴

The case was then referred back by the German Constitutional Court
 to the Federal Court of Justice, which, in turn, referred a number of
 questions on this case for a preliminary ruling to the C.J.E.U.¹⁸⁵ The latter
 has explicitly regarded the technique of music sampling as "a form of
 artistic expression which is covered by freedom of the arts, as protected
 in Article 13 of the [E.U.] Charter."¹⁸⁶ Consequently, according to the
 C.J.E.U., artistic freedom has a role to play in shaping the reach of the
 right of reproduction: "[W]here a user, in exercising the freedom of the
 arts, takes a sound sample from a phonogram in order to use it, in a
 modified form unrecognizable to the ear, in a new work, it must be held

183. See BVerfG, 1 BvR 1585/13, May 31, 2016, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2016/05/rs20160531_1bvr158513en.html.

184. *Id.* at ¶ 86 (emphasis added). Translated from German in 48(3) *IIC* 343 (2017).

185. Pursuant to Article 267 of the Treaty on the Functioning of the European
 Union, if the court of one of the E.U. Member States finds a provision of E.U. law
 unclear, it may search for guidance from the C.J.E.U. by requesting the latter to give a
 preliminary ruling on the matter. In those situations where the national court is one
 against whose decisions no appeal exists under domestic law, that court is obliged to
 bring the matter before the C.J.E.U.

186. Case C-476/17, *Pelham GmbH and Others v. Ralf Hütter and Florian Schneider-
 Esleben*, 2019 EUR-Lex CELEX (July 29, 2019), ¶ 35.

that such use does not constitute 'reproduction' within the meaning of Article 2(c) of Directive 2001/29."¹⁸⁷ Pursuant to the C.J.E.U.:

[T]o regard a sample taken from a phonogram and used in a new work in a modified form unrecognisable to the ear for the purposes of a distinct artistic creation, as constituting 'reproduction' of that phonogram within the meaning of Article 2(c) of Directive 2001/29 would not only run counter to the usual meaning of that word in everyday language, [...] but would also fail to meet the requirement of a fair balance [...].¹⁸⁸

In France, in a widely publicized case in which Victor Hugo's heirs tried to use the famous author's moral rights to prevent a sequel to the work "Les Misérables," the French Supreme Court likewise gave priority to the freedom of creation.¹⁸⁹ Citing Article 10 (freedom of expression) of the E.C.H.R., it held that subject to respect of the right to paternity and of integrity of the adapted work, freedom of creativity hinders the author of the work or his heirs from preventing the making of a sequel after the exploitation monopoly has expired.¹⁹⁰

More recently, in a decision that concerned the creative reuse of three copyright-protected photographs in a painting, the French Supreme Court reversed, referring to Article 10 E.C.H.R., the lower court's finding of an infringement on the ground of the Appeal Court's failure to show how exactly the fair balance between the freedom of artistic expression and the copyright-holder's interests had been achieved.¹⁹¹

187. *Id.* at ¶ 31.

188. *Id.* at ¶ 37.

189. See Christophe Geiger, *Copyright and the Freedom to Create – A Fragile Balance*, 38 INT'L REV. INTELL. PROP. & COMPETITION L. 707, 710 (2007).

190. *See id.*

191. French Supreme Court (*Cour de cassation*), no. 13-27391, May 15 2015, <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000030600576&fastReqId=328890726&fastPos=1>. Note, however, that in a judgment of March 16 2018 (*Malika v. Klasen*, RG No 15/06029) the court to which the case was referred back (Versailles Court of Appeal) held that the use of the photograph in a painting was not sufficiently transformative and amounted therefore to an infringement. It also found that neither the parody exception nor freedom of expression covered the use at issue. See Christophe Geiger, *Appropriation créative et droit d'auteur, Réflexions sur les évolutions récentes de la jurisprudence française à la lumière du droit de l'Union et du droit comparé*, in *Mélanges en l'honneur du Professeur Claude Witz* 325 (Paris, LexisNexis, 2018). Interestingly, in a similar case from Sweden that involved likewise an artistic reuse of the copyrighted photograph in a painting, the Swedish Supreme Court found that the use was sufficiently transformative and thus constituted a new and

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By recognizing a higher protection for freedom of artistic creativity within the framework of FoE, the courts in Europe thus establish a balancing mechanism analogous to the transformativeness subfactor of U.S. fair use.

Artistic expression as an expression in the general interest that overshadows the significance of other factors, including commerciality, was also considered in a number of trademark and design cases. One of the most frequently discussed is the case of “Darfurnica” decided by the District Court of The Hague in 2011.¹⁹² The case arose out of a dispute between the Danish/Dutch artist Nadia Plesner and Louis Vuitton over the painting “Darfurnica” (inspired by Picasso’s Guernica). A part of that painting (titled “Simple Living”) depicted a starving African child holding a Louis Vuitton handbag. The aim was to “draw attention to the poignant difference between luxury and affluence on the one hand and poverty and famine in Darfur on the other hand.”¹⁹³ Within the framework of an exhibition at which “Darfurnica” was shown and offered for sale, a number of T-shirts and posters depicting “Simple Living” were sold.¹⁹⁴ “Darfurnica” was also used as an eye-catcher on Plesner’s website.¹⁹⁵ Louis Vuitton objected to the use of its famous design-protected pattern on the ground of a potential damage to its reputation and requested an *ex parte* order against Plesner and the gallery that organized the

independent creation not infringing on the copyright in the original photograph (Swedish Supreme Court, “*Swedish scapegoats*,” No. T 1963-15, 21 Feb. 2017). The court has made no reference in this case, however, to the right to freedom of expression of the secondary user. At the same time, the stress of both French and Swedish courts on transformativeness in the context of creative reuses of works (although with different outcomes) points to the emergence of a quasi-fair use standard in European copyright.

192. See *Plesner v. Louis Vuitton*, Court of the Hague Civil Law Section, application number KG RK 10-214, Jan. 27, 2011 [Kennedy van der Laan trans] http://www.rechtundgerechtigkeit.de/2-4-gesellschaftsanktionen/berichte/vuitton-darfurnica/belege/Court_Order_Louis_Vuitton_vs_Plesner.pdf; Jani McCutcheon, *Designs, Parody, and Artistic Expression – A Comparative Perspective of Plesner v. Louis Vuitton*, 41 MONASH U. L. REV. 189, 195 (2015) (discussing in depth the case of *Plesner v. Louis Vuitton* and its implications); see also Lucie Guibault, *The Netherlands: Darfurnica, Miffy and the Right to Parody*, 2 J. INTEL. PROP. INFO. TECH. & ELEC. COM. L. 236, 237 (2011) (discussing in depth the case of *Plesner v. Louis Vuitton*).

193. *Plesner v. Louis Vuitton*, Court of the Hague Civil Law Section, application number KG RK 10-214, Jan. 27, 2011, ¶ 2.3.

194. *Id.* at ¶ 2.2.

195. *Id.*

exhibition.¹⁹⁶ The Dutch court rejected the request, reasoning,

Opposite Louis Vuitton's fundamental right to peaceful enjoyment of its exclusive rights to the use of the design, there is, according to established case law of the European Court of Human Rights, the fundamental right of Plesner that is high in a democratic society's priority list to express her opinion through her art. In this respect it applies that artists enjoy a considerable protection with regard to their artistic freedom.¹⁹⁷

Importantly, in the light of this artistic character of the use, it could not be deemed to serve "a mere commercial purpose."¹⁹⁸

Analogously, in the case from Germany that concerned the ironic use of trademarks and advertising campaigns of a famous chocolate producer Milka on commercially distributed postcards, the German Federal Court of Justice gave precedence to the freedom of art over the potential damage to the interests of a trademark holder.¹⁹⁹

Artistic (and, in the Dutch case, also societal) filling of the messages at stake in these cases outweighed their commercial character, demonstrating once again that commerciality does not, analogous to U.S. fair use, have a final say under the FoE balancing. In other words, the profit-making considerations, although important, might not be decisive. What is required is the speech's contribution to the general public interest.

As it concerns non-artistic uses for a different purpose than the original, such as the use of copyrighted data in machine learning, for the operation of search engines or in other instances of text and data mining, those are likely to be considered "fair" both under the U.S. fair use doctrine and the FoE balancing as uses in the general public interest. Importantly, certain uses can bear the features of both artistic and "different purpose" transformativeness, as was the case with Nadia

196. *Id.*

197. See *Rechtbank's-Gravenhage*, 4 mei 2011, KG ZA, 11-294 m.nt. ¶ 4.8 (Neth.).

198. *Id.* See also *Laugh It Off Promotions CC v. South African Breweries International (Finance) B.V. t/a Sabmark International*, 2006 (1) SA 1 (CC) at 38 (S. Afr.) (finding that a parody on a T-shirt can still be an expression worth protection even if the T-shirt is sold).

199. See Bundesgerichtshof [BGH] [Federal Court of Justice], Feb. 3, 2005, I ZR 159/02

<http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=32899&pos=0&anz=1> (Ger.).

Plesner's use of Louis Vuitton's protected design. The Court of The Hague has recognized that the use in question, apart from being obviously artistic (incorporation in the painting), was likewise fostering an important general interest of attracting the public's attention to the drastic situation in Darfur. At the same time, the use did not "free ride with Louis Vuitton's reputation in a commercial sense."²⁰⁰

B. PURPOSE OF EXPRESSION

Factor one of U.S. fair use looks, apart from the character of the use (which can be commercial or not, transformative or consumptive), at the purpose of the use.²⁰¹ As already mentioned, prioritized purposes under U.S. fair use doctrine include Section 107 preambular purposes (criticism, comment, news reporting, teaching, scholarship, and research) and any other analogous use that, in the broader sense, is in society's interest.²⁰²

The FoE balancing likewise takes the purpose of use/expression into account. It distinguishes political speech and speech in the general public interest among the two prioritized fields of the freedom of expression protection.²⁰³

Whereas political expression is by far not the most frequent use with which the copyright law is concerned (although the cases on political "fair use" do arise too), the same is not true with regards to the use in the general public interest, which arguably comprises all of the statutory purposes listed under American fair use.

200. *Plesner v. Louis Vuitton*, Court of the Hague Civil Law Section, application number KG RK 10-214, Jan. 27, 2011, ¶ 4.8.

201. See R. Anthony Reese, *Transformativeness and the Derivatives Work Right*, 31 COLUM. J.L. & ARTS 101, 102 (2008) (stating that the transformativeness of a derivative work may give it completely different purpose and character of the use, which is the first factor in U.S. fair use).

202. Copyright Act of 1976, 17 U.S.C. § 107 (1990) (stating the preambular purposes of the American fair use doctrine).

203. *Sürek v. Turkey* (no. 1), No. 26682/95, Eur. Ct. H.R. ¶ 61 (1999), <http://hudoc.echr.coe.int/eng?i=001-58279>; *Lindon, Otchakovsky-Laurens and July v. France*, Nos. 21279/02 and 36448/02, Eur. Ct. H.R. ¶ 46 (2007), <http://hudoc.echr.coe.int/eng?i=001-82846>; *Axel Springer AG v. Germany*, No. 39954/08, Eur. Ct. H.R. ¶ 90 (2012), <http://hudoc.echr.coe.int/eng?i=001-109034>; *Morice v. France*, No. 29369/10, Eur. Ct. H.R. ¶ 125 (2015), <http://hudoc.echr.coe.int/eng?i=001-154265>; *Bédat v. Switzerland*, No. 56925/08, Eur. Ct. H.R. ¶ 49 (2016), <http://hudoc.echr.coe.int/eng?i=001-161898>.

To give just a few examples, in *Cengiz* and *Yildirim*, transmission of academic materials (thus serving educational and teaching purposes) constituted a factor favoring the freedom of expression finding.²⁰⁴ To the contrary, the use of the "pirate" websites to access music, films, and other analogous content, when other means of access were available without entailing a breach of copyright, was ruled by the E.Ct.H.R. to be outside of the sphere of general public interest.²⁰⁵

Alongside education, criticism²⁰⁶ and news reporting²⁰⁷ also rank highly on the FoE balancing scale.

In application to other areas of I.P., such as trademarks and designs, matters of public interest were ruled to include artistic use of a famous fashion brand to criticize the culture of consumerism,²⁰⁸ a parody of a well-known cigarette mark to draw attention to the health risks of smoking,²⁰⁹ parodic uses of the companies' logos to highlight the risks to the environment resulting from these companies' activities or products,²¹⁰ criticism of the social policy of these players in the economy,²¹¹ or simple ironic use of the companies' trademarks and

204. See *Cengiz and Others v. Turkey*, Nos. 48226/10 and 14027/11, Eur. Ct. H.R. ¶ 50 (2015), <http://hudoc.echr.coe.int/eng?i=001-159188>; *Ahmet Yildirim v. Turkey*, No. 3111/10, Eur. Ct. H.R. ¶ 51 (2012), <http://hudoc.echr.coe.int/eng?i=001-115705>.

205. See *Neij and Sunde Kolmisoppi v. Sweden*, No. 40397/12, Eur. Ct. H.R. (2013), <http://hudoc.echr.coe.int/eng?i=001-117513>; *Akdeniz v. Turkey (dec.)*, No. 20877/10, Eur. Ct. H.R. ¶¶ 25-26 (2014), <http://hudoc.echr.coe.int/eng?i=002-9493>.

206. Criticism under the U.S. fair use doctrine though presupposes the criticism of original work, whereas the notion of criticism under the law on FoE concerns rather more tolerated levels of criticism towards governmental, political, and other public figures or practices. See Onder Bakircioglu, *Freedom of Expression and Hate Speech*, 16 TULSA J. COMP. & INT'L L. 1, 43 (2008) (emphasizing the importance of allowing criticism of government officials).

207. News reporting purpose is reflected through the higher level of the FoE protection traditionally accorded to the press and journalists. See discussion *infra* Part IV, Section F on the status of the "speaker".

208. See *Rechtbank's-Gravenhage*, 4 mei 2011, KG ZA 2011, 11-294 m.nt. (Neth.).

209. See Cour de cassation [Cass.] [supreme court for judicial matters] 2e civ., Oct. 19, 2006, Bull. Civ. II, No. 1601 (Fr.) (finding that parody was allowed when it came to parodying "Camel" products as part of a campaign to denounce smoking).

210. Cour de cassation [Cass.] [supreme court for judicial matters] com., Apr. 8, 2008, Bull. civ. IV, No. 06-10961 (Fr.); Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Apr. 8, 2008, Bull. Civ. I, No. 07-11.251 (Fr.).

211. Cour d'appel [CA] [regional court of appeal] Paris, D. 2003, Apr. 30, 2003, AJ 1760 (Fr.).

advertising campaigns to advance the user's own marketing interests.²¹²

C. NATURE OF INFORMATION

1. *Entertainment and the Value of Information*

Factor two of U.S. fair use draws the line between factual and fictional or, put differently, informational and entertaining nature of the copyrighted work. More protection is usually given to creative, fictional works, whereas the factual/informational ones cut in favor of fair use.

A generally higher level of copyright protection for the works of entertainment under the U.S. fair use doctrine somewhat mirrors a generally lower level of FoE safeguards for such information when compared with political or otherwise "social" expression. Pure entertainment is, however, not excluded from the FoE coverage; the Strasbourg Court has stated that its importance, alongside cultural expressions, should not be disregarded.²¹³

One example is the E.Ct.H.R. case of *Kburshid Mustafa and Tarzibachi v. Sweden*.²¹⁴ The applicants, an immigrant family residing in Sweden, complained that they were evicted from their rented flat following a refusal to remove a satellite dish. This amounted, according to them, to an unjustified interference with their freedom to receive information as the satellite dish allowed the family to watch television programs in their mother tongues (Arabic and Farsi) from their country of origin (Iraq). The Court agreed, observing that the information the applicants wished to receive included political, social, and cultural news and programs that could be of particular interest to them as immigrants from Iraq.²¹⁵ The E.Ct.H.R. noted further that, apart from this "general interest" information, the applicants also wished to have access to the entertaining content. With regards to this latter type of information, the Court stated that "the freedom to receive information does not extend only to reports

212. Bundesgerichtshof [BGH] [Federal Court of Justice] Feb. 3, 2005, I ZR 159/02, [http://juris.bundesgerichtshof.de/cgi-](http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=32899&pos=0&anz=1)

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213. *Kburshid Mustafa and Tarzibachi v. Sweden*, No. 23883/06, Eur. Ct. H.R. ¶ 44 (2008), <http://hudoc.echr.coe.int/eng?i=001-90234>.

214. *Id.*

215. *Id.*

of events of public concern but covers in principle cultural expressions as well as *pure entertainment*. *The importance of the latter types of information should not be underestimated*, especially for an immigrant family with three children, who may wish to maintain contact with the culture and language of their country of origin. The right at issue was therefore of *particular importance* to the applicants.²¹⁶

Whether the entertainment is included in the scope of the right to information and which level of protection it attains is influential. Much of the debate on copyright in the E.U. is now centered on the platforms that make the films, music, and other entertaining content available online for free download or streaming. The ways to regulate these practices in a manner that would not result in “[e]very day citizens . . . across the E.U. break[ing] the law just to do something commonplace,”²¹⁷ and fairly reward the creators, is still looming in legal uncertainty. Both the U.S. fair use doctrine and European FoE balancing, however, still share the general confusion as to “whether defendant’s work serves the public interest if it is primarily entertainment.”²¹⁸ As Wendy Gordon notes, “[s]ome courts [in the U.S.] have suggested that entertainment has a social value, while [others] . . . demanded that defendant show some additional claim to serving the public.”²¹⁹ Similarly, despite the E.Ct.H.R.’s pronouncements on the importance of cultural and entertaining expression that “should not be underestimated,”²²⁰ in two cases on copyright decided by the Court in 2013, an entertaining nature of information did not seem to tilt, at least to some extent, towards the “fair use” finding.

One such case mentioned above concerned a conviction in France of the three fashion photographers for copyright infringement following the taking of photographs of designers’ clothes at fashion shows and their subsequent unauthorized publication online. Responding to the photographers’ claim of violation of their freedom to impart information, the Court stated, “although one cannot deny that the public is interested in fashion in general and *haute couture* fashion shows in

216. *Id.* (emphasis added).

217. Press Release, *supra* note 52.

218. Gordon, *supra* note 163, at 300.

219. *Id.* at 301.

220. *Khurshid Mustafa and Tarzibachi v. Sweden*, No. 23883/06, Eur. Ct. H.R. ¶ 44 (2008), <http://hudoc.echr.coe.int/eng?i=001-90234>.

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particular, it could not be said that the applicants took part in a debate of general interest when restricting themselves to making photographs of fashion shows accessible to the public."²²¹ It is noticeable that the E.Ct.H.R. did not give any reason why the fashion shows should be left outside the matters of general interest. This is all the more interesting in view of the fact that this same case has also made its way to the U.S. courts, where it was found at lower instance that:

The subject matter of protected expression extends beyond the political to include matters of cultural import. . . . *Fashion shows are a matter of great public interest, for artistic as well as commercial purposes.* These shows are open to the public, including the press . . . and the extensive coverage given to such events in various mass media makes clear that *there is widespread public interest in these matters* . . . The First Amendment simply does not permit plaintiffs to stage public events in which the general public has a considerable interest and then control the way in which information about those events is disseminated in the mass media.²²²

Another case in which the entertaining nature of information was not arguably given sufficient consideration (and which was also discussed briefly in the previous sections) was brought to the Strasbourg Court by the co-founders of a notorious Pirate Bay file-sharing service who were convicted in Sweden for complicity to commit crimes for furthering the other persons' infringement of copyright.²²³ When considering the type of information at issue (that largely consisted, in fact, of entertainment – music, films, and computer games), the Court simply underlined that, "although protected by Article 10, the safeguards afforded to the distributed material . . . cannot reach the same level as that afforded to political expression and debate."²²⁴

Thus, although admitting in theory the importance of protecting

221. *Ashby Donald and Others v. France*, No. 36769/08, Eur. Ct. H.R. ¶ 39 (2013), <http://hudoc.echr.coe.int/eng?i=001-115845>. See Geiger & Izyumenko, *Copyright on the Human Rights' Trial*, *supra* note 109.

222. *Sarl Louis Feraud Int'l v. Viewfinder, Inc.*, 406 F. Supp. 2d 274, 283 (S.D.N.Y. 2005), *vacated*, 489 F.3d 474 (2nd Cir. 2007) (emphasis added) (finding that the lower court failed to conduct the full analysis necessary to reach the conclusion that Viewfinder's First Amendment rights were violated).

223. *Nej and Sunde Kolmisoppi v. Sweden*, No. 40397/12, Eur. Ct. H.R. (2013), <http://hudoc.echr.coe.int/eng?i=001-117513>.

224. *Id.* See also Geiger & Izyumenko, *Copyright on the Human Rights' Trial*, *supra* note 109, at 320 (analyzing in detail "The Pirate Bay" and *Ashby Donald* decisions).

cultural and entertaining expressions, the E.Ct.H.R. in practice still often falls into the generalized statements on the higher levels of protection for political speech, which seem to downplay any added value of the recognition of *some* level of protection behind entertainment.²²⁵ The situation is largely the same in the United States in relation to the inclusion of entertainment in the scope of fair use – persisting confusion that does not benefit to clearing the situation in which laws do not correspond to the everyday practices of the majority of the population.²²⁶

Before moving any further, another important observation on the distinction between the fictional/factual subfactor of U.S. fair use and European FoE balancing is due here. It is noticeable that, unlike in the case of American fair use, the law on FoE does not grant elevated protection to factual information *per se*. It deals with the “quality” or social utility of such information. It does not preoccupy itself with making the facts as such (even those devoid of evident significance in terms of the general societal interest) available to the public. In other words, higher protection of the right to receive information about the facts would directly depend, under the FoE analysis, on the social value of such facts.

This is because the law on FoE makes the level of protection dependent not on the nature of the work but on the nature of information at stake.²²⁷ This might prove problematic for the foundation

225. It is worth noting that neither in the case of the photographers nor in “*The Pirate Bay*” did the character of expression inclined in favour of “fair use;” the use was not for political, artistic, or similar purposes and had a commercial motivation at its core.

226. See Press Release, *supra* note 52.

227. It is important to distinguish, in addition, the *nature of information* under the FoE balancing from the *character of expression* or use – a distinction which is somewhat mirrored in the U.S. fair use division between the character of the use under factor one and the nature of the copyrighted work under factor two. There is a possibility, for example, that information (subject matter) that is not political by its nature is used in a political way – in other words, to transmit a political message. See, e.g., Case C-201/13, *Deckmyn, et al. v. Vandersteen, et al.*, 2014 EUR-Lex CELEX LEXIS, ¶¶ 19–23 (Sept. 3, 2014) (showing that non-political content (cover of the children’s book) was used to deliver a political message). The different levels of protection existing for different types of *expression* (political, artistic, cultural, or otherwise socially valuable) thus equally apply, as a separate factor, to the different types of *information* targeted by that expression. Taking “*Darfurnica*” again as an example, as it concerned the character of expression in that case, it was both artistic and of a socially important, primarily not commercial, character. The nature of information used to deliver the artist’s message concerned,

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Nevertheless, at times an elevated deference to the nature of information (such as political news) can be traced in the U.S. fair use context alike. Thus, in *Harper & Row*, the Court of Appeals was especially influenced by the "politically significant" nature of the subject matter of President Ford's unpublished memoirs accounting for an important historical event.²²⁹ The Court's conviction was that it is not "the purpose of the Copyright Act to impede that harvest of knowledge so necessary to a democratic state."²³⁰

A separate subfactor under the nature of information evaluation in FoE balancing is the target of speech. The speech about politicians and other public figures has higher permissibility levels and hence tilts in favor of "fair use."²³¹ In application to I.P., this logic was extended

moreover, a well-known brand – the use which could be equated, for the FoE purposes, to the speech about a prominent political figure. See *Rechtbank's-Gravenhage*, 4 mei 2011, KG ZA 2011, 11-294 m.nt. (Neth.), ¶ 4.9. By contrast, in the case of the fashion photographers from France, the use was not primarily artistic; photographers merely transmitted the pictures to the public with no intention of creating their own "art" by the photographs. See *Ashby Donald and Others v. France*, No. 36769/08, Eur. Ct. H.R. (2013), <http://hudoc.echr.coe.int/eng?i=001-115845>. Nor was it for a socially valuable purpose. See Dirk Voorhoof and Inger Høedt-Rasmussen, *Copyright vs. Freedom of Expression Judgment*, ECHR BLOG (Jan. 22, 2013), <http://echrblog.blogspot.fr/2013/01/copyright-vs-freedom-of-expression.html> ("It would undoubtedly have been different if the pictures posted on the Internet had contributed to a public debate e.g. on women's rights in the world of fashion or on public health issues related to anorexia and young girls being tempted to look like models in the glossy fashion magazines.").

228. See generally Eleanora Rosati, *Originality in EU Copyright: Full Harmonization through Case Law* (Edward Elgar, 2013) (discussing how the originality of a work distinguishes the level of protection awarded to the work).

229. *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 723 F.2d 195, 197 (2d Cir. 1983) (discussing, most notably, President Ford's decision to pardon the former president, Richard Nixon).

230. *Id.* at 208. The Supreme Court was, however, much more reluctant to discuss this factor, although it did not overturn its relevance either. See also *Harper & Row*, 471 U.S. at 545-46.

231. See *Otegi Mondragon v. Spain*, No. 2034/07, Eur. Ct. H.R. ¶ 50 (2011), <http://hudoc.echr.coe.int/eng?i=001-103951> ("[T]he limits of acceptable criticism are

towards speech concerning well-known companies and brands. For example, in the above-discussed “Darfurnica” case concerning the use of the Louis Vuitton’s design-protected pattern in an artistic work critical of the culture of consumerism, the Dutch court observed that “[t]he circumstance that Louis Vuitton is a very well-known company, the products of which enjoy a considerable reputation, which it also stimulates through advertising famous people, . . . implies that Louis Vuitton must accept critical use . . . to a stronger degree than other rightholders.”²³²

2. *Published/Unpublished Status of the Work and the Timing of Expression*

Apart from fictional/factual nature of the copyrighted work, factor two of U.S. fair use also distinguishes between the published or unpublished status of a work.²³³ This subfactor does not have an explicit analogue under the European FoE balancing, although an indirect European peer to the subfactor could be found in the factor dealing with the timing of expression.²³⁴ Thus, in *Leroy v. France*, the fact that the caricature of the September 11th attack on the twin towers in the U.S. was published shortly after the tragedy (two days after), “when the whole world was shocked by the news,”²³⁵ played a role in finding that the national courts’ conviction of the caricaturist for complicity in condoning terrorism did not infringe on his right to freedom of expression.

wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance [. . .]. He is certainly entitled to have his reputation protected, even when he is not acting in his private capacity, but the requirements of that protection have to be weighed against the interests of open discussion of political issues, since exceptions to freedom of expression must be interpreted narrowly [. . .]. The Court has also acknowledged that public officials are subject to wider limits of criticism than private individuals, although the criteria applied to them cannot be the same as for politicians [. . .].”

232. See *Rechtbank's-Gravenhage*, 4 mei 2011, KG ZA 2011, 11-294 m.nt. (Neth.), ¶ 4.8 (emphasis added); *Steel and Morris v. United Kingdom*, No. 68416/01, Eur. Ct. H.R. ¶ 94 (2005), <http://hudoc.echr.coe.int/eng?i=001-68224>.

233. See Bruce Keller & Jeffrey Cunard, *Copyright Law: A Practitioner's Guide* 8–19, 20 (2d ed. 2015) (explaining the distinction the Supreme Court made between unpublished and published works and subsequent Congressional action in the Copyright Act).

234. See *Leroy v. France*, No. 36109/03, Eur. Ct. H.R. (2008), <http://hudoc.echr.coe.int/eng?i=001-88657>.

235. *Id.* at ¶ 45.

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According to the Court, "this *temporal dimension* was intended to increase the responsibility of the [caricaturist]."²³⁶ By analogy, it is not impossible to envisage that unauthorized use of a copyrighted material that has not yet been published would increase the responsibility of the user under Article 10 E.C.H.R. just as it increases such responsibility under factor two of the U.S. fair use doctrine.

Similarly, in *Éditions Plon v. France*,²³⁷ the E.Ct.H.R. held that even though both the temporary and permanent bans on the distribution of a book about President Mitterrand's physical condition were prescribed by law and pursued a legitimate aim of protecting the rights of the President and his heirs, the decision to maintain the ban indefinitely – in view of the time that had elapsed since François Mitterrand's death and availability of the book on the Internet – was no longer compatible with freedom of expression and therefore resulted in a violation of Article 10 E.C.H.R.²³⁸

The time-factor was also considered by the Slovak Constitutional Court in its first case on copyright and FoE.²³⁹ The case revolved around the use by the local newspaper of an iconic "Tank Man" photograph taken by the young Slovak photographer Ladislav Bielik in 1968.²⁴⁰ The photograph, which depicted the Soviet occupation of former Czechoslovakia, was used by the newspaper in question in 2003 and 2005 repeatedly without attribution and with no authorization from Ladislav Bielik's heirs who held the rights in the photograph.²⁴¹ The courts at all instances ruled in favor of the rightholders having considered that, contrary to what the newspaper claimed, the copyright did subsist in the photograph and that the news reporting exception did not apply in this case.²⁴² At the final instance, the FoE argument was also raised by the

236. *Id.* (emphasis added).

237. *Éditions Plon v. France*, No. 58148/00, Eur. Ct. H.R. (2004), <http://hudoc.echr.coe.int/eng?i=001-61760>.

238. Parallels can also be drawn with such U.S. non-statutory factors that are sometimes advanced in the doctrine, as the "age" of the work. *See, e.g.*, Samuelson, *Unbundling Fair Uses*, *supra* note 27, at 2541-42.

239. *See* Uznesenie Ústavného súdu Slovenskej republiky 30.9.2014 [Resolution of the Constitutional Court of the Slovak Republic] II. ÚS 647/2014, ¶ 17.

240. *Id.* at ¶ 1.

241. *Id.* at ¶ 7.

242. *Id.* at ¶¶ 11–14.

newspaper.²⁴³ In rejecting this claim too, the Slovak Constitutional Court paid attention, among other factors, to the timing of expression.²⁴⁴ According to it, there was no time pressure in publishing the photograph, which appeared for the first time back in 1968.²⁴⁵ The newspaper could thus have first tried to obtain a license from the rightholders.²⁴⁶ It follows that the time factor can tilt, in analogous circumstances, against “fair use,” as the duty of the user to initially attempt to acquire a license is even more strict with respect to the information on past events in relation to which no urgency exists.²⁴⁷

The alternative means factor discussed in subsequent sections can also play its role here. Although, in the majority of U.S. fair use cases where an unpublished status of the work would cut against fair use, some jurisprudential examples to the contrary do exist too.²⁴⁸ Thus, at times the U.S. courts were ruling that an unpublished status of the work *favoured* fair use because otherwise the work was not available to the public, and vice versa – when the work was published, it tilted against fair use because the work was available for purchase, and thus a reasonable alternative to infringing use existed.²⁴⁹ This alludes to the Article 10

243. *Id.* at ¶ 16.

244. *Id.* at ¶ 49. See Martin Husovec, *Tank Man hits the Constitutional Court*, KLUWER COPYRIGHT BLOG (Apr. 6, 2015), <http://copyrightblog.kluweriplaw.com/2015/04/06/tank-man-hits-the-constitutional-court/>.

245. Uznesenie Ústavného súdu Slovenskej republiky 30.9.2014, II. ÚS 647/2014, ¶ 49.

246. *Id.*

247. A comparison can be drawn here with a higher responsibility of the journalists to verify the accuracy of the published information if such information relates to the past events. See *Times Newspapers Ltd (Nos. 1 and 2) v. United Kingdom*, Nos. 3002/03 and 23676/03, Eur. Ct. H.R. ¶ 45 (2009), <http://hudoc.echr.coe.int/eng?i=001-91706>. (“[T]he duty of the press to act in accordance with the principles of responsible journalism by ensuring the accuracy of historical, rather than perishable, information published is likely to be more stringent in the absence of any urgency in publishing the material.”).

248. See Beebe, *supra* note 29, at 613–15 (comparing the majority and the contrary positions regarding a work’s unpublished nature as it relates to fair use).

249. See *id.* at 613–14 (“[I]n the opinions studied, the fact that the plaintiff’s work was unpublished appears to have exerted no significant effect on the outcome of the fair use test, but the fact that the plaintiff’s work was *published* appears to have exerted a strong effect on the outcome of the test in favor of a finding of fair use.” (emphasis in the original)).

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consideration on the availability of alternative means of access to information,²⁵⁰ which thus can also be considered as a factor covering, in Europe, what in the United States constitutes the separate subfactor of factor two.

D. IMPACT ON THE PROPERTY OF THE Rightholder

Under the freedom of expression balancing, an important consideration is given to the degree of interference with copyrighted property, which the freedom of expression use has caused.²⁵¹ Quite similarly, the U.S. fair use doctrine analyzes the impact of the use on copyrighted property under factor four, termed as "the effect of the use on the potential market for or value of the copyrighted work".²⁵²

In the above-discussed case of "Metall auf Metall" from Germany on music sampling, courts considered the degree of interference with property of copyright holders as a factor in the FoE analysis.²⁵³ As noted by the German Federal Constitutional Court in that case, "[i]f the artist's freedom of creative expression is measured against an interference with copyright which *only slightly* limits the possibilities of exploitation, the exploitation interests of copyright owners may have to cede in favor of the freedom of artistic debate."²⁵⁴ The C.J.E.U. in its recent judgment on

250. See *Akdeniz v. Turkey*, No. 20877/10, Eur. Ct. H.R. (2014), <http://hudoc.echr.coe.int/eng?i=002-9493>; *Cengiz and Others v. Turkey*, Nos. 48226/10 and 14027/11, Eur. Ct. H.R. (2015), <http://hudoc.echr.coe.int/eng?i=001-159188>. (considering the availability of alternative means of access to information). See *infra* Part IV, Section E.

251. *Mouvement Raëlien Suisse v. Switzerland*, No. 16354/06, Eur. Ct. H.R. (2012), <http://hudoc.echr.coe.int/eng?i=001-112165>.

252. 17 U.S.C.S. § 107 (LexisNexis 2019).

253. BVerfG, 1 BvR 1585/13, May 21, 2016, at 12, http://www.bverfg.de/e/rs20160531_1bvr158513en.html.

254. *Id.* at 14 (emphasis added). As outlined above, this position was not shared by the Advocate General of the C.J.E.U. in his opinion on this case. According to the Advocate General, "[a]rtists must be particularly aware of the limits and restrictions that life imposes on creative freedom where they concern the rights and fundamental freedoms of others, in particular their right to property, including intellectual property. [...] I am not of the opinion that the freedom of the arts [...] requires the introduction or recognition of an exception [...] which covers uses such as those at issue in the main proceedings, in which the works or other subject-matter are used, not for purposes of interaction, but rather in the creation of new works bearing no relation to the pre-existing works. The requirement of obtaining a licence for such use does not restrict, in my opinion, the freedom of the arts to a degree that extends beyond normal

this case has also referred to the degree of an interference with property of the rightholder as a factor to be taken into account.²⁵⁵ By applying this criterion, the C.J.E.U. appears to follow the German Constitutional Court, insofar as the Luxemburg Court considers that "sampling would not interfere with the opportunity which the producer has of realizing satisfactory returns on his or her investment."²⁵⁶

Analogously, in another decision from Germany, "*Germania 3*," which concerned the refusal of the heirs of Bertolt Brecht to allow the use of passages from a play by their ancestor for insertion in a new play to permit a critical analysis in artistic form of some of his theories, the German Constitutional Court gave precedence to the freedom to create laid down in Article 5(3) (artistic freedom) of the German Basic Law over "a minor infringement of copyright that only involved a *minimal financial loss* for the right holders."²⁵⁷ The German Constitutional Court thus considered, within the FoE analysis for these cases, the factor known in the United States as the impact of the use on the market for a work.

When the FoE use is more intrusive, however, the property interests are likely to prevail. For instance, in the E.Ct.H.R. case of *Appleby*, the applicants were stopped from setting up a stand and distributing leaflets in the shopping mall by the private company that owned the mall.²⁵⁸ The applicants complained that their right to FoE was thereby violated, maintaining that the State owed a positive obligation to secure the exercise of their rights within the mall despite that the dispute concerned the relationships between private parties. Although the Strasbourg Court

market constraints, especially since those new works often generate significant revenue for their authors and producers. So far as concerns the argument that, in certain cases, obtaining a licence may prove impossible, for example in the event that the rightholders refuse, I take the view that the freedom of the arts cannot guarantee the possibility of free use of whatever is wanted for creative purposes." (Opinion of Advocate General Szpunar in Case C-476/17, *Pelham GmbH v. Hutter*, 2018 EUR-Lex CELEX LEXIS, ¶¶ 94, 96 (Dec. 12, 2018)).

255. Case C-476/17, *Pelham GmbH and Others v. Ralf Hütter and Florian Schneider-Esleben*, 2019 EUR-Lex CELEX (July 29, 2019), ¶ 38.

256. *Id.*

257. BVerfG, 1 BvR 825/98, June 25, 2000, ¶ 24, https://www.bundesverfassungsgericht.de/e/rk20000629_1bvr082598.html (emphasis added).

258. *Appleby and Others v. United Kingdom*, No. 44306/98, Eur. Ct. H.R. (2003), <http://hudoc.echr.coe.int/eng?i=001-61080>.

agreed that the positive obligation might have existed in the present case,²⁵⁹ it was:

[N]ot persuaded that . . . demographic, social, economic, and technological developments [that] are changing the ways in which people move around and come into contact with each other . . . require[] the *automatic creation* of rights of entry to private property. . . . Where, however, the bar on access to property has the effect of preventing any effective exercise of freedom of expression or it can be said that the essence of the right has been destroyed, the Court would not exclude that a positive obligation could arise for the State to protect the enjoyment of the Convention rights by regulating property rights.²⁶⁰

As the Court's reasoning in this case demonstrates, the impact of the FoE use on the property of the rightholder is a sensitive consideration, which will depend on the circumstances of each case – largely in line with the U.S. jurisprudence on the fourth factor of the fair use doctrine.²⁶¹

One important difference exists when assessing the impact on the property of copyright holder from the U.S. fair use and European FoE balancing perspectives. As already mentioned above, no remuneration to the rightholder is envisaged under the U.S. fair use doctrine.²⁶² To the contrary, the FoE balancing leaves sufficient room for allowing the uses against the payment of fair remuneration to the rightholder – the fact permitting, arguably, an extension of the scope of permissible uses that, if the fair remuneration not existed, would have fallen under the scope of “unfair.”²⁶³ In other words, the payment of remuneration arguably

259. *Id.* at ¶ 41.

260. *Id.* at ¶ 47 (emphasis added).

261. *Id.* See also *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1275, n.32 (11th Cir. 2001).

262. See Ginsburg, *Fair Use for Free*, *supra* note 31, at 1385 (defining fair use within copyright cases).

263. When balancing freedom of expression with the right to property (including property of copyright holders), the E.Ct.H.R. takes into account the severity of interference not only with freedom of expression, but also with the countervailing property interest. See, e.g., *Appleby and Others v. United Kingdom*, No. 44306/98, Eur. Ct. H.R. ¶ 47 (2003), <http://hudoc.echr.coe.int/eng?i=001-61080>; *Mouvement Raëlien Suisse v. Switzerland*, No. 16354/06, Eur. Ct. H.R. ¶ 58 (2012), <http://hudoc.echr.coe.int/eng?i=001-112165>. In application to copyright law, this principle was recognized, for example, by the German Federal Constitutional Court in its famous “Schoolbook” decision. As held by the court in that case, although it should be possible to limit the author's exclusive right if important public interests require so, the remuneration may be avoided only in the rarest cases. BVerfG, 1 BvR 765/66, July

mitigates the density of the FoE's conflict with property of copyright owner and thereby increases the chances that the FoE-based use would prevail (and "fair use" will accordingly be found).²⁶⁴

7, 1971, <http://www.uni-leipzig.de/urheberrecht/ressrc/material/vorles/grur/grur72-481.pdf> ("With the exclusion of the author's right to prohibit access, the public interest in having access to the cultural assets is satisfied sufficiently; this exclusion clearly defines the social obligation of copyright in this decisive area. It does not follow from Article 14 paragraph 2 of the Constitution, however, that in these cases, the author would have to make his intellectual asset available to the general public free of charge."). See generally Geiger, *Promoting Creativity Through Copyright Limitations*, *supra* note 4, at 540–41 (discussing the German Federal Constitutional Court's use of limitation-based remuneration).

264. In the same line of thought, authors suggest that compulsory licensing, statutory licences, and fair remuneration can present a way of mitigating the conflict with FoE without unnecessarily intruding on the remuneration interests of rightholders. See Gustavo Ghidini & Andrea Stazi, *Freedom to Conduct a Business, Competition and Intellectual Property*, in RESEARCH HANDBOOK ON HUMAN RIGHTS AND INTELLECTUAL PROPERTY 410, 419 (Christophe Geiger ed., 2015) (observing that a proper balance between third parties' access rights and rightholders' due reward can be achieved "not only *ex ante*, through compulsory, extended, or voluntary public licenses, but also *ex post*, by applying the liability rule, as a reasonable remuneration instead of full damages, when the property rule appears too strict at the stage of enforcement, e.g. in worthy cases of derivative innovation or creation"); see also Graeme B. Dinwoodie, *Copyright and Free Expression: Engine or Obstacle?*, in COPYRIGHT AND FREEDOM OF EXPRESSION: PROCEEDINGS OF THE ALAI STUDY DAYS 253–54 (Raquel Xalbarder ed., 2006) ("If we accept the premise that a particular act controlled by the copyright owner should be something that third parties should be able to do in order to exercise free speech rights, should it matter that the third party must pay to do so? . . . If payment is not a threat to free speech, then we need only modify our rules on injunctions. The way we answer this question affects the extent to which the availability of licenses (compulsory or voluntary) can ameliorate impediments and allow us to navigate between engines and obstacles."); Varsha Mangal, *Is Fair Use Actually Fair? Analyzing Fair Use and the Potential for Compulsory Licensing in Authors Guild v. Google*, 17 N.C. J. L. & TECH. 251, 273–74 (2016) ("Fair use acts as an 'on/off' switch, which forces one party to be a winner and the other party to be a loser. However, as fair use is applied to benefit the public, sometimes the burden on the losing party is simply too great. Therefore, a different legal avenue ought to be pursued," which according to the author, compulsory licensing provides.); Neil Weinstock Netanel, *COPYRIGHT'S PARADOX* 208 (Oxford Univ. Press, 2008) ("[I]t would serve free speech policy to convert copyright from a right of proprietary control to a right to receive compensation. Copyright law should not serve as a tool for media incumbents or for media-licensed distributors of digital content . . . to parlay mass media dominance into digital markets. Nor should copyright be available to suppress the wellspring of peer-created remixes and mashups that digital technology makes possible. At the same time, neither should untrammelled file sharing be allowed to eviscerate revenues for creators and media firms that look to the market for

E. ALTERNATIVE MEANS OF ACCESSING THE INFORMATION

Yet another important point of correlation between the U.S. fair use and European FoE balancing is the alternative means factor.²⁶⁵ Both in the United States and in Europe, the availability of the work to the user is influential for the fair use finding.²⁶⁶ Although in the United States this is not one of the statutory factors, its relevance to fair use, as explained by Wendy Gordon, "is implicitly reflected in the legislative history of section 107 of the Copyright Act. The Senate Report to the [then] new copyright act states that '[a] key, though not necessarily determinative, factor in fair use is whether or not the work is available to the potential user.'"²⁶⁷

Put more generally, if no other means of accessing the copyrighted work exists and the only access that is available is somehow disproportionately problematic (excessively high price, refusal to license, etc.), this tilts in favor of fair use.²⁶⁸

sustenance and a degree of editorial independence." See Geiger, *Statutory Licenses as Enabler of Creative Uses*, *supra* note 32, at 305 (discussing statutory licences and limitation-based remuneration rights as an "interesting tool [...] for legislators in order to avoid the blocking effect of exclusivity, while at the same time ensuring that the creator can participate fairly in the creative reuse of their works"); see also P. Bernt Hugenholtz & Joao Pedro Quintais, *Towards a Universal Right of Remuneration: Legalizing the Non-Commercial Online Use of Works*, in *COPYRIGHT RECONSTRUCTED: RETHINKING COPYRIGHT'S ECONOMIC RIGHTS IN A TIME OF HIGHLY DYNAMIC TECHNOLOGICAL AND ECONOMIC CHANGE* 241, 263-268 (P. Bernt Hugenholtz, ed., Wolters Kluwer 2018).

265. See Dawn C. Nunziato, *Freedom of Expression, Democratic Norms, and Internet Governance*, 52 *EMORY L. J.* 187, 264-65 (2003) (discussing the use of the alternative means factor in various cases); Geiger & Izyumenko, *The Role of Human Rights in Copyright Enforcement Online*, *supra* note 116, at 72 (discussing the use of the alternative means factor in relation to Article 10 E.C.H.R.).

266. Compare Gordon, *supra* note 163, at 1627-28 (citing a Senate Report stating that "the new copyright act states that '[a] key, though not necessarily determinative, factor in fair use is whether or not the work is available to the potential user,' so that the out-of-print status of a copyrighted work may help to justify fair use"), with *Akdeniz v. Turkey*, No. 20877/10, Eur. Ct. H.R. ¶ 28 (2014), <http://hudoc.echr.coe.int/eng?i=002-9493> (ruling that since the applicant could without difficulty have had access to a range of musical works by numerous means without breaching copyright rules, the applicant was not injured in order to have standing).

267. See Gordon, *supra* note 163, at 1627-28 (citing S. REP. NO. 94-473, at 64 (1975)).

268. See Fisher, *supra* note 151, at 1684 ("A question often asked by lower courts construing the fair use doctrine [has been]; assuming the defendant's objective was

In Europe, a similar approach exists within the ambit of the FoE balancing.²⁶⁹ One example is the E.Ct.H.R. case of *Akdeniz v. Turkey*.²⁷⁰ The case concerned the blocking of access in Turkey to the websites “myspace.com” and “last.fm” because they were disseminating musical works in violation of copyright. In dismissing the applicant’s claim that the blocking amounted to a violation of his right to receive information, the Court noted, among other things, that the applicant:

[H]ad been deprived of *only one means* of listening to music among many others. The Court considers that the applicant could without difficulty have access to a range of musical works *by numerous means without this entailing a breach of copyright rules*. Moreover, the applicant does not dispute that he could at the time of the contested decision receive such or similar programs *by means other than websites*. On this point, the case is barely distinguishable from the . . . *Tanrıkuşu and others* in which the Court has not recognized as victims the readers of a daily

laudable, could he have achieved it without copying the plaintiff’s copyrighted material? If so, the courts held the defendant’s invocation of the fair use defense was less persuasive than it would have been otherwise.”); Samuelson, *Unbundling Fair Uses*, *supra* note 27, at 2579, 2610 (“An unreasonable refusal to license a use . . . or to license the use on reasonable terms . . . has sometimes favored fair use;” “The availability of alternative means to make movies ‘family-friendly’ was a significant factor in defeating a fair use claim made by a firm that altered actual DVD disks so that ‘harmful’ content in the movies would not be rendered when the DVD played.”); Gordon, *supra* note 163, at 1629 (“In a case where a county educational program was videotaping educational television programs, the systematic and centralized nature of the copying and the various market alternatives that were present made license and purchase agreements quite possible.”).

269. For the discussion of an alternative means factor in the case law of the E.Ct.H.R. as it concerns alternatives to imparting information, see *Mouvement Raëlien Suisse v. Switzerland*, No. 16354/06, Eur. Ct. H.R. (2012), <http://hudoc.echr.coe.int/eng?i=001-112165>; *Guja v. Moldova*, No. 14277/04, Eur. Ct. H.R. (2008), <http://hudoc.echr.coe.int/eng?i=001-85016>; *Appleby and Others v. United Kingdom*, No. 44306/98, Eur. Ct. H.R. (2003), <http://hudoc.echr.coe.int/eng?i=001-61080>. On the alternatives to receiving information, see *Cengiz and Others v. Turkey*, Nos. 48226/10 and 14027/11, Eur. Ct. H.R. (2015), <http://hudoc.echr.coe.int/eng?i=001-159188>; *Magyar Helsinki Bizottság v. Hungary*, No. 18030/11, Eur. Ct. H.R. (2016), <http://hudoc.echr.coe.int/eng?i=001-167828>; *Khurshid Mustafa and Tarziyachi v. Sweden*, No. 23883/06, Eur. Ct. H.R. (2008), <http://hudoc.echr.coe.int/eng?i=001-90234>; *Kalda v. Estonia*, No. 17429/10, Eur. Ct. H.R. (2016), <http://hudoc.echr.coe.int/eng?i=001-160270>.

270. *Akdeniz v. Turkey*, No. 20877/10, Eur. Ct. H.R. (2014), <http://hudoc.echr.coe.int/eng?i=002-9493>. See Geiger & Izyumenko, *The Role of Human Rights in Copyright Enforcement Online*, *supra* note 116, at 49–52 (discussing in detail *Akdeniz v. Turkey*).

newspaper which was banned from distribution.²⁷¹

Although the applicant's claim was dismissed in the circumstances of this particular case, the Strasbourg Court left open the possibility of refusing the copyright enforcement in a situation of a lack of legitimate offerings. In another case on website blocking, by contrast, a violation of Article 10 E.C.H.R. was established where the measure rendered a website inaccessible with information of specific interest that *was not otherwise easily available* and for which there was *no equivalent*.²⁷²

Another good example, even if not concerned directly with copyright, is the case of *Khurshid Mustafa and Tarzibachi* about the immigrant family from Iraq discussed above.²⁷³ The Court, having observed first that the information the family wished to receive covered all types of content, including pure entertainment,²⁷⁴ then went on stating that:

[I]t has not been claimed that the applicants had any other means of receiving these or similar programmes at the time of the impugned decision than through the use of the satellite installation in question, nor that their satellite dish could be installed in a different location. They might have been able to obtain some news through foreign newspapers and radio programmes, but these sources of information only cover parts of what is available via television broadcasts and cannot in any way be equated with the latter. Moreover, it has not been shown that the landlord later installed broadband and internet access or other alternative means which gave the tenants in the building the possibility to receive these television programmes.²⁷⁵

On that basis, the E.Ct.H.R. concluded that the interference with the

271. *Akdeniz v. Turkey*, No. 20877/10, Eur. Ct. H.R. ¶ 25 (2014), <http://hudoc.echr.coe.int/eng?i=002-9493> (emphasis added) (translation by the authors draws for some parts on the legal summary of the case prepared by the Registry of the E.Ct.H.R. See Information Note on the Court's case-law No. 173, April 2014); see also *Animal Defenders International v. United Kingdom*, No. 48876/08, Eur. Ct. H.R. ¶ 124 (2013), <http://hudoc.echr.coe.int/eng?i=001-119244> (finding that restrictions on access to broadcast media were justified by the availability of information in question on the Internet and noting that "access to alternative media is key to the proportionality of a restriction on access to other potentially useful media").

272. *Cengiz and Others v. Turkey*, Nos. 48226/10 and 14027/11, Eur. Ct. H.R. ¶¶ 51-52 (2015), <http://hudoc.echr.coe.int/eng?i=001-159188>.

273. *Khurshid Mustafa and Tarzibachi v. Sweden*, No. 23883/06, Eur. Ct. H.R. (2008), <http://hudoc.echr.coe.int/eng?i=001-90234>.

274. *Id.* at ¶ 44.

275. *Id.* at ¶ 45.

applicants' right to freedom of information was disproportionate to the landlord's interest in upholding order and good custom.²⁷⁶ As a result, it was held unanimously that there had been a violation of Article 10 (freedom of expression) E.C.H.R.

Apart from its explicit recognition, there is yet another avenue under the right to FoE for considering the ease with which the work can be accessed by the user. In particular, "[t]he nature and severity of the penalties imposed are also factors to be taken into consideration when measuring the proportionality of the interference [with freedom of expression]."²⁷⁷ By analogy, if we consider proportionality of the FoE use *before* the courts decide on the penalties (i.e. when they have to make a decision on whether the use is fair), the fact that the work was not accessible (i.e. was out of print; the license was refused) or was not accessible on reasonable terms (disproportionately high licensing fees; no attractive business models) can tilt the scales towards a "fair use" finding just like the disproportionate amount of fines or other penalties imposed on the applicant often cuts towards a violation of Article 10 E.C.H.R.

Arguably, this is an important benefit of the European "fair use." The current copyright framework in the E.U. does not give the courts an ability to weigh all the interests and improvise a complete set of remedies. Under the E.U. exceptions framework, there is always a defendant proving that her use of the accuser's work fell within one of the exceptions to copyright. At the same time, the most "fair" use might be something that the accuser herself is capable of bringing on the marketplace.²⁷⁸ In this way, the emphasis on freedom of information, rights of users, and, more specifically on the "alternative means" factor opens the way to a broader perspective. Viewed in this light, the alternative means factor is capable of remedying the current "lack of

276. *Id.* at ¶¶ 47-49.

277. *Leroy v. France*, No. 36109/03, Eur. Ct. H.R. ¶ 47 (2008), <http://hudoc.echr.coe.int/eng?i=001-88657> (translation from French by the authors); *Otegi Mondragon v. Spain*, No. 2034/07, Eur. Ct. H.R. ¶ 58 (2011), <http://hudoc.echr.coe.int/eng?i=001-103951>.

278. *Cf. Cambridge Univ. Press v. Becker*, 863 F. Supp. 2d 1190, 1237 (N.D. Ga. 2012) ("For loss of potential license revenue to cut against fair use, the evidence must show that licenses for excerpts of the works at issue are easily accessible, reasonably priced, and that they offered excerpts *in a format which is reasonably convenient for users.*" (emphasis added)); Ginsburg, *supra* note 140, at 1397.

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structural incentives for improving access"²⁷⁹ by partially shifting the onus on the rightsholders.²⁸⁰ The latter have in the past preferred deterrence strategies of enforcement to the introduction of more attractive alternatives in the marketplace. It must be admitted though, that no such strategies achieved the expected results,²⁸¹ thus clearly raising the question of their appropriateness and calling for an examination of possible solutions. The alternative means factor within the framework of the European "fair use" can serve as one step in this direction.²⁸²

279. See Rebecca Giblin, *When ISPs Become Copyright Police*, in 18 IEEE INTERNET COMPUTING 84–85 (Charles Petrie ed., 2014) (detailing the lack of structural incentives for improving access of products).

280. See Fred von Lohmann, Legal Dir. for Copyright, Google, Speech at the Information Influx International Conference of the Institute for Information Law (IVIIR); *Filtering Away Infringement: Copyright, Injunctions and the Role of ISPs* (July 3, 2014) (arguing, in the context of website blocking injunctions against the Internet access providers, that the current enforcement framework in the E.U. does not allow the judges to weigh whether the rightholder herself has provided reasonable means of access to her works before demanding that the "pirate" sites are blocked by the ISPs).

281. See, e.g., *id.* at 707 (relating to graduated response and certain other enforcement initiatives); see Geiger & Izyumenko, *The Role of Human Rights in Copyright Enforcement Online*, *supra* note 116, at 46–47, 110–12 (demonstrating that none of the deterrence strategies for enforcement were successful in relation to website blocking).

282. The negative sides of the alternative means factor should not be overlooked though, both for the purposes of objective assessment of the European "fair use" feasibility and to avoid the negative flip-sides inherent, plausibly, in each legal tool, whether judicial or legislative. Thus, the alternative means factor is often criticized for its failure to give sufficient consideration to the importance of certain means of transmission of information. See *Mouvement Raëlien Suisse v. Switzerland*, No. 16354/06, Eur. Ct. H.R. (2012), <http://hudoc.echr.coe.int/eng?i=001-112165> (Pinto de Albuquerque, J., dissenting) (arguing that "the existence of alternative means of communication . . . could not by itself justify the interference with . . . freedom of expression. *The limited scope of the interference does not free the State of the duty to provide a sufficient reason for it . . .* The mere fact that public authorities choose to interfere with a limited means of communication does not excuse them from having to provide a convincing argument to support the pressing social need for the interference." (emphasis in the original)); see also Mark Bartholomew & John Tehranian, *An Intersystemic View of Intellectual Property and Free Speech*, 81 GEO. WASH. L. REV. 1, 64–65 (2013) (discussing that in the U.S. too, the alternative means factor is criticized at times as favoring the industries; "it is no secret that the content creation industries served by copyright law are among the most powerful in the United States, both economically and politically. There is great awareness of their contribution to the gross domestic product and economic growth as well as their critical place in the international marketplace. As a result, when the movie, music, publishing, and software industries bring suits against alleged infringers, the courts' emphasis on the alternative means by which the

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F. OTHER FACTORS

1. *Amount and Substantiality of Taking*

In the United States, amount and substantiality of taking is evaluated under factor three of the fair use doctrine.²⁸³ Under the FoE balancing, however, no direct analogue to this factor exists.²⁸⁴ Nor has it yet been considered in any of the copyright disputes decided by the E.Ct.H.R. up to date. The case law does exist, however, in which the amount of transmitted information was taken into account as a factor in the FoE analysis outside of the copyright sphere. Such cases concern, notably, the area of privacy and personal data protection – the sphere that is often instructive for the resolution of copyright disputes.

In the recent case from June 2017, the E.Ct.H.R. had to address a complaint of two media companies who had published the data on the income and assets of around one third of all taxable population of Finland.²⁸⁵ The data in question were already a matter of public record in the country, but the manner and the *extent* to which that information was published constituted a problematic issue for the national authorities and courts. Under Finnish law, although information on the taxable income and assets of taxpayers is public, its processing is constrained by a number of limitations set to protect the taxpayers' privacy. A would-be data processor is not subject to the majority of such limitations, provided it is engaged (as was the case, on the surface of things, with the applicant companies) in journalism. The Supreme Administrative Court of Finland had found, however, that the journalism derogation did not apply in the circumstances of the applicants' case. According to that court:

The term, 'processing of personal data for journalistic purposes' cannot be regarded as covering the *large-scale* publication of the journalistic background file, almost verbatim, as catalogues, albeit split into different parts and sorted

defendants can vindicate their free speech interests without impinging on the plaintiffs' property rights may reflect a certain solicitude towards those industries.”)

283. 17 U.S.C.A. § 107 (1992).

284. See BYCHAWSKA-SINIARSKA, PROTECTING THE RIGHT TO FREEDOM OF EXPRESSION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS, *supra* note 48, at 32–33 (discussing the Court's use of the three-part test in assessing the inference of freedom of expression).

285. *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland*, No. 931/13, Eur. Ct. H.R. (2017), <http://hudoc.echr.coe.int/eng?i=001-175121>.

by municipality. Since the disclosure of registered data *on such a scale* is equivalent to the disclosure of the entire background file kept for journalistic purposes by the company, such disclosure does not represent solely an expression of information, opinions, or ideas . . . [T]he processing of personal data collected in the company's background file by publishing it and by rendering it available to the general public *to the extent* that has been done in the present case . . . cannot be regarded as compatible with the purpose of the Personal Data Act.²⁸⁶

The Supreme Court further observed that the preparatory work on the Personal Data Act made it clear that databases established for journalistic purposes were not intended to be made available to persons not engaged in journalistic activities and that journalistic privilege in question thus related to the processing of data for internal purposes. The E.Ct.H.R. essentially agreed with this reasoning (by fifteen votes to two), having held that "the existence of a public interest in providing access to, and allowing the collection of, large amounts of taxation data did not necessarily or automatically mean that there was also a public interest in disseminating *en masse* such raw data in unaltered form without any analytical input."²⁸⁷ It thus followed, according to the Court, that "the sole object of the impugned publication was not, as required by domestic and E.U. law, the disclosure to the public of information, opinions, and ideas— a conclusion borne out by the layout of the publication, its form, content, and the *extent of the data disclosed*."²⁸⁸

This conclusion, although not free from possible criticism (as evidenced notably by the opinion of two dissenting judges on the panel to this case²⁸⁹), provides some insights on how the amount of use factor found in U.S. fair use can be approached from the FoE perspective.

2. Status of the "Speaker"

Unlike within the U.S. fair use doctrine, the status of the user, or "speaker", including that of the press, is one of the factors taken in consideration under the FoE balancing. Although Article 10 (freedom of

286. *Id.* at ¶ 22 (citing Supreme Administrative Court of Finland) (emphasis added).

287. *Id.* at ¶ 175.

288. *Id.* at ¶ 178 (emphasis added).

289. *Id.* (Sajó, J., and Karakaş, J., dissenting), at ¶ 26 (observing in particular that "it is a major burden upon journalists to prescribe requirements on the amount of data they can collect and publish and on the form in which they must publish it, etc.").

expression) E.C.H.R. does not explicitly mention the freedom of the press, the Court has developed extensive case law providing a body of principles and rules granting the press a special status in the enjoyment of Article 10 freedoms.²⁹⁰ Thus, in *Lingens v. Austria*, the Court stressed the freedom of the press as a particularly significant aspect of the “right to receive and impart information and ideas.”²⁹¹ Therefore, the most careful scrutiny on the part of the Court is called for when the measures taken or sanctions imposed by the national authorities are capable of discouraging the participation of the press in the debates over matters of legitimate public concern.²⁹²

An elevated status accorded to the press under the FoE balancing mirrors one of the statutory purposes of the U.S. fair use, news reporting, which also features among the exceptions to copyright listed in Article 5 InfoSoc.²⁹³

Another aspect of the status of the “speaker” factor is the role played by the user in information transmission, particularly on the Internet. Unlike the C.J.E.U., the Strasbourg Court distinguishes between “active” users involved in not only receiving, but also imparting information, and the so-called “mere” or “simple” users acting as the passive recipients thereof.²⁹⁴

This was explained in *Cengiz and Others* – the case that concerned the blocking of access to YouTube in Turkey.²⁹⁵ According to the E.Ct.H.R., the answer to the question whether the YouTube user can claim to be a

290. Monica Macovei, FREEDOM OF EXPRESSION: A GUIDE TO THE IMPLEMENTATION OF ARTICLE 10 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 11 (2d ed. 2004).

291. *Lingens v. Austria*, No. 9815/82, Eur. Ct. H.R. ¶ 42 (1986), <http://hudoc.echr.coe.int/eng?i=001-57523>; see also David Harris et al., LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 351 (2d ed. 2009).

292. See *Jersild v. Denmark*, No. 15890/89, Eur. Ct. H.R. ¶ 35 (1994), <http://hudoc.echr.coe.int/eng?i=001-57891>; *Bladet Tromsø and Stensaas v. Norway*, No. 21980/93, Eur. Ct. H.R. ¶ 64 (1999), <http://hudoc.echr.coe.int/eng?i=001-58369>.

293. Council Directive 2001/29, *supra* note 6, art. 5(3)(c).

294. *Akdeniz v. Turkey*, No. 20877/10, Eur. Ct. H.R. ¶ 27 (2014), <http://hudoc.echr.coe.int/eng?i=002-9493>; *Cengiz and Others v. Turkey*, Nos. 48226/10 and 14027/11, Eur. Ct. H.R. ¶ 50 (2015), <http://hudoc.echr.coe.int/eng?i=001-159188> (emphasis added).

295. *Cengiz and Others v. Turkey*, Nos. 48226/10 and 14027/11, Eur. Ct. H.R. (2015), <http://hudoc.echr.coe.int/eng?i=001-159188>.

victim of Article 10 violation in such situation depends, *inter alia*, on the manner in which that Internet platform is used.²⁹⁶ In that particular case for example, the applicants, through their YouTube accounts, “used the platform not only to access videos relating to their professional sphere but also in an active manner, for the purpose of uploading and sharing files of that nature. The second and third applicants also pointed out that they had published videos about their academic activities.”²⁹⁷ Analogously in the case of *Yıldırım*, a violation of Article 10 was found in relation to the applicant who had published his academic work and his views on various topics on the website of which he was, in addition, an owner himself, and which was blocked in the context of judicial proceedings wholly unrelated to the applicant.²⁹⁸ By contrast, in the only copyright case on website blocking decided by the Strasbourg Court so far, the E.Ct.H.R. found that the applicant lacked standing on the FoE grounds because, among others, the use concerned was qualified as passive.²⁹⁹ The applicant simply sought to access the “pirate” music-sharing websites, bypassing the payment.

3. Form of Expression

Another criterion generally common to Article 10 analysis (but not to the U.S. fair use evaluation) is concerned with the form (as opposed to the content) of expression. The form of expression is protected not only because it can be essential to, or inseparable from, the content but also because it is essential for imparting ideas.³⁰⁰ The point of particular relevance, in application to copyright law, is the protection of photographs, films, broadcasts, or similar forms of expression which, by their mere nature, are inseparable from the content. As the U.K. Court

296. *Id.* at ¶ 49

297. *Id.* at ¶ 50.

298. *Abmet Yıldırım v. Turkey*, No. 3111/10, Eur. Ct. H.R. (2012), <http://hudoc.echr.coe.int/eng?i=001-115705>.

299. *Akdeniz v. Turkey*, No. 20877/10, Eur. Ct. H.R. ¶ 27 (2014), <http://hudoc.echr.coe.int/eng?i=002-9493>.

300. See, e.g., *Mouvement raëlien suisse v. Switzerland*, No. 16354/06, Eur. Ct. H.R. (2012), <http://hudoc.echr.coe.int/eng?i=001-112165> (Sajó, J., Lazarova Trajkovska, J., & Vučinić, J., dissenting) (“The Federal Court’s approach reflects a profound understanding of the communication process in the age of the internet. The poster is both an expression of specific content . . . and a medium for additional information to be found on or via the website.”).

has stated in *Ashdown*,³⁰¹ with reference to the Strasbourg Court's judgment in *Fressoz and Roire v. France*,³⁰² "[t]here will be occasions when it is in the public interest not merely that information should be published, but that the public should be told the very words used by a person, notwithstanding that the author enjoys copyright in them. On occasions, indeed, *it is the form and not the content* of a document which is of interest."³⁰³ According to the E.Ct.H.R. case law, indeed, "it is not [the Court's] role to cast judgment on the manner in which individuals choose to express themselves because Article 10 of the Convention also protects the form in which ideas are conveyed."³⁰⁴

As mentioned, the situations in which the message cannot be separated from its content are not governed in the United States by fair use.³⁰⁵ Under the FoE analysis, by contrast, there is a potential for addressing these situations.

In many of the national courts' decisions in Europe, the judges had particular regard to the form of reporting in a broader context of the copyright/freedom of expression balancing.³⁰⁶

In one such case, *Utrillo*, originating from France, the first-instance court expressed the view that the integral reproduction of the paintings in the television broadcast was necessary for the public to get a better understanding of the exhibition.³⁰⁷ Even if the judgment was ultimately

301. EWCA (Civ) 1142 ¶¶ 42-44.

302. *Fressoz and Roire v. France*, No. 29183/95, Eur. Ct. H.R. (1999), <http://hudoc.echr.coe.int/eng?i=001-58906>.

303. EWCA (Civ) 1142 ¶ 43 (emphasis added); see also Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180, 1197 (1970) ("To the extent that a meaningful democratic dialogue depends upon access to graphic works generally, including photographs as well as works of art, it must be said that little is contributed by the idea divorced from its expression.")

304. *Mouvement raëlien suisse v. Switzerland*, No. 16354/06, Eur. Ct. H.R. ¶ 10 (2012), <http://hudoc.echr.coe.int/eng?i=001-112165> (Sajó, J., Lazarova Trajkovska, J., and Vučinić, J., dissenting); see also *Thoma v. Luxembourg*, No. 38432/97, Eur. Ct. H.R. ¶ 45 (2001), <http://hudoc.echr.coe.int/eng?i=001-59363>; *Oberschlick v. Austria*, No. 11662/85, Eur. Ct. H.R. ¶ 57 (1991), <http://hudoc.echr.coe.int/eng?i=001-57716>.

305. See also Christopher Kelly, *Current Events and Fair Dealing with Photographs: Time for a Revised Approach*, 4 INTELL. PROP. Q. 242, 260 (2012) (highlighting the difficulties in giving sufficient weight to FoE when regulating the use of photographs under the U.K. fair dealing).

306. *Id.*

307. Tribunal de Grande Instance [ordinary court of original jurisdiction] Paris, Feb.

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reversed,³⁰⁸ it is nevertheless noteworthy since it paid a special attention to the form of reporting. Indeed, it might be difficult to conceive how a medium like television, working exclusively with images, can inform in an effective way about an exhibition without showing at least one of the artist's paintings.³⁰⁹

On another occasion, in the U.K. case of *Hyde Park Residence Ltd. v. Yelland*,³¹⁰ the first-instance court allowed media use of the stills from the film showing Princess Diana and Dodi Al Fayed just before their deaths. The judge's view was that the public interest clearly applied in the context of "communication of what is essentially information – information clothed in copyright."³¹¹ However, the U.K. Court of Appeals rejected this approach,³¹² holding that there was no excuse for using copyright-protected photographs when the information could have been conveyed in words without publishing the stills.³¹³

4. *Medium of Expression and the Role of the Internet*

Article 10 is applicable "not only to the content of information but also to the means of transmission or reception since any restriction imposed on the means necessarily interferes with the right to receive and impart information."³¹⁴ Accordingly, "the potential impact of the medium of expression concerned is an important factor in the consideration of the proportionality of an interference."³¹⁵ The

23, 1999, No. 98/7053 (Fr.).

308. Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Nov. 13, 2003, Bull. civ. I, No. 01-14385 (Fr.) (reversing the decision of the High Court in Paris Court of Appeal (*Cour d'Appel de Paris*), "Utrillo," 30 May 2001). See Christophe Geiger, *Quotation Right and Fundamental Rights*, 35 INT'L REV. INTELL. PROP. & COMPET. L. 716, 718–19 (2004).

309. Christophe Geiger, *Author's Right, Copyright and the Public's Right to Information: A Complex Relationship*, in NEW DIRECTIONS IN COPYRIGHT LAW 38 (Fiona Macmillan ed., vol. 5, 2007).

310. *Hyde Park Residence Ltd. v. Yelland* [1999] Ch. 4853 at 4854, 4876 (Eng.).

311. *Id.*

312. *Hyde Park Residence Ltd. v. Yelland* [2000] EWCA (Civ) 37, at ¶¶ 37–40.

313. Graham Dutfield & Uma Suthersanen, GLOBAL INTELLECTUAL PROPERTY LAW 227 (2008).

314. *Autronic AG v. Switzerland*, No. 12726/87, Eur. Ct. H.R. ¶ 47 (1990), <http://hudoc.echr.coe.int/eng?i=001-57630>.

315. *Murphy v. Ireland*, No. 44179/98, Eur. Ct. H.R. ¶ 69 (2003), <http://hudoc.echr.coe.int/eng?i=001-61207>.

Strasbourg Court has acknowledged that the traditional audio-visual media (television and radio) have a more immediate and powerful effect than the print media³¹⁶ or even the Internet.³¹⁷

Nevertheless, expression on the Internet (which is of particular interest in the context of this article) still attracts particular scrutiny on the part of the E.Ct.H.R. As noted by Judge Pinto de Albuquerque, "[t]he Internet being a public forum par excellence, the State has a narrow margin of appreciation with regard to information disseminated through this medium."³¹⁸ According to the E.Ct.H.R., "[i]n the light of its accessibility and its capacity to store and communicate vast amounts of information, the Internet plays an important role in enhancing the public's access to news and facilitating the dissemination of information in general."³¹⁹ The Court has also observed that "[t]he electronic network, serving billions of users worldwide, is not and potentially will never be subject to the same regulations and control [as the printed media]."³²⁰ This recognition of the Internet's role in the modern society is important for copyright law since the gradual amount of copyright disputes of our days are situated in the digital space.

Considerations as to the role of the Internet also feature in the proposal of a flexible copyright exception advanced by the Global

316. *Jersild v. Denmark*, No. 15890/89, Eur. Ct. H.R. ¶ 31 (1994), <http://hudoc.echr.coe.int/eng?i=001-57891>; *Murphy v. Ireland*, No. 44179/98, Eur. Ct. H.R. ¶ 74 (2003), <http://hudoc.echr.coe.int/eng?i=001-61207>; *Pedersen and Baadsgaard v. Denmark*, No. 49017/99, Eur. Ct. H.R. ¶ 79 (2004), <http://hudoc.echr.coe.int/eng?i=001-67818>; *TV Vest AS & Rogaland Pensjonistparti v. Norway*, No. 21132/05, Eur. Ct. H.R. ¶ 60 (2008), <http://hudoc.echr.coe.int/eng?i=001-90235>; *Centro Europa 7 S.r.l. and Di Stefano v. Italy*, No. 38433/09, Eur. Ct. H.R. ¶ 132 (2012), <http://hudoc.echr.coe.int/eng?i=001-111399>.

317. *Animal Defenders Int'l v. the United Kingdom*, No. 48876/08, Eur. Ct. H.R. ¶ 119 (2013), <http://hudoc.echr.coe.int/eng?i=001-119244> ("[T]he Court considers coherent a distinction based on the particular influence of the broadcast media. In particular, the Court recognises the immediate and powerful effect of the broadcast media, an impact reinforced by the continuing function of radio and television as familiar sources of entertainment in the intimacy of the home.").

318. *Mouvement Raëlien Suisse v. Switzerland*, No. 16354/06, Eur. Ct. H.R. (2012), <http://hudoc.echr.coe.int/eng?i=001-112165> (Pinto de Albuquerque, J. dissenting).

319. *Times Newspapers Ltd. (Nos. 1 and 2) v. United Kingdom*, Nos. 3002/03 and 23676/03, Eur. Ct. H.R. ¶ 27 (2009), <http://hudoc.echr.coe.int/eng?i=001-91706>.

320. *Editorial Board of Pravoye Delo and Shtetel v. Ukraine*, No. 33014/05, Eur. Ct. H.R. ¶ 63 (2011), <http://hudoc.echr.coe.int/eng?i=001-104685>.

Network on Copyright Users' Rights.³²¹ The proposal provides as follows:

In addition to uses specifically authorized by law, any use that promotes general economic, social, and cultural objectives is not infringing if its character and extent is appropriate to its purposes and does not unduly prejudice the legitimate interests of the copyright owner, taking account of the legitimate interests of creators, users, third parties, and the public.³²²

It then proceeds to state that the "[d]eterminations that a use is non-infringing pursuant to the above-outlined provision shall be based on an overall assessment of all relevant considerations, including . . . considerations such as whether, and the extent to which, the copyrighted material is . . . used to enable or implement new communications and information technologies. . . ."³²³

It must be noted, however, that alongside the recognition of the important role played by the Internet in the exercise of freedom of expression, the case law from Strasbourg also acknowledges a corresponding "risk of harm posed by content and communications on the Internet to the exercise and enjoyment of human rights and freedoms."³²⁴ "[T]he Court does not lose sight of the ease, scope, and speed of the dissemination of information on the Internet and the persistence of the information once disclosed, which may considerably aggravate the effects of unlawful speech on the Internet compared to traditional media."³²⁵

³¹ (1994),
9/98, Eur. Ct.
and Baadsgaard
79 (2004),
'ensjonistparti v.
60 (2008),
Stefano v. Italy,
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01-91706.
Eur. Ct. H.R.

321. *Model Flexible Copyright Exception*, *supra* note 143.

322. *Id.* at art. X.1.

323. *Id.* at art. X.2.C.1(d); *see also* Thomas C. Folsom, *Defining Cyberspace (Finding Real Virtue in the Place of Virtual Reality)*, 9 TUL. J. TECH. & INTELL. PROP. 75, 77 (2007) (suggesting that "legal problems in several fields [including copyright and trademark law] can be better handled by adding a new factor to the otherwise ordinary analysis in whichever field is implicated: the nature and place of use"). According to this author, "[t]he new factor directs a decisionmaker to consider both *the general nature and values of cyberspace (the place of use)*, and the specific kind of conflict that is occurring among the users there (the nature of use) as highly relevant factors in assessing the applicability of familiar legal principles in space."

324. *Editorial Board of Pravoye Delo and Shtekel v. Ukraine*, No. 33014/05, Eur. Ct. H.R. ¶ 63 (2011), <http://hudoc.echr.coe.int/eng?i=001-104685>.

325. *Delfi AS v. Estonia*, No. 64569/09, Eur. Ct. H.R. ¶ 147 (2015), <http://hudoc.echr.coe.int/eng?i=001-155105>.

V. CONCLUSION:

A TEXT PROPOSAL FOR A "FAIR USE" CLAUSE
BASED ON FREEDOM OF EXPRESSION AND
FUNDAMENTAL RIGHTS BALANCING TO BE
IMPLEMENTED IN E.U. COPYRIGHT LAW

As the above analysis demonstrates, European judicial practice on fundamental rights application provides for a sufficient list of fairness factors analogous to what the U.S. courts use when applying their famous fair use doctrine.

This article examined and systematized these factors, which the contemporary European case law allows to summarize as follows: 1) the character of the use, including whether such use is commercial or transformative (i.e. artistic or furthers an important social goal); 2) the purpose of use; 3) the nature of information at stake (in the general public interest or not, and, to a certain extent, the "oldness" of such information); 4) the degree of interference with the property of copyright-holder, including whether the fair remuneration was paid; 5) availability of alternative means of accessing the information; and certain other factors that less frequently feature in the FoE analysis, including the status of the "speaker"/user, form, and medium of expression.

Europe currently lacks a clause analogous in openness and flexibility to the U.S. fair use provision, and the balancing test of FoE has all the ability to fill this gap. This test makes it possible to build upon existing European perceptions of "fairness" as well as accepted and improved methodologies of fundamental rights application instead of importing a U.S.-style fair use doctrine at the pan-European level or developing brand new approaches, which would take years for the courts to cultivate.

Consequently, the paper advocates an introduction by the legislature of an open provision based on the FoE balancing test in the E.U. copyright framework.³²⁶ Such a FoE-grounded "fair use" would *not* be the four-factor test known from U.S. law but would subsist in the proportionality test. It can further be combined with an already existing

326. Mike Palmedo, *The User Rights Database: Measuring the Impact of Copyright Balance*, INFOJUSTICE (Oct. 30, 2017), <http://infojustice.org/archives/38981> (commenting on an economic merit of reflecting on open, fair-use like clauses).

list of limitations as found currently in Article 5 InfoSoc. One possible proposal of how such a clause can be worded is presented hereby:

1. Any other proportional use for the purpose of freedom of expression and information is permitted. In determining whether the use made of a work in any particular case is proportional, the factors to be considered shall include:

- a) the character of the use, including whether such use is commercial or transformative;
- b) the purpose of use (in the common interest or not);
- c) the nature of the information at stake;
- d) the degree of interference with the property of copyright-holder, including whether the fair remuneration was paid;
- e) availability of alternative means of accessing the information; and any other factor that might be relevant for the circumstances of the case.

2. All factors are considered in an overall assessment. In the case of 1.d, the payment of a fair remuneration subsequent to the use can re-establish its proportionality when otherwise freedom of expression and information would be unduly restricted.

Implementing an open-ended copyright clause in E.U. copyright law would not only be possible but more transparent than the currently functioning external limitations to copyright (including fundamental rights) to which the judges have to recourse in the situation of a lack of appropriate legislative provision. Furthermore, a codification of the criteria of the FoE balancing test would ensure a better predictability and thus an increased legal security with an ensuing harmonizing effect. Finally, the "fair use" clause grounded in the European human rights tradition is, by definition, supranational, which is important in view of the E.U. legislature's intention of harmonization or even unification of I.P. laws,³²⁷ particularly significant in the online environment. Such a clause could also reconcile, in view of the upcoming E.U.'s accession to

327. See, e.g., *A Single Market for Intellectual Property Rights – Boosting Creativity and Innovation to Provide Economic Growth, High Quality Jobs and First Class Products and Services in Europe*, at 13–14, COM (2011) 287 final (May 24, 2011).

the European Convention on Human Rights,³²⁸ the current European legal framework for intellectual property rights with Europe's human rights law obligations.

328. *See* Treaty of Lisbon amending the Treaty on European Union and the Treaty Establishing the European Community, art. 1(8), Dec. 13, 2007, 2007/C 306/01 (amending Article 6(2) of the T.E.U.); Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, art. 17, May 13, 2004, C.E.T.S. 194 (amending Article 59(2) E.C.H.R.). Although the C.J.E.U. rejected the latest draft agreement of E.U. accession to the E.C.H.R., this only delayed the accession, which remains binding on the E.U.; *see* Opinion 2/13, 2014 ECLI:EU:C:2014:2454, Dec. 18, 2014, at VIII, <http://curia.europa.eu/juris/celex.jsf?celex=62013CV0002&lang1=en&type=TXT&ancre=>.

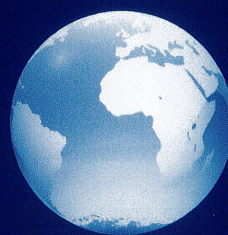
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WASHINGTON COLLEGE OF LAW
