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Working Paper

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working papers, Forum Transregionale Studien 31/2023

re:constitution - Exchange and Analysis on Democracy and the Rule of Law in Europe
c/o Forum Transregionale Studien e. V., Wallotstr. 14, 14193 Berlin

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DOI: https://doi.org/10.25360/01-2023-00048

Design: Plural | Severin Wucher

The Forum Transregionale Studien is an institutional platform for the international cooperation between scholars of different expertise and perspectives on global issues. It is funded by the Berlin Senate Department for Higher Education and Research, Health and Long-term Care.

Working Papers are available in open access via *perspectivia.net*, the publication platform of the Max Weber Stiftung.

re:constitution - Exchange and Analysis on Democracy and the Rule of Law in Europe is a joint programme of the Forum Transregionale Studien and Democracy Reporting International, funded by Stiftung Mercator.

Abstract

Copyright regulates speech because every copyright protected work does contain a communication content. Right holders take advantage of it to silence others: they use their copyright as censorship right. Copyright doctrine must therefore allow a case by case balancing to strike a fair balance between freedom of expression and copyright, both enshrined in the European Charter of Fundamental Rights (CFR) and the European Convention on Human Rights (ECHR). In the digital age with an overly expanded copyright, it is more important than ever to prevent a censorious copyright – not only for the standing of copyright in society but for the sake of the fundamental rights of third parties. Free speech is only free if one can speak with works of others that are valuable in constitutional terms.

Keywords: Copyright; Freedom of Speech; Censorship; Fundamental Rights; Abuse

Suggested Citation:

Viktoria Kraetzig, "Copyright as a Rule of Law Challenge", re:constitution Working Paper, Forum Transregionale Studien 31/2023, available at https://reconstitution.eu/working-papers.html

Copyright as a Rule of Law Challenge

Viktoria Kraetzig[1]

"Copyright is the uniquely legitimate offspring of censorship."[2]

Introduction: copying is speaking

The copyright/free speech conflict is inherent in copyright law:[3] copyright grants its owners a limited monopoly on a work, which is also a communication content.[4] If third parties copy[5] the work, they might infringe copyright while invoking their fundamental right of free speech.[6] The conflict arises because free speech doctrine does not distinguish whether someone speaks with own or other people's words, whether something has been said for the first, second or hundredth time: speaking is speaking. And so is copying.[7]

Freedom of speech is not only essential for the individual to express own thoughts but also has a fundamental function for democracy. It is the air to breathe for the public discourse in a democratic society governed by the rule of law.[8] As enshrined in Article 11 European Charter

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[2] Paul Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV, 983 (1970).

[3] Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 Yale L.J. 283, 285 (1996).

[4] ABRAHAM DRASSINOWER, WHAT'S WRONG WITH COPYING 8 (2015), arguing that copyright infringement is wrongful because it is compelled speech; IMMANUEL KANT, ON THE UNLAWFULNESS OF REPRINTING, 417 (1785), Primary Sources on Copyright (1450-1900), (eds. L. Bently & M. Kretschmer) https://www.copyrighthistory.org; *see* Goldstein, *supra* note 1, at 984: "a monopoly over expression"; VIKTORIA KRAETZIG, URHEBERRECHT ALS ZENSURRECHT [COPYRIGHT AS CENSORSHIP RIGHT] 7 (2022): „Kommunikationsregulierungsrecht" [communication regulation law]; on copyright as a monopoly right, MARIETTA AUER, DER PRIVATRECHTLICHE DISKURS DER MODERNE [THE DISCOURSE ON PRIVATE LAW IN THE MODERN ERA] 156 (2014).

[5] In this article, the term „copy" or "copying" is used both for physically and non-physically uses of copyright subject matter.

[6] In U.S. copyright law, the debate about the conflict between copyright and the First Amendment was initiated much earlier than in Europe, groundbreaking Nimmer, *Does Copyright Abridge First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV, 1180 (1970); *see* Goldstein, *supra* note 1; for Europe, see Christophe Geiger/Elena Izyumenko, *Copyright on the Human Rights' Trial: Redefining the Boundaries of Exclusivity Through Freedom of Expression*, 45 IIC 316 (2014); see also Elena Izyumenko, *The Freedom of Expression Contours of Copyright in the Digital Era: A European Perspective*, 19 J. World Intellect. Prop. 115 (2016).

[7] Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 Yale L.J. 535, 567 (2004).

[8] RUDOLF SMEND, STAATSRECHTLICHE ABHANDLUNGEN [CONSTITUTIONAL LAW DISCOURSES] 95 (1994); KONRAD HESSE, GRUNDZÜGE DES VERFASSUNGSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND [FUNDAMENTALS OF THE CONSTITUTIONAL LAW OF THE FEDERAL REPUBLIC OF GERMANY] 68 (1995); JÜRGEN HABERMAS, FAKTIZITÄT UND GELTUNG [BETWEEN FACTS AND NORMS] 445 (1998).

of Fundamental Rights (CFR) as well as Article 10 European Convention on Human Rights (ECHR) it is one of the very conditions for a democratic rule of law.[9] It is vital that the member of a democratic civil society can not only make free choices but are fully informed about ideas which be upon their political decisions. A functioning democracy lives from the expectation that citizens and politicians will come to "better" decisions through communicative exchange and free information. But speech is only *free* if one is allowed to speak not only about another's work but *with* it.[10] Communicative exchange depends on interacting with copyright protected expressions of others for which one must be able to speak *with* them.

Because freedom of speech is such a high good in a democracy, the bar for its restriction is high. This is where copyright comes into play. For as long as it exists, it has been used to silence others – such cases are commonly known as "copyright silencing"[11]. Individuals or even the state use their exclusive right to suppress unpopular speech. They claim infringement of their exploitation rights even though they are obviously pursuing other interests that copyright does not protect. Because European copyright law provides only an exhaustive list of exceptions and limitations to authors' exploitation rights and no balancing of fundamental rights takes place beyond them, if none of the exceptions apply, an injunction can be granted without taking freedom of speech into account at all. We are not yet living in an Orwellian nightmare in which copyright results in "memory holes in society's knowledge".[12] But censorious uses do happen and *can* chill the democratic discourse.[13] Copyright doctrine must take them seriously and acknowledge that fundamental rights unfold a horizontal effect in private law relationships.[14] It should already be made clear at this point: freedom of speech should by no means always prevail. Very often, a copy might not serve the discourse of a democratic society but the illegal usage of intellectual property. [15] While the value copying can have for speech interests for the copier as well as for the audience must be acknowledged,[16] it must vice versa be recognized that not every copy serves free speech values.[17] Copying the latest blockbuster will very rarely be vitally important speech: downloading a James Bond film is convenient for the copier consuming but not beneficial for the public discourse, which is

[9] Case C-516/17, Spiegel Online GmbH v. Volker Beck, para. 72 (Jul. 29, 2019), https://curia.europa.eu; Case C-145/10, Eva-Maria Painer v. Standard Verlags GmbH, para. 113 (Dec. 01, 2011), https://curia.europa.eu; Case C-283/11, Sky Österreich GmbH v. Österreichischer Rundfunk (Jan. 22, 2013), https://curia.europa.eu; The Sunday Times v. The United Kingdom, App. No.6538/74, para. 65 (Apr. 26, 1979), https://hudoc.echr.coe.int; Lingens v. Austria, App. No. 9815/82, para. 41 (Jul. 8, 1986), https://hudoc.echr.coe.int; Castells v. Spain, App. No. 11798/85, para. 42 (Apr. 23, 1992), https://hudoc.echr.coe.int; Godwin v. The United Kingdom, App. No. 17488/90, para. 39 (Mar. 27, 1996), https://hudoc.echr.coe.int.

[10] Critically, see Christopher L. Eisgruber, *Censorship, Copyright, and Free Speech: Some tentative skepticism about the campaign to impose First Amendment restrictions on copyright law*, 2 J. ON TELECOMM. & HIGH TECH. L. 17, 22 (2003).

[11] Cathay Y. N. Smith, *Copyright Silencing*, 106 CLR Online, 71 (2021) with further references.

[12] Eric Goldman/Jessica Silbey, *Copyright's Memory Hole*, 4 BYU Law Rev. 929 (2019).

[13] John Tehranian, *The New ©ensorship*, 101 Iowa Law Rev. 101 (2015); David McGowan, *Why the First Amendment Cannot Dictate Copyright Policy*, 65 U. PITT. L. REV. 281 (2004).

[14] C-275/06, Promusicae, para. 68 (Jan. 29, 2008), https://curia.europa.eu (groundbreaking for the fundamental rights of the CFR).

[15] Harper & Row v. Nation Enterprises, 471 U.S. 539, 596 (1985) with reference to Pacific & Southern Co. v. Duncan, 744 1499–1500 (1984): "Any copyright infringer may claim to benefit the public by increasing public access to the copyrighted work".

[16] Eugene Volokh, *Freedom of Speech and the Right of Publicity*, 40 HOUS. L. REV 697, 726 (2003).

[17] *See* Tushnet, *supra* note 6, at 590.

what freedom of speech is supposed to ensure.[18] However, the example also shows that there is no rule without exception: of course, excerpts from the latest James Bond can also be used to point out gender stereotypes in society. Most of the time, copying is just for fun and not of public interest – but it can be. Thus, in each individual case, the question must be asked: Does the copy merely serve to consume or indeed to communicate?[19] Is it just for fun or for an argument?

The problem is outlined: copying is speaking. And speaking is a fundamental right. How should EU copyright law deal with the abuse of this fundamental rights overlap by right holders? This article wants to provide a blueprint for dealing with a censorious copyright. For this purpose, firstly, it will be shown that the use of the exclusive right to censor is neither a national nor a new phenomenon. However, it reaches new dimensions in times of digitalization when copyright is suddenly everywhere: a new culture of communication has developed online that communicates more and more *with* the works of third parties. Copyright doctrine must reflect this digital structural change to live up to its own aspiration of not cutting excessively into people's communication (1.). Secondly, it will be outlined that such censorious use of copyright can happen because of copyright's dogmatic structure. It contains safety valves which aim to solve the copyright/free speech conflict but all too often they fail. Moreover, it provides exclusive rights for the authors vis-à-vis mere privileges of users (2.). Subsequently, the censorious use of copyright to suppress free speech will be tackled according to the Luxemburg approach to such cases. Following the case law of the Court of Justice of the European Union (CJEU), a case-by-case balancing within the interpretation of the codified exceptions and limitations of EU law must be undertaken. It may not be carried out as an ad hoc weighing but must be aligned with the omnipresent principle of proportionality (3.). The article ends with a conclusion.

1. Censorious use of copyright

For as long as people speak, there have been other people who want to censor them. They often choose copyright law to do so (1.1). In the 15th century, copyright started of as a privilege to silence others.[20] For the purpose of religious and political surveillance, the granting of privileges was combined with censorship.[21] Nowadays, the majority of censorious cases will not involve "censorship" in a formal sense as this would only include state pre-censorship. In Germany, for example, only a pre-censorship by state authorities can fall under the formal

[18] Viktoria Kraetzig, *Netzsperren – Eigentumsschutz oder Zensur?* [DNS blocking - property protection or censorship?], 3 ZUM 181, 186 (2022).

[19] Jannis Lennartz, *Digitale Filter zwischen Konsum und Kommunikation* [Digital filters between consuming and communicating], EuGRZ 482, 487 (2022), who argues that the exercise of the fundamental right to free speech must be seen in the context of its use [„Verwendungszusammenhang"].

[20] *See* Tehranian, *supra* note 12, at 148; for a "brief history of the birth of exclusivity, see Konrad Gliściński, *Reclaim the state: public interest in copyright and Modern Monetary Theory*, 3 internet&sociedade 89, 91 (2022).

[21] RONAN DEAZLEY, COMMENTARY ON THE STATIONERS' ROYAL CHARTER 1557 (2008), in Primary Sources on Copyright (1450-1900), eds L. Bently & M. Kretschmer, www.copyrighthistory.org; CYNDIA SUSAN CLEGG, PRESS CENSORSHIP IN ELIZABETHAN ENGLAND, 1997; see also W.S. Holdsworth, *Press control and copyright in the 16th and 17th centuries*, Yale L.J. 841 (1920).

concept of censorship in Article 5 (1) sentence 3 of the Basic Law.[22] Yet, censorship research operates with a whole range of censorship terminology, which in turn is subject to constant change.[23] The concept of censorship can therefore be understood much broader – up to an extended understanding in the sense of a "burden on communication".[24] By any means, copyright law must prevent such censorious use of the exclusive right to suppress speech which is valuable in constitutional terms – in the digital age, more than ever (1.2).

1.1 From Howard Hughes to the Duchess of Sussex

The censorious use of copyright law is a global phenomenon and not a new one. The first example shows a frequently occurring constellation, namely that a third party acquires exclusive rights to a copyright protected content to stop its publication: Aviation pioneer and tycoon *Howard Hughes* formed a company which acquired rights of use to press articles not to protect the economic value of them but to prevent the publication of a forthcoming Random House biography about himself. While the District Court held that the company had a valid copyright claim and preliminarily restrained the defendants from publishing and distributing the biography,[25] the Second Circuit Court held that the public interest shall prevail.[26] Another constellation to be found in Germany is that the state uses copyright law to suppress official documents. In this scenario, civil servants have created a work in the course of their official duties, and the copyright is owned by their employer: the state.[27] A well-known case of this category is the *Funke Medien* case, in which the German Ministry of Defence wanted to stop the publication of military situation reports on a mission in Afghanistan.[28] The reports were considered classified information. One might say: rightly so. Is there not a legitimate interest of the state to oppose the publication of such documents? Definitely - but not because of a violation of exploitation rights under copyright law. The state hardly wanted to exploit the military situation reports commercially. Speaking of the military, in the US, Navy Seals sued for copyright infringement against the publication of photos showing them abusing Iraqi prisoners.[29] There are also constellations in which the state wants to suppress documents because of a violation of exploitation rights that it previously had to release under the Freedom of Information Act.[30] Hence, by invoking its exclusive rights under copyright law, the

[22] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Nov. 27, 1990, NEUE JURISTISCHE WOCHE [NJW] 1471, 1475.
[23] BODO PLACHTA, ZENSUR 13 et seq. (2006).
[24] *See* Plachta, *supra* note 21, at 18 citing KLAUS PETERSEN, ZENSUR IN DER WEIMARER REPUBLIK 4 (1995).
[25] Rosemont Enters., Inc. v. Random House, Inc., 256 F. Supp. 55, 58 (S.D.N.Y. 1966).
[26] Rosemont Enters., Inc. v. Random House, Inc., 366 F.2d 303 2d Cir. (1966): „The public interest (in the free dissemination of information about Howard Hughes) should prevail over the possible damage to the copyright owner"; see also Jeanne C. Fromer, *Should the law care why intellectual property rights have been asserted?*, 53 Hous. L. Rev. 549, 557 (2015); *see* Goldstein, *supra* note 1, at 985.
[27] It is to be assumed that the civil servant has at least implicitly granted the employer all rights of use on the copyright protected subject matter, see Sec. 43 German Copyright Act.
[28] Bundesgerichtshof [BGH] [Federal Supreme Court], April 30, 2020, 35 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2547; Case C-469/17, Funke Medien v. BRD, (Jul. 29, 2019), https://curia.europa.eu.
[29] Four Navy SEALS v. Associated Press, 413 F.Supp.2d 1136, 1141–42 (S.D. Cal. 2005); *See* Tehranian, *supra* note 12, at 126 et seq.
[30] Landgericht Köln [LG Köln], Nov. 12, 2020, Zeitschrift für Urheber- und Medienrecht Rechtsprechungsdienst [ZUM-RD] 43; Landgericht Köln [LG Köln], Mar. 03, 2019, Zeitschrift für IT-Recht und Recht der Digitalisierung [MMR] 546; Kammergericht Berlin [KG Berlin], Mar. 12, 2014, Zeitschrift für Urheber- und Medienrecht [ZUM] 969.

state is deliberately undermining the freedom of information ordered by the Freedom of Information Act. You might call it the most abusive abuse of copyright.[31] Furthermore, very often, lawsuits are filed against the publication of letters for copyright infringement, although it is not their economic protection that is at stake but rather the privacy of the content that is ought to be protected. In the world of "droit d'auteur" and "Urheberrecht" such uses seem at least less censorious, because in these copyright regimes, not only commercial but personal rights are covered by copyright law. To give some examples: Independently of each other, the two befriended writers Ernest Hemingway and J.D. Salinger sued for copyright infringement against the publication of letters in biographies about them.[32] That such blocking of the publication of letters does not serve any economic interests, is obvious.[33] They are not to be published but kept under lock for personal reasons. The most recent case of a censorious use of copyright concerned again a personal letter which the author wanted to stop from being published: Meghan, the Duchess of Sussex, opposed the publication of a letter addressed to her father by the British press, inter alia, on the grounds of a copyright infringement.[34] This list could go on and on.[35] All these cases have one thing in common: the plaintiffs claim infringement of their exploitation rights under copyright law, although they are in fact not concerned with them. They are pursuing other interests, in the vast majority of cases such of a personality rights nature.[36] So, in most cases they are not pursuing ill-fitting motivations by any means, but quite understandable objectives as privacy or security interests. However, if the objectives pursued are understandable, this does not mean that they can be based on copyright law. It is not a vehicle for the vindication of privacy or security interests.[37] It can therefore be summarized: across national borders, the censorial use of copyright is characterized by the fact that copyright is used to achieve interests that lie outside its scope of protection and are therefore to be described as ill motivated from the perspective of copyright law.[38]

[31] Viktoria Kraetzig, *Zensururheberrecht* [censorship copyright], 23 GRUR 1707, 1708 (2022).

[32] Hemingway's widow and his estate sued against the author of the biography "Papa Hemingway" which contained substantial excerpts from conversations between him and the defendant, Estate of Hemingway v. Random House, Inc., 53 Misc. 2d 462, 470, 279 N.Y.S.2d 51, 6 (see Note, Copyright, *Right to Common Law Copyright in Conversations of a Decedent*, 67 COLUM. L. REV. 366 (1967).; J.D. Salinger sued under copyright law against the publication of letters in a biography, among others to Ernest Hemingway: in the first instance, the claim was dismissed, see Salinger v. Random House, Inc, 650 F. Supp. 413, 426 (S.D.N.Y. 1986): "The copyright law does not give him protection against that form of injury"; but the second instance upheld it, see Salinger, 811 F.2d at 100.

[33] *See* Goldstein, *supra* note 1, at 985.

[34] HRH The Duchess of Sussex v. Associated Newspapers, [2021] EWHC 273 (Ch).

[35] For more examples from the EU *see* Kraetzig, *supra* note 3; for examples from the U.S., *see* Smith, *supra* note 10, at 72 et seq.; *see* Fromer, *supra* note 24, at 557; Neil Weinstock Netanel, *Locating Copyright within the First Amendment Skein*, 54 Stanford Law Review 1, 15 et seq. (2001).

[36] Margaret McKeown, *Censorship in the Guise of Authorship: Harmonizing Copyright and the First Amendment*, 15 Chi. -Kent J. Intell. Prop. 1 (2016): "[…] copyright is becoming a go-to tool to remedy invasions of privacy and other harms."

[37] *See* McKeown, *supra* note 34, at 16.

[38] There are also other IP rights that are used for purposes that are unrelated to the IP system, most notably patents ("patent trolls"), *see* Fromer, *supra* note 24.

1.2 Copyright silencing in the digital age

In our time, the censorious use of copyright is more dangerous than ever because copyright has become part of our everyday communication.[39] In today's creator economy, copyright is everywhere. Its scope has expanded tremendously, especially over the last decades.[40] It affects "ordinary" people not only every day but probably every hour.[41] This is because copyright covers subject matter – such as computer programs[42] or press publications[43] – that it did not in the past.[44] Moreover, technical hurdles to producing and sharing works have disappeared. Once a work has been published, in less than a minute, a perfect digital copy is produced and can be made available to the other end of the world.[45] The marginal cost for it? Zero. Due to these new dimensions of producing and sharing works, a new culture of communication has developed in the digital environment.[46] Copyright has reflected this structural change in relation to the threats posed by new distribution possibilities for right holders. Legislative adjustments in the 1990s in the USA, in the 2000s in the EU, focused solely on the interests of industry.[47] But what about user needs?[48] Copyright law itself claims to strike a balance with conflicting user interests, not to interfere unreasonably with everyday communication.[49] As the explanatory memorandum to the German Copyright Act states particularly clearly: the idea that the private sphere must remain free of the author's claims is probably the most deeply rooted.[50] If this ideal is to be upheld, copyright law must be adapted to the new communication culture.

Copyright works have always been part of cultural and social communication processes. Yet, reference culture is experiencing a Golden Age in the time of social media. In everyday life, people use the works of others for their own communication to a previously unknown extent. Because of new technical possibilities, works or parts of them can be creatively processed in new dimensions - by merging them, adding comments or editing them digitally. However, not only transformative uses of works, such as that of Memes in social media, are flourishing. With the rise of citizen journalism, a new culture of political communication has developed online that speaks a lot *with* copyright protected subject matter - namely images. Consider the news

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[39] Jannis Lennartz/Viktoria Kraetzig, *Urheberrechtsschutz digitaler Alltagsspuren* [Copyright protection of digital everyday traces], 3 RuZ 205 (2022).
[40] See critically LESSIG, REMIX 269 (2008).
[41] Jessica Litman, *The Exclusive Right to Read*, 13 Cardozo Arts & Entertainment Law Journal 29, 34 (1994); *see* Tushnet, *supra* note 6, at 543.
[42] See Art. 1 Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (Codified version), L. 111/16-22.
[43] See Art. 15 Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, L 130/92-125.
[44] *See* Tushnet, *supra* note 6, at 541.
[45] *See* Netanel, *supra* note 2, at 285 and 292.
[46] Arguing that digital technologies fundamentally changed what freedom of speech, Jack M. Balkin, *Digital Speech and Democrativ Culture: A Theory of Expression for the Information Society*, 79 N.Y.U. L. REV. 1 (2004).
[47] This refers to the adaptations in the USA through the Digital Millennium Copyright Act (DMCA), and in the EU in particular through the Infosoc Directive; for overbroad DMCA claims, see Rebecca Tushnet, *Fair Use's Unfifinished Business*, 15 Chi. -Kent J. Intell. Prop. 399 (2016).
[48] Jessica Litman, *Campbell at 21/Sony at 31*, 90 WASH. L. REV. 652 (2015).
[49] See Recital 3 InfoSoc Directive.
[50] BT-Drs. IV/270, 31 ["Im Bewußtsein der Allgemeinheit am stärksten verwurzelt ist wohl der Gedanke, daß der private Bereich von Ansprüchen des Urhebers freibleiben müsse"].

feed on platforms: images everywhere. Because the threshold for copyright protection is set very low under CJEU case law,[51] and there is even protection for images below the works threshold under related rights in some EU Member States,[52] copyright protection of content posted on platforms is now the normal case. It is precisely this proliferation of copyright protection in the digital environment that can be used by right holders to silence others. Posting about news and topics of public interest can therefore be burdened by copyright law more than ever.[53]

To give an example: The Berlin Regional Court recently ruled that a German public service broadcaster (the "Südwestrundfunk") must refrain from making available a simple cell phone picture of general informational interest due to a violation of exploitation rights.[54] The case concerned a blurry cell phone picture showing German Finance Minister Christian Lindner after a dinner with a real estate entrepreneur and honorary consul of Belarus - in violation of the Corona rules at that time. The fact that the finance minister did not follow the government's security rules but rather had fun in a celebrity restaurant, was of public information interest. In parallel with the report of the incident in the radio program, the broadcaster retweeted the photo as evidence that it went viral online. Now one might think: Why is this a copyright case? It was just a blurry cell phone picture. But in Germany, every cell phone picture, no matter how poor the quality, is at least protected as a photograph ("Lichtbild") under § 72 UrhG;[55] the photographer has a 50-year exclusive right to such a picture under related rights.[56] Therefore, the broadcaster was contacted by the photo agency, which holds the exclusive rights to the photo in dispute, about post-licensing. Out of fear of facing claims under copyright law, the broadcaster immediately removed the image – at a time when there was undoubtedly a public information interest in the photo. With other words: the public broadcaster, whose task it is under Section 30 Media State Treaty (Medienstaatsvertrag) to enable participation in the information society, was prohibited from doing so under copyright law. The example shows that copyright law not only affects the comfort of use of copyright protected subject matter but can hinder political communication. Cases like this have significance beyond the specific proceeding. They can have a chilling effect for the public discourse. Because of these new threats for free speech posed by copyright in the digital sphere, it is more important than ever to deal with the

[51] Case C-5/08, Infopaq Int v. Danske Dagblades Forening (Jul. 16, 2009), https://curia.europa.eu; Case C-393/09, Bezpečnostní softwarová asociace – Svaz softwarové ochrany v. Ministerstvo kultury (Dec. 22, 2010), https://curia.europa.eu; Joined Cases C-403/08 & 429/08, Football Association Premier League v. QC Leisure and Karen Murphy v. Media Protection Services (Oct. 04, 2011), https://curia.europa.eu; *Eva-Maria Painer*, Case C-145/10; Case C-310/17, Levola Hengelo BV v. Smilde Foods BV (Nov. 12, 2018), https://curia.europa.eu.

[52] For example, under Sec. 72 German Copyright Act or Sec. 87 (1) of the Italian Copyright Act (L. 633/1941).

[53] On the fact that copyright does not want an exclusive right on news, see Supreme Court, News Service v. Associated Press, 248 U.S. 215 (1918): „But the news element— the information respecting current events contained in the literary production— is not the creation of the writer, but is a report of matters that ordinarily are publici juris; it is the history of the day"; on copyright in news, see CORNISH/LLEWELYN & ALPIN, INTELLECTUALL PROPERTY: PATENTS, COPYRIGHT, TRADE MARKS AND ALLIED RIGHTS, 9th Ed., 14-003.

[54] Landgericht Berlin [LG Berlin] [Regional Court of Berlin], Mar. 29, 2022, Case No. 15 O 419/20.

[55] According to § 72 UrhG every photograph, also such that do not qualify as personal intellectual creation, is protected under related rights.

[56] *See* Lennartz/Kraetzig, *supra* note 37, at 211 et seq.

censorious use of copyright. The exclusive right can be used as a censorship right because of copyright's dogmatic structure, which will now be addressed.

2. Pro-author copyright

Copyright doctrine is well aware of the copyright/free speech clash, that's why it contains built-in safety valves for free speech.[57] Two pillars shall ensure copyright's compatibility with free speech: the idea-versus-expression distinction and exception instruments for privileged forms of use (2.1). These speech-protective instruments might sound good in theory, in practice they often fail. Moreover, copyright grants an overbroad protection for rightsholders vis-à-vis mere privileges for users of protected subject matter (2.2). Copyright law is thus inherently imbalanced to the expense of users and their freedom of speech. This is also reflected in international treaties, which primarily contain protective provisions for right holders, but hardly any obligations for the contracting states to provide safeguards for conflicting third-party interests.

2.1 Built-in safety valves for free speech

The protection of copyright is designed in such a way that information as such cannot claim protection.[58] Only its embodiment in a "personal intellectual creation" shall enjoy protection as a work under copyright law. With this copyright doctrine known as the idea/expression dichotomy,[59] copyright law aims to resolve the conflict with freedom of speech: firstly, at its entrance door since information cannot be protected per se. Secondly, it prevents users of copyright protected subject matter only from copying the copyright holder's particular form of expression, but not the ideas or facts that are expressed in it.[60] In other words: One can speak about a copyright work in own words but is not allowed to speak *with* the work. Yet, the argument falls short on two aspects.[61] The line between idea and expression cannot be drawn clearly but is blurred since copyright content has an inherent informational content that cannot be separated from its form of expression: information and form of expression are inseparably interwoven.[62] Where does the idea end, where does the expression begin? When does a copier use the idea itself, when the expression of it? There is protected subject matter for which the line is very difficult to draw. For example, the German Federal Court of Justice has already held that, in the case of a novel as a literary work within the meaning of Section 2 (1) No. 1 German Copyright Act, it is not only the concrete wording of the text or the direct expression of an idea that is protectable under copyright law. In addition, personal components and form-forming elements of the work, which lie in the course of the plot, in the characteristics and distribution of roles of the acting persons, in the arrangement of scenes

[57] Eldred v. Ashcroft, 537 U.S. 186, para. 12 (Jan. 15, 2003): "copyright's built-in free speech safeguards"; next to them also copyright's limited term can be regarded as such.
[58] On the consequences if it would not be, *see* Nimmer, *supra* note 5.
[59] On the doctrine see Abraham Drassinower, *A Rights-Based View of the Idea/ Expression Dichotomy in Copyright Law*, 16 Can. J. Law Jurisprud. 3 (2003).
[60] *See* Netanel, *supra* note 33, at 13.
[61] See also critical Alfred C. Yen, *First Amendment Perspective on the Idea/Expression Dichotomy and Copyright in a Work's "Total Concept and Feel"*, 38 EMORY L.J. 393 (1989).
[62] *See* Tushnet, *supra* note 6, at 549; *see* Netanel, *supra* note 33, at 19; *see* Goldstein, *supra* note 1, at 1016.

and in the "scenery" of the novel, shall enjoy copyright protection.[63] The other reason why the idea/expression dichotomy cannot reconcile copyright with free speech: copying can be needed for "effective" speech.[64] Copies can serve free speech purposes which cannot be achieved through their description but only verbatim. There are situations in which a paraphrased reproduction of copyright-protected content cannot replace its copying because it is less authentic, less comprehensible, less effective – it is simply not the original. A classic example is the video showing the Kennedy assassination: A researcher used the amateur film that captured the moment that President Kennedy was shot for a book that dealt critically with the commission that investigated the assassination.[65] Life Magazine had acquired the rights in the film – it sued for copyright infringement. The defendant could not have argued with the film in the same way, for example by describing the copyrighted frames of the movie, as he could by showing frames from the film in his book.[66] Or think of the successful suit against a translation of Hitler's Mein Kampf to show the danger of Nazi ideology.[67] There are works that cannot be reworded or described. Sometimes one must speak with a copyright protected work to say what needs to be said.

Second, whatever free speech exception mechanisms might be provided for in the various copyright systems, they have their weaknesses. Flexible judge-elaborated instruments such as the U.S American fair use doctrine, on the one hand, are driven by particular facts in particular cases. They suffer from much the same problems as the idea/expression dichotomy: difficulties in drawing the line and unforeseeability.[68] The doctrine requires to undertake a case-by-case analysis considering four statutory factors plus any other factor which the court considers worthy of consideration.[69] Such doctrinal elasticity always comes at a price: legal uncertainty. As copier, you can never know for sure whether your speaking with one others work is deemed to be "fair". For this reason, the balancing apparatus of the doctrine induces considerable speaker self-censorship. The legal uncertainty causes a "chilling effect" which forces individuals to forego exercising their fundamental right of speech for fear of being sued and paying dearly for their own speech.[70] But even if your fair use defense is successful, the lawsuit is expensive.[71] On the other hand, a lack of flexibility is inherent in closed list-approach's as provided for in the EU by Article 5 Copyright and Information Society Directive[72] (InfoSoc Directive) or in the UK by the concept of "fair dealing" in Sections 29 et seq. Copyright,

[63] Bundesgerichtshof [BGH] [Federal Court of Justice] Apr. 29, 1999, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2022.
[64] *See* Netanel, *supra* note 33, at 14.
[65] Time incorporated v. Bern Geis Associates, Bernard Geis, Josiah Thompson, and Random House, Inc., 293 F. Supp. 130 (S.D.N.Y. 1968).
[66] *See* Netanel, *supra* note 33, at 14.
[67] Houghton Mifflin Co. v. Noram Publ'g Co., Inc., 28 F. Supp. 676, 678 (S.D.N.Y. 1939).
[68] *See* Tushnet, *supra* note 6, at 554; *see* Netanel, *supra* note 33, at 20; see also critical on the fair use doctrine William W. Fisher, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1661 (1988).
[69] See 17 U.S.C. § 107.
[70] *See* Nimmer, *supra* note 5, at 1183.
[71] *See* Tushnet, *supra* note 6, at 545.
[72] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, L 167/10-19.

Designs and Patents Act 1988 (CDPA 1988).[73] While the codified exceptions may normally be able to solve the copyright/free speech collision, there will always be cases in which they cannot.

2.2 Exclusive right vs. privileges of users

Copyright thinks from the perspective of the right holders. It is copyright-centered and copyright-oriented. It is designed in such a way that the protection of the author is the principle, restrictions of the protection of the author being the exception. According to the case law of the CJEU, a broad concept of work generously opens the door to copyright.[74] Exploitation rights shall cover all typical acts of use, even to the point that the right of making protected subject matter available to the public (Article 3 (1) InfoSoc Directive) can cover only indirect acts, such as linking to[75] or framing of[76] copyrighted content. By way of an interpretation in conformity with fundamental rights and in light of the 23th Recital of the InfoSoc Directive, the CJEU thus interprets exploitation rights in a broad way - ensuring a high level of protection for rights holders is, after all, *the* maxim of copyright law. The argument that this interpretation serves a high level of protection for authors, is very often a charade. Do the authors really profit or not rather the publishers etc.? For this article, however, it is only important that EU copyright law is designed and interpreted pro-author. In contrast, the exceptions and limitations of the InfoSoc Directive privilege narrowly defined acts of use in an exhaustive catalog. The CJEU has repeatedly stated that although Article 5 of the InfoSoc Directive is expressly entitled “exceptions and limitations”, it must be noted that its provisions “themselves confer rights on the users of works or other subject matter”.[77] However, as is so often the case, this Luxembourg case law cannot be understood literally. The CJEU means “right” in the sense of a broad understanding of the concept as a “privilege”.[78] It cannot be concluded from the rulings of the CJEU that the exceptions and limitations of the InfoSoc Directive are intended to give users substantive rights. Unlike subjective rights, “privileges” or “freedoms” cannot be claimed *a priori* against the right holder in court but rather only *a posteriori* in an infringement suit in such a way that they can privilege the act of use in question.[79] It cannot change the structural imbalance at the expense of the users of protected subject matter: they cannot oppose the author's exclusive right with an independent right of their own, but only with a privilege that leads to a limitation of the scope of the exploitation

[73] On the concept of fair dealing, see BENTLY ET AL., INTELLECTUAL PROPERTY LAW, 242 et seq. (6th Ed. 2022); in very rare instances, a defendant can also resist an action for copyright infringement because the use is justified ‘in the public interest’ within the meaning of Section 171 (3) CDPA 1988.
[74] *Levola Hengelo BV*, Case C-310/17.
[75] Case C-160/15, GS Media v. Sanoma and others (Sep. 08, 2016), https://curia.europa.eu.
[76] Case C-392/19, VG Bild-Kunst v. Stiftung Preußischer Kulturbesitz (Mar. 09, 2021), https://curia.europa.eu.
[77] *Spiegel Online GmbH*, Case C-516/17 at para. 54; *Funke Medien*, Case C-469/17 at para. 70 (see Christophe Geiger/Elena Izumenko, *The Constitutionalization of Intellectual Property Law in the EU and the Funke Medien, Pelham and Spiegel Online Decisions of the CJEU: Progress, but Still Some Way to Go!*, 51 IIC 282, 296 (2020); with regard to Art. 5 Abs. 3 lit. n) InfoSoc Directive Case C-117/13, Technische Universität Darmstadt v. Eugen Ulmer KG (Sep. 11, 2014), https://curia.europa.eu.
[78] On the use of the term "right" for privileges, see Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 Yale L.J. 16, 30 (1913); with respect to the exceptions and limitations of the InfoSoc Directive, see TITO RENDAS, EXCEPTIONS IN EU COPYRIGHT LAW, 72 et seq. (2021).
[79] *See* Rendas, *supra* note 75, at 75.

right at stake.[80] The Luxembourg case law is therefore to be understood merely in such a way that user interests must be taken into account as a counterweight within the framework of a fundamental rights-friendly interpretation of the exceptions and limitations of the InfoSoc Directive – as in cases of a censorious use of copyright.

3. The Luxemburg approach

Two German cases of censorious uses of copyright have ended up before the CJEU: *Funke Medien*[81] and *Spiegel Online*[82]. These cases are decisive for how the courts of the Member States must deal with the censorious use of copyright: Firstly, there can be no all-or-nothing solution in the sense that if copyright is used to silence others, its protection is denied in principle. Within the framework of the written exceptions and limitations of the InfoSoc Directive, there must be a case-by-case balancing of interests (3.1). Secondly, the case-by-case balancing act must not be misunderstood to mean that the courts shall make an ad hoc balancing decision. Dogmatically, the balancing is a proportionality test (3.2).

3.1 Case-by-case balancing within the InfoSoc-Directive

As the CJEU held in *Funke Medien* and *Spiegel Online*, the exceptions and limitations of Article 5 of the InfoSoc Directive must be interpreted in such a way by the domestic courts that they ensure a fair balance between the interests of rights holders guaranteed by Article 17(2) CFR and users of protected subject matter, in particular their freedom of expression and information guaranteed by Article 11 of the CFR, as well as of the public interest .[83] The Court further stated that the "freedom of information and freedom of the press, enshrined in Article 11 of the Charter, are not capable of justifying, beyond the exceptions or limitations provided for in Article 5(2) and (3) of Directive 2001/29, a derogation from the author's exclusive rights of reproduction and of communication to the public, referred to in Article 2(a) and Article 3(1) of that directive respectively."[84] In this respect, the CJEU cited Recital 32 of the InfoSoc Directive and earlier judgments in which it had already held that the exceptions and limitations in Article 5 InfoSoc are exhaustive and that member states may not provide for exceptions beyond the catalogue in their national copyright systems.[85] For dealing with censorial uses of copyright in domestic law, two things follow from this which will be examined in more detail in the following.

[80] Regarding the German "Schranken", see STIEPER, RECHTFERTIGUNG, RECHTSNATUR UND DISPONIBILITÄT DER SCHRANKEN DES URHEBERRECHTS [JUSTIFICATION, LEGAL NATURE AND DISPOSABILITY OF GERMAN COPYRIGHT LIMITATIONS], 541 (2009).
[81] *Funke Medien*, Case C-469/17.
[82] *Spiegel Online GmbH*, Case C-516/17.
[83] *Spiegel Online GmbH*, Case C-516/17 at para. 31 and 42; *Funke Medien*, Case C-469/17 at para. 51 and 57.
[84] *Spiegel Online GmbH*, Case C-516/17 at para. 49 and 42; Case C-469/17, *Funke Medien*, Case C-469/17 at para. 64.
[85] The CJEU made reference to Case C-572, Hewlett-Packard Belgium SPRL v. Reprobel SCRL, para. 38-39 (Nov. 12, 2015) https://curia.europa.eu; Case C-435/12, ACI Adam BV and Others v. Stichting de Thuiskopie, Stichting Onderhandelingen Thuiskopie vergoeding, para. 27 (Apr. 2014), https://curia.europa.eu.

Firstly, it is always necessary to weigh up the conflicting fundamental rights in each individual case. Therefore, it is not possible for example, as has been suggested in the U.S.,[86] to dismiss suits characterized as censorious cases on the basis of Anti-SLAPP-Law. In the EU, there is currently no Anti-SLAPP law, but the Commission has presented its draft for an Anti-SLAPP Directive in 2022 to tackle such abusive lawsuits.[87] Brussels wants to counter SLAPPs ("Strategic lawsuits against public participation") with procedural protection mechanisms. These are to be included in the domestic laws governing the course of civil court proceedings, enabling the courts to dismiss and sanction evidently unfounded and abusive claims at an early stage.[88] However, in the light of the court's narrow inquiry at this stage, an early adjudication and dismissal of such suits could not involve a substantive balancing of the conflicting interests which has to be undertaken according to the Luxemburg case law.[89] Or even less: at such a procedural stage and with a cursory examination only, it might not even be possible for the courts to determine whether there has been a censorious use of the exclusive right. Instead, national derogations must be interpreted in a way that gives effect to the user interests reflected in the exceptions and limitations of the InfoSoc Directive while balancing all conflicting interests in the specific case.

Secondly, this balancing act can only take place within the framework of the interpretation of the written exceptions and limitations of Article 5 InfoSoc. For the implementation of this case law, it must be stressed out that the exceptions and limitations of the InsfoSoc Directive need not be conceived as exception provisions in the domestic laws of the Member States as well. This already follows from primary law, according to which directives are binding as to the result to be achieved but leave the choice of form and methods to the national authorities (Article 288 III TFEU). With other words: directives are blind for the dogmatics of the legal systems of the Member States. They only ever think in terms of political objectives without any interest in how these are implemented in national legal systems.[90] Since doctrinal requirements for implementation in domestic law can never be concluded from directives nor their interpretation by the CJEU, the balancing of fundamental rights must not take place within the framework of provisions of exceptions in national copyright law. The catalogue of the Infosoc Directive is thus to be understood as an exhaustive list of all substantive derogations from the exclusive exploitation rights of the author that may exist in the EU. The Member States may implement these derogations dogmatically in whatever way they wish. This shall be illustrated briefly using German copyright law as an example: The German Copyright Act provides in Sections 44a et seq. for an exhaustive catalogue of limitations (called "Schranken"). When copyright is used as censorship law, usually none of the codified limitations can apply since the limitations in question – those on the reporting of "daily"

[86] *See* Smith, *supra* note 10, at 85; s*ee* Goldman/Silbey, *supra* note 11, at 994; *See* Tehranian, *supra* note 12, at 137.

[87] See Proposal for a Directive of the European Parliament and of the Council on protecting persons who engage in public participation from manifestly unfounded or abusive court proceedings ("Strategic lawsuits against public participation") COM (2022) 177 final; the proposal was accompanied by a recommendation to the Member States based on Article 292 TFEU setting out guidance to address purely domestic cases of SLAPPs (see Com Recommendation (EU) 2022/758 of 27 April 2022).

[88] The legal basis for the proposal is Article 81(2) TFEU, which is the legal basis for judicial cooperation in civil matters having a cross-border implication.

[89] With regard to the U.S. fair use doctrine, see Browne v. McCain, 612 F. Supp. 2d.1125, 1130 (C.D.Cal. 2009).

[90] *See* Kraetzig, *supra* note 3, at 81 et seq.

events (Section 50) and for quotations (Section 51) – are too narrowly drawn for such cases. According to the case law of the CJEU, an interpretation in conformity with a directive shall not result in an interpretation of national law *contra legem*.[91] This means that the German limitations may not be interpreted *contra legem*[92] but a different free speech safety-valve must be opened for the weighing of interests. According to Section 97 German Copyright Act, a claim for injunctive relief for copyright infringement exists only if copyright is "unlawfully" ("widerrechtlich") infringed.[93] In Germany, this term of "unlawfulness" is to be opened as a valve for the balancing of interests.[94] In other Member States in which the exception provisions are broader designed than in German copyright law, it may of course be possible for the balancing of interests to take place within their interpretation. If this is not the case, it might also be an option to invoke misuse doctrine for a case-by-case assessment;[95] as an affirmative defense to the infringement, it renders the right unenforceable.[96] In any case, within the interpretation of the national free speech safety-valve, according to the case law of the CJEU, only those exceptions and limitations may be applied that are laid down in the catalogue of Article 5 InfoSoc Directive.

The censorious use of copyright *can* be overcome by two exceptions and limitations: Article 5 (3) lit. c) and lit. d) InfoSoc Directive. However, the exception and limitation of Article 5(3) lit. d) InfoSoc Directive for quotations for purposes such as criticism or review[97] will often not apply because, according to its wording, it only privileges the use of documents which have already been lawfully made available to the public; frequently, there may be a public interest in the publication of unpublished documents. The exception and limitation for a reporting of currents events under Article 5(3) lit. c) InfoSoc Directive also has a weak point, namely the requirement that the use of works or other subject-matter must take place "in connection with" the reporting of current events. In its *Spiegel Online* judgement, the CJEU stated that "the exception or limitation provided for requires only that such use be 'in connection with the reporting of current events'".[98] This interpretation of secondary law is problematic insofar

[91] Case C-282/10, Maribel Dominguez v. Centre informatique du Centre Ouest Atlantique and others (Jan. 24, 2012), https://curia.europa.eu;
Case C-212/04, Konstantinos Adeneler v. Ellinikos Organismos Galaktos (Jul. 04, 2006), https://curia.europa.eu.
[92] Unfortunately, the German Federal Supreme Court (BGH) did not take this into account and decided in favour of an extensive interpretation of Sec. 50 German Copyright Act, which seemed to be no longer an interpretation, but rather a further development of the law by judges, see Bundesgerichtshof [BGH] [Federal Supreme Court], April 30, 2020, 35 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2547; Bundesgerichtshof [BGH] [Federal Supreme Court], April 30, 2020, 35 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2554; critically see Viktoria Kraetzig, *Reformistischer Aufbruch in Richtung „urheberrechtliche Interessenabwägung"?* [Reformist departure towards a "copyright balancing of interests"?], 9 GRUR 955 (2020).
[93] Too little attention is paid to the concept of "unlawfulness" in German case law and academia; this is also reflected in the fact that Sec. 97 (1) in the official English translation does not even contain the term at all ("Any person who infringes copyright or another right protected under this Act may be required by the injured party to eliminate the infringement or, where there is a risk of repeated infringement, may be required by the injured party to cease and desist.").
[94] *See* Kraetzig, *supra* note 3, at 133 et seq.
[95] For German copyright law Haimo Schack, *Schutzgegenstand, "Ausnahmen oder Beschränkungen" des Urheberrechts* [Subject matter of protection, "exceptions or limitations" to copyright], 7 GRUR 904, 907 (2021).
[96] As solution for U.S. law, *see* Fromer, *supra* note 24, at 586.
[97] For a broader understanding in the light of Art. 10 (1) RBC see ALPIN/BENTLY, GLOBAL MANDATORY FAIR USE (2020).
[98] *Spiegel Online GmbH*, Case C-516/17 at para. 64.

as it must be interpreted in conformity with international law, ergo in accordance with the Revised Berne Convention (RBC). According to Article 10bis (2) RBC, the work used must "become seen or heard in the course of the event". The wording is thus clear that the work must be perceptible not only "in connection with" but *during* the current event. This includes, for example, the constellation of reporting on a speech during which a song is playing in the background.[99] The exception and limitation can consequently not apply if the work and the current event are identical. With any other interpretation, third parties could create a current event *eo ipse*.

3.2 Balancing as proportionality test

Proportionality has evolved from a constitutional law concept into a general principle of law.[100] With the case law of the CJEU it has migrated into EU law.[101] As structured form of doctrine, the proportionality test gives the domestic courts a common methodology for evaluating the copyright/free speech conflict. They must carry out the balancing of interests not as an ad hoc weighting up but as a four-step proportionality test: Is the suppression of free speech for a legitimate purpose? This will always be the case. Just as freedom of speech is guaranteed by Article 11 CFR and Article 10 ECHR, freedom of property is guaranteed by Article 17 II CFR and Article 1 of Protocol No. 1 to the ECHR; its protection is to be considered a legitimate purpose. Is it appropriate, necessary and proportionate to achieve it?[102] A cease and desist order will generally be appropriate and necessary to protect the interests of the right holders. At the heart of the test is the assessment of proportionality,[103] in the context of which the conflicting interests copyright versus freedom of speech must be balanced.

According to the case law of the CJEU, the provision of Article 5(3) InfoSoc Directive does not constitute full harmonization of the scope of the exceptions and limitations it contains.[104] Thus, when interpreting national law which implements the exceptions and limitations of the InfoSoc Directive, the domestic courts are operating in an area in which the actions of the Member State are not fully determined by Union law. This also applies if the Member States do not implement the exceptions and limitations of the InfoSoc Directive in their national law in the context of exception provisions, but, for example, as in Germany, in the interpretation of the concept of unlawfulness.[105] According to the *Åkerberg-Fransson-/Melloni*-formula of the CJEU, in such not fully harmonized areas of EU law, the domestic courts may weigh their

[99] This example was provided by the German Copyright Act explanatory memorandum, which contained a limitation that served as a model for the exception and limitation of the InfoSoc Directive, see Entwurf eines Gesetzes über Urheberrecht und verwandte Schutzrechte (UrhG) der Bundesregierung [Draft Law on Copyright and Related Rights (UrhG) of the Federal Government], 23.03.1962, BT-Drucks. IV/270.

[100] ALEXANDER TISCHBIREK, DIE VERHÄLTNISMÄßIGKEITSPRÜFUNG, METHODENMIGRATION ZWISCHEN ÖFFENTLICHEM RECHT UND PRIVATRECHT [THE PROPORTIONALITY TEST, METHOD MIGRATION BETWEEN PUBLIC AND PRIVATE LAW] (2022); Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 Yale L.J. 3096 (2015).

[101] See in general Case C-331/88, The Qeen and others v. Fedesa, para. 13 (Nov. 13, 1990), https://curia.europa.eu; with the *Promusicae* judgement it has migrated to the relationship *inter privatos*, see Case C-275/06, para. 13 (Jan. 29, 2008), https://curia.europa.eu.

[102] For the four steps, see Case C-331/88, The Qeen and others v. Fedesa, para. 13 (Nov. 13, 1990), https://curia.europa.eu.

[103] FRANCISCO J. URBINA, A CRITIQUE OF PROPORTIONALITY AND BALANCING, 2 (2017).

[104] *Spiegel Online GmbH*, Case C-516/17 at para. 27; Case C-469/17, *Funke Medien*, Case C-469/17 at para. 42.

[105] *See* Kraetzig, *supra* note 3, at 178-188.

national fundamental rights against each other as long as these do not affect the level of protection of the CFR.[106] For the case-by-case balancing act, no exhaustive catalogue of criteria can be presented but, at least, a few criteria shall be named that must be included in the balancing process in any case - *pro copyright* and *pro free speech*.

3.2.1 Pro copyright

If right holders invoke an infringement of their copyright, only copyright-specific interests can weigh for them within the balancing process but non-copyright interests cannot.[107] Thus, for example, state secrecy interests can never be taken into account in favour of the right holders, as the German Federal Supreme Court found in the *Funke Medien* case.[108] Moreover, within the balancing process the three-step test as laid down in Article 5 (5) InfoSoc Directive is to be taken into account *pro copyright*.[109] Accordingly, the interpretation of the domestic law must implement the exceptions and limitations in in such a way that they meet the requirements of the three-step test, which is mandatory under four international treaties (Article 9 (2) RBC, Article 13 TRIPS, Article 10 WCT and Article 16 (2) WPPT) and which, through its inclusion in Article 5 (5) InfoSoc Directive, has also become a part of the copyright Acquis Communautaire, thus, subject to review by the CJEU.[110] The legal instrument of the three-step test must not be misunderstood in a way that only exception provisions in the formal sense shall meet its requirements. Rather, the test claims validity for *any* substantive restriction of the right holder's exploitation rights since international and EU law do not think in the doctrinal categories of their Convention or Member States. If the test refers to "exceptions" in the international treaties, and to "exceptions and limitations" in the InfoSoc Directive, this must not be interpreted formally in the sense that the test would refer solely to exception provisions such as the limitations of Sections 44a et seq. German Copyright Act. Rather, according to the three-step test, *any* substantive restriction on copyright exploitation rights may only be permissible in certain special cases (1st step) if they do not interfere with the normal exploitation of the work (2nd step) and do not unreasonably infringe the legitimate interests of the author (3rd step).[111] The first two test levels cannot weigh in favor of the right holders in the case of a censorious use of the exclusive right. The first step can be interpreted in such a way that certain special cases must not be defined by the law but can be established by case law.[112] If the national courts open up safety valves to prevent the censorious use of copyright and case law develops in this respect, this meets the requirement. The second step of the test is obviously not affected, because in the case of a censorial use, the intention is indeed to suppress works that are *not* to be used commercially.[113] However, the third step,

[106] Case C-399/11, Melloni vs. Ministerio Fiscal, para. 58 (Feb. 26, 2013), https://curia.europa.eu; Case C-617/10, Åklagare vs. Hans Åkerberg Fransson, para. 29 (Feb. 26, 2013), https://curia.europa.eu.
[107] *See* Kraetzig, *supra* note 3, at 160.
[108] Bundesgerichtshof [BGH] [Federal Supreme Court], April 30, 2020, 35 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2547, para. 54.
[109] *See* Kraetzig, *supra* note 3, at 181-183.
[110] Case C-435/12, ACI Adam BV and Others v. Stichting de Thuiskopie, Stichting Onderhandelingen Thuiskopie vergoeding, para. 39 (Apr. 10, 2014), https://curia.europa.eu; *Eva-Maria Painer*, Case C-145/10 at para. 110.
[111] On the test and its implementation in different Member States, see Martin Senftleben, *The International Three-Step Test*, 1 JIPITEC 67 (2010).
[112] Martin Senftleben, *Grundprobleme des urheberrechtlichen Dreistufentests* [Fundamental problems of the three-step test under copyright law], 3 GRUR 200, 207 (2004).
[113] *See* Kraetzig, *supra* note 3, at 183.

according to which the legitimate interests of the authors must not be unreasonably infringed, may weigh pro copyright. This is because in *droit d'auteur* jurisdictions, in the light of Article 6bis RBC, the "legitimate interests" of the third step must also include those of a moral rights nature.[114] Due to the monistic structure of continental European copyright law, moral rights must also be considered when the infringement of exploitation rights is claimed as these rights are inseparably interwoven with one another. However, since the infringement must reach an unreasonable level under the 3rd step, the three-step test can only be weighed in favor of copyright in the case of a serious interference with moral rights.

Insofar, since the InfoSoc Directive does not harmonize moral rights of the authors,[115] national case law as well as fundamental rights can be taken into account. If provided for in national law,[116] an infringement of the author's right of first publication can, in principle, be regarded as such serious interference with moral rights and thus not be justified. The right of first publication protects the interest of authors in keeping the content of the work private by allowing them to decide whether or not to publish it for the first time and thus to make it known to the public. In the case of an infringement of the right of first publication, only in very exceptional circumstances, when an outstanding interest of the general public is at stake, freedom of speech will prevail. In Germany, for example, this has been assumed in the following case, which shows how high the bar is set: An "outstanding interest of the general public" was assumed in the submission of a member of the Bundestag, which he had written in the (East) German Democratic Republic (GDR) as the attorney of a regime critic in criminal proceedings. The court held that even at the time of publication, the trial had still been able to serve "as a lesson in the staging of a political trial" in the times of the GDR and contribute to the "political and historical reappraisal of an important part of GDR history".[117] It can thus be summarised: In the "normal" case, the first publication of copyright-protected subject matter cannot be justified.

3.2.2 Pro free speech

As precondition for the process of democratic opinion- and will-forming, freedom of speech is one of the very conditions for a democratic rule of law.[118] In fact it is vital for it, as the CJEU[119] and the ECtHR[120] have repeatedly point out in their case law; this is especially true for the freedom of press. A free press, which enables open political debate, is "the very core of the concept of a democratic society"[121]. The Court speaks metaphorically of the "vital public-

[114] MARTIN SENFTLEBEN, COPYRIGHT, LIMITATIONS AND THE THREE-STEP TEST 219 et seq. (2004).
[115] According to Recital 19 InfoSoc Directive moral rights remain outside the scope of the directive.
[116] As, for example, in France under Articles L121-2 Code de la propriété intellectuelle, in Poland under Art. 16 4) Polish Copyright Act of 1994, in Germany under s. 12 German Copyright Act; in Art. 6bis RBC, besides the right to be named and the prohibition of a distortion of the work, there is no corresponding provision reserving the author the right of first publication.
[117] Oberlandesgericht Hamburg [OLG HH] [Higher Regional Court], Jul. 29, 1999, 45 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 3343.
[118] For the connection between democratic legitimation and expressions of the rule of law see MÖLLERS, THE THREE BRANCHES, 51 et. seq. (2013); *see* Habermas, *supra* note 7, at 112 et seq.
[119] Case C-516/17, *Spiegel Online GmbH*, Case C-516/17 at para. 72; *Eva-Maria Painer*, Case C-145/10 at para. 113; *Sky Österreich GmbH*, Case C-283/11.
[120] *The Sunday Times*, App. No.6538/74 at para. 65; *Lingens*, App. No. 9815/82 at para. 41; *Castells*, App. No. 11798/85 at para. 42; *Godwin*, App. No. 17488/90 at para. 39.
[121] *Lingens*, App. No. 9815/82 at para. 42.

watchdog role of the press"[122]. Due to this democratic functional dimension of freedom of communication, the Convention States have an extremely limited margin of appreciation with regard to a restriction of the freedoms of communication: „... the national margin of appreciation is circumscribed by the interest of democratic society in ensuring and maintaining a free press."[123] Hence, if a Convention State restricts or prohibits an expression that serves to participate in political discourse and can have an influence on the democratic formation of will, Article 10 (2) ECHR leaves the member states all the less room for a restriction of freedom of speech. In the run-up to elections, the publication of documents that can influence the voting decision has thus a particularly high democratic relevance. The public interest can therefore not only result from the content of a publication, but also from the time of its publication. To illustrate this again with an example: In the *Spiegel Online* case, a politician wanted to suppress a manuscript he had written on the decriminalization of sexual acts between minors and adults shortly before the election to the German parliament for which he was standing. Only some days before the election, he was able to suppress the manuscript in preliminary injunction proceedings on the grounds of a violation of his exploitation rights, although the public interest in the information was particularly high at that time. Obviously, he was not concerned with a violation of his exploitation rights at all. He did not want to exploit the manuscript commercially but to suppress it. Years later – after the case had ended up in Luxembourg and had been referred back again – the German Federal Supreme Court (BGH) held that the suppressed documents were of considerable importance for the political discussion and the formation of public opinion, especially during an election campaign, and that the politician could therefore not suppress them.[124] At that point, however, it was already too late. At the time when public interest in the information was particularly high, namely before the election, the politician could suppress the documents using his copyright.[125]

With regard to the copyright/free speech collision, in its *Ashby Donald et autres v. France*[126] decision, the ECtHR developed two factors that shall define the margin to which the domestic courts are entitled in such cases: as first factor, the character of the information in question is decisive ("le type d'information"). The balancing decision is substantially determined by the existence of a public interest in the information in question.[127] Neither the *Ashby Donald et autres v. France* decision nor other judgments of the ECtHR indicate what constitutes a subject of general interest; there is no clear definition in this respect: "[T]he definition of what constitutes a subject of general interest will depend on the circumstances of the case."[128] However, this is in the nature of things - there can be no exhaustive definition of what is of

[122] *Godwin*, App. No. 17488/90 at para. 39.
[123] Fressoz u. Roire v. France, App. No. 2918/95, para. 45 (Jan. 21, 1999), https://hudoc.echr.coe.int; Radio ABC v. Austria, App. No. 19736/92, para. 30 (Oct. 20, 1997).
[124] Bundesgerichtshof [BGH] [Federal Court of Justice], Apr. 30, 2020, 35 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2554, para. 39 and 96.
[125] Landgericht Berlin [LG Berlin] [Berlin regional court] Jun. 17, 2014, Case No. 15 O 546/13.
[126] Ashby Donald et autres v. France, App. No. 36769 (Jan. 10, 2013), https://hudoc.echr.coe.int.
[127] *Ashby Donald et autres*, App. No. 36769 at para. 39; Neji and Sunde Kolmisoppi v. Sweden, App. No. 40397/12 (Feb. 02, 2013), https://hudoc.echr.coe.int; in general, see Monnat v. Switzerland, App. No. 73604/01, para. 58 (Sep. 09, 2006), https://hudoc.echr.coe.int; *Lingens*, App. No. 9815/82 at para. 42.
[128] Axel Springer v. Germany, App. No. 39954/08, para. 90 (Feb. 07, 2012), https://hudoc.echr.coe.int.

public interest. Anything can be potentially political, [129] anything can be relevant for the public discourse. Whether it is in a specific case is for the domestic courts to determine. It can thus be concluded: The higher the democratic relevance of a work used by third parties, the more weight is to be given to the freedom of speech within the case-by-case balancing act. The courts cannot provide an abstract definition of when or which information is of relevance to democracy since nothing can be said about the political relevance of a topic in general. There is, however, one exception. Reporting on institutionalized politics – what politicians do and the process that makes politicians – is always of relevance to democracy. As a second relevant factor for the scope of the margin of appreciation, the ECtHR emphasized the nature of the opinion ("le type de discours"). According to the court, the margin available to Convention States to restrict freedom of speech is wide if the expression in question concerns economic matters – commercially motivated communication – without political relevance.[130] Thus, a privileged status of political speech follows from the Strasbourg jurisprudence. In cases of a censorious use of copyright, a suppression of political speech can hardly be justified.

Conclusion

By its very nature, copyright regulates speech. Right holders take advantage of it to silence others. We therefore need a constant vigilance in regard to copyright doctrine. Not only for the standing of copyright in society but for the sake of the fundamental rights of third parties. Copyright can have a chilling effect, thereby threaten the free democratic discourse. National courts must implement the exceptions and limitations as interpreted by the CJEU in their national law. They do not have to implement them in the framework of exceptional provisions, but any safety valves of national law can be opened to strike a fair balance between copyright and freedom of speech. In the digital age with an overly expanded copyright, it is more important than ever to prevent a censorious copyright. Free speech is only *free* if one can speak with works of others that are valuable in constitutional terms.

[129] On the difficulty of defining what is "political", see CARL SCHMITT, DER BEGRIFF DES POLITISCHEN, 19 et seq. (2009).

[130] *Ashby Donald et autres*, App. No. 36769 at para. 39; in general, see Mouvement Raelien Suisse/Switzerland, App. No. 16354/06, para. 62 and 63 (Jul. 13, 2012), https://hudoc.echr.coe.int; Markt Intern Verlag GmBH and Klaus Beermann v. Germany, App. No. 10572/83, para. 33 (Nov. 20, 1989); Hertel v. Switzerland, App. No. 25181/94, para. 47 (Aug. 25, 1998).

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