Chapter 10
Quotation under EU copyright law

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Abstract

A fundamental act of permissible use in copyright law, quotation has a relatively broad scope under EU copyright as the Court of Justice (CJEU) has affirmed. Developing a principle-based perspective on the theoretical justification underpinning copyright protection as a dialogue between authors and users, cases C-469/17 *Funke Medien*, C-476/17 *Pelham,* and C-516/17 *Spiegel Online,* explain that exceptions and limitations to copyright, including the quotation exception, crystallise the balance between copyright and fundamental freedoms, such as the freedom of speech. External application of fundamental freedoms as defensive rules is hence not necessary. A natural unfolding of the implications of the concept of the balance between copyright and fundamental rights is that the CJEU affirmed the integral status of copyright exceptions and limitations as user rights. This is a ground-breaking insight on the legal nature of these defensive rules under EU copyright law, aligning with scholarly consensus towards the recognition of copyright user rights and departing from national precedents denying the existence of rights of the users. The present contribution discusses the scope of permissible quotation under EU copyright, investigates the legal nature of this provision and, going beyond current scholarship, inquires the contextual framework and legal implications from declaring the relevant legal provision as a right of the users of copyright protected works.

Keywords

Quotation; copyright exceptions and limitations; public domain; fundamental freedoms; freedom of speech; copyright balance; user rights

Introduction

Quotation is one of the fundamental acts of permissible use in copyright law, finding its roots in freedom of speech and being available under international copyright law.[1] Technically listed as one of the so-called exceptions and limitations to copyright under Article 5 of the Information Society Directive[2] and the national laws implementing it, it is understood to serve as a defence in cases of *prima facie* copyright infringement. Despite the longstanding scholarly consensus in favour of

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[1] Article 10(1) of the Berne Convention for the Protection of Literary and Artistic Works (as amended on September 28, 1979).

[2] 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, Official Journal L 167, 22 June 2001 ('Information Society Directive').

recognizing copyright exceptions premised on fundamental rights as user rights[3] (see specifically the discussion in Chapter 11), the quotation exception, and copyright exceptions and limitations more broadly, have not received such a recognition under EU copyright,[4] until recently.

In a trilogy of cases that were incidentally issued on the same day,[5] the Court of Justice of the European Union (CJEU) discussed the quotation exception of Article 5(3)(d), offering interpretative guidance on the concept of permissible 'quotation', its object and legal nature, and the intersection of the exception with the fundamental rights that underpin it, notably freedom of speech and press. In all three cases, the key question centred on whether freedom of expression and information, including freedom of the media (in *Funke Medien* and *Spiegel Online*) and freedom of arts (in *Pelham*), justifies copyright exceptions or limitations to the exclusive rights of authors or phonogram producers beyond the list of exceptions and limitations available under Article 5 of the Information Society Directive. To put it simply, the question was whether copyright law can be subject to review on the basis of freedom of expression from an external perspective. Upholding the stance of the Advocate General (AG), the Court rejected the idea that the list of exceptions and limitations of Article 5 can be complemented with external defences, which find their root in fundamental freedoms[6] (on the interplay between copyright and other fundamental rights, see the discussion in Chapter 2; with specific regard to copyright exceptions, see the discussion in Chapter 12). Following a discussion on the so-called copyright balance, the Court stated that exceptions to rights are not to be understood as mere derogations from exclusive rights but as rights of the users of the protected works or other subject matter.[7] As the Court noted in *Funke Medien* and *Spiegel Online:*

> [a]lthough Article 5 of Directive 2001/29 is expressly entitled 'Exceptions and limitations', it should be noted that those exceptions or limitations do themselves confer rights on the users of works or of other subject matter.[8]

Although it is not yet entirely clear what the meaning of such a proclamation is, this is

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[3] See e.g. Pascale Chapderlaine, *Copyright User Rights: Contracts and the Erosion of Property* (Oxford: Oxford University Press, 2017); Niva Elkin-Koren, 'Copyright in a Digital Ecosystem: A User Rights Approach' in Ruth L. Okediji (ed), *Copyright Law in an Age of Limitations and Exceptions* (New York: Cambridge University Press, 2017) 132.

[4] Besides the legal framework envisaged in Article 6 of the Information Society Directive. National case law on other copyright exceptions has so far been negative in recognizing the status of user rights for copyright exceptions. Indicatively see: *Studio Canal et al v S. Penguin and Union Federale des Consommateurs Que Choisir*, Cour de Cassation, 19 June 2008, No 07-142777 (France); Supreme Court (Cour de cassation), no 07-18778, 27 November 2008 ('Phil Collins') (France); *L'ASBL Association Belge des Consomateurs Test Achats v La SA EMI Recorded Music Belgium et al*, Tribunal of First Instance of Brussels, 2004/46/A, 27 April 2004 (Belgium).

[5] *Funke Medien NRW GmbH v Federal Republic of Germany*, C-469/17, 29 July 2019, ECLI:EU:C:2019:623 ('Funke Medien'); *Pelham GmbH, Moses Pelham, Martin Haas v Ralf Hütter, Florian Schneider-Esleben*, Case C-476/17, 29 July 2019, ECLI:EU:C:2019:624 ('Pelham'); *Spiegel Online v Volker Beck*, Case C-516/17, 29 July 2019, ECLI:EU:C:2019:625 ('Spiegel Online').

[6] *Funke Medien*, [64]; *Pelham*, [65]; *Spiegel Online*, [49].

[7] Opinion of Advocate General Szpunar in *Funke Medien NRW GmbH v Federal Republic of Germany*, C- 469/17, 25 October 2018, EU:C:2018:870; Opinion of Advocate General Szpunar in *Pelham GmbH and Others v Ralf Hütter and Florian Schneider- Esleben*, C-476/17, 12 December 2018, EU:C:2018:1002; and Opinion of Advocate General Szpunar in *Spiegel Online GmbH v Volker Beck*, C-516/17, 10 January 2019, EU:C:2019:16.

[8] *Funke Medien,* [70]; *Spiegel Online*, [54].

a first step towards the recognition of copyright exceptions as user rights – a matter that has been subject to a long-standing scholarly debate,[9] making the CJEU quotation cases equivalent to the Canadian *CCH* judgment,[10] which developed an understanding of copyright exceptions as user rights.

The quotation exception in the light of the CJEU case law has so far been discussed in a research paper by Christophe Geiger and Elena Izyumenko, where the authors offer insights on the constitutionalization of EU copyright law, focusing primarily on the intersection between copyright, exceptions, and fundamental rights.[11] There is also scholarship on the quotation exception before the trilogy of cases was issued.[12] The present contribution discusses the scope of permissible quotation under EU copyright, investigates the legal nature of this provision and, going beyond current scholarship, inquires the contextual framework and legal implications from declaring the relevant legal provision as a right of the users of protected works.

Permitted quotations in CJEU case law

Quotation is one of the fundamental acts of permissible use in copyright law. There is no copyright system on worldwide basis that does not allow quotation of protected works or other subject matter.[13] Indeed, quotation is one of the few so-called exceptions to copyright that are permissible as a matter of international copyright law. Article 10(1) of the Berne Convention allows Member States to introduce legal provisions allowing fair quotations of protected works. According to that provision,

> [i]t shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries.

Article 10(3) of the Berne Convention adds a further requirement, according to which:

> [w]here use is made of works in accordance with the preceding paragraphs of this Article, mention shall be made of the source, and of the name of the author if it appears thereon.

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[9] See e.g. Pascale Chapderlaine, *Copyright User Rights: Contracts and the Erosion of Property* (Oxford: Oxford University Press, 2017); Niva Elkin-Koren, 'Copyright in a Digital Ecosystem: A User Rights Approach' in Ruth L. Okediji (ed), *Copyright Law in an Age of Limitations and Exceptions* (New York: Cambridge University Press, 2017) 132.

[10] *CCH Canadian Ltd v Law Society of Upper Canada*, 2004 SCC 14 (CCH) (Canada).

[11] Christophe Geiger and Elena Izyumenko, '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!' Centre for International Intellectual Property Research Paper Series, University of Strasburg, Paper No 2019-09 (NB: Tanya Aplin and Lionel Bently, *Global Mandatory Fair Use: The Nature and Scope of the Right to Quote Copyright Works* (Cambridge: CUP, forthcoming).

[12] See Lionel Bently and Tanya Aplin, 'Whatever Became of Global, Mandatory, Fair Use? A Case Study in Dysfunctional Pluralism' in Susy Frankel (ed.), *Is Intellectual Property Pluralism Functional?* (Cheltenham: Edward Elgar, 2019), 8; Jane Parkin, 'The copyright quotation exception: *not* fair use by another name' (2019) 19(1) *Oxford University Commonwealth Law Journal* 55.

[13] This is because it is a mandatory provision of the Berne Convention and as such applies to all 174 contracting states. In addition, Article 10(1) of the Berne Convention has to be complied by TRIPS.

The rationale for permitting quotation of protected works rests primarily on freedom of expression as two of the central purposes for which permissible quotation can be carried out are criticism and review. The quotation exception available under international copyright law has been convincingly argued to introduce global mandatory fair use: 'The breadth of the obligatory exception is wide: as enacted in national law, it should not be limited by work, nor by type of act, nor by purpose.'[14]

At the EU level, quotation has been harmonized through Article 5(3)(d) of the Information Society Directive, according to which:

> Member States may provide for exceptions or limitations to the rights [of reproduction and communication to the public allowing] quotations for purposes such as criticism or review, provided that they relate to a work or other subject-matter which has already been lawfully made available to the public, that, unless this turns out to be impossible, the source, including the author's name, is indicated, and that their use is in accordance with fair practice, and to the extent required by the specific purpose.[15]

In line with the Berne Convention, the Directive offers an indication of purposes for which permissible quotations can be made, requires that the source, including the author's name, is attributed, and stipulates that quoted materials must relate to a work that has been lawfully made available to the public. In addition, it is clarified that use of protected works is carried out in accordance with fair practice and within the specific purpose for which quotation was carried out.

The CJEU offered interpretative guidance on Article 5(3)(d) in *Funke Medien*, *Pelham* and *Spiegel Online*. It is discussed below.

The purpose and character of the use

The concept of permissible quotations under EU copyright is broad, in that it can be carried out for any purpose; criticism and review are offered as indicative examples. Although it is to be assumed that this choice of words indicates that some critical engagement is necessary, a broad range of further purposes may be equally permissible, such as cross-referential use, advancement of knowledge, advertisement and so on. This enlarges the scope of the exception which is applicable in the context of any purpose that can be judicially deemed as acceptable. However, to be permitted, the quote should be confined to the particular purpose for which the use is carried out. This means that the exception is subject to a proportionality limit.

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[14] Lionel Bently and Tanya Aplin, 'Whatever Became of Global, Mandatory, Fair Use? A Case Study in Dysfunctional Pluralism' in Susy Frankel (ed.), *Is Intellectual Property Pluralism Functional?* (Cheltenham: Edward Elgar, 2019), 8 (NB: Tanya Aplin and Lionel Bently, *Global Mandatory Fair Use: The Nature and Scope of the Right to Quote Copyright Works* (Cambridge: CUP, forthcoming).

[15] Also see to this effect Recital 34 of the Information Society Directive 2001/29/EC which reads as follows:

> Member States should be given the option of providing for certain exceptions or limitations for cases such as educational and scientific purposes, for the benefit of public institutions such as libraries and archives, for purposes of news reporting, for quotations, for use by people with disabilities, for public security uses and for uses in administrative and judicial proceedings.

Clarity on the meaning of permissible quotation was offered in *Pelham,* which explained that, because the term 'quotation' is not defined in statutory sources, its meaning and scope has to be determined on the basis of its usual meaning in everyday language, whilst taking into consideration the broader context of the legislative framework of which it is part.[16] In this regard, 'quotation' includes

> the use, by a user other than the copyright holder, of a work or, more generally, of an extract from a work for the purposes of illustrating an assertion, of defending an opinion or of allowing an intellectual comparison between that work and the assertions of that user, since the user of a protected work wishing to rely on the quotation exception must therefore have the intention of entering into 'dialogue' with that work.[17]

Such a dialogue cannot be possible when the extract no longer remains identifiable, in which case it is not part of permissible 'quotation'. This remark was relevant in *Pelham* as the case concerned sampling and the extent to which it requires a licence from the relevant phonogram producer, to be lawful. In that context, the Court held that permissible quotations do not include those where the intellectual dialectic between the original and the new work is interrupted. In this regard, *Pelham* is interesting as it can be read as having 'legitimized' the unlicensed mining of musical content (on the EU text and data mining exceptions, see the discussion in Chapters 11 and 21).

The concept of permissible 'quotation' was further clarified in *Funke Medien*, where the Court stated that Article 5(3)(d) outlines a merely illustrative list of permissible quotations as use of the words 'for purposes such as criticism or review' indicates.[18] This affirms the broad and perhaps flexible scope of the quotation exception under EU copyright law. In that case, Funke Medien, the owner of a German newspaper (*Westdeutsche Allgemeine Zeitung*) website, had requested competent authorities to provide access to classified, weekly military status reports but application was denied for to public-security reasons. However, Funke Medien obtained a portion of the aforementioned documents through an undisclosed source and published individually scanned pages online. The Federal Republic of Germany brought proceedings, requesting the removal of the materials on grounds of copyright infringement. The German Republic's action for an injunction against Funke Medien was upheld by the Regional Court of Cologne and Funke Medien's appeal before the Higher Regional Court of Cologne was dismissed. In its appeal on a point of law, brought before the Federal Court of Justice, Funke Medien maintained its contention that the action for an injunction should be dismissed. When discussing the copyright exception permitting reproductions by the press and quotations—available respectively under Articles 5(3)(c) and (d) of the Information Society Directive—the Court stressed that none of these provisions constitutes 'full harmonisation of the scope of the exceptions or limitations which it contains'.[19] The Court noted that criticism and review are merely indicative examples of purposes for which permissible quotations can be

[16] Ibid, [70].

[17] Ibid, [71] (affirming the position of the AG); also see *Spiegel Online v Volker Beck*, Case C-516/17, 29 July 2019, ECLI:EU:C:2019:625 (Spiegel Online), [77]-[78].

[18] *Funke Medien*, [43].

[19] *Funke Medien*, [42].

made. Although there is limited national case law on the quotation exception that could shed light on other purposes for which the permissible quotation can be carried out, the Court clarified in *Pelham* that further purposes include illustration of an assertion, defending an opinion or of allowing an intellectual comparison between that work and the assertions of that user.[20] Read together, *Pelham* and *Funke Medien* clarify that permissible quotations have a relatively broad scope in that the purposes for which they are carried out can be flexible in so far as it enables a dialectic between the original and the new work.

The understanding that the purposes of criticism and review are merely indicative examples of permissible use aligns with earlier national interpretations of the quotation exception. For instance, in the UK case *Pro Sieben Media*,[21] which concerned a current affairs programme that copied a TV-show extract, the Court of Appeal of England and Wales observed that the phrase 'for the purpose of' does not mean that a subjective test should be used in order to assess whether a use is for the purpose of criticism and review; the intentions and motives of the user are not irrelevant but should be taken into consideration in assessing whether a dealing is 'fair' in relation to its purpose. In this regard, a liberal approach was taken in order to assess the appropriate scope of 'criticism or review'.

A liberal approach on the purposes for which quotation can take place allows certain secondary uses of works that 'transform' the original, in a fair use sense[22] (for a discussion of US fair use *vis-á-vis* the European approach, see Chapter 13). Such uses however are not permissible when they are as excessive as no longer depicting the original work and intellectual engagement with it. This could be read to enable certain kinds of uses that have been deemed 'transformative', hence fair, under the US fair use doctrine. Such uses could include, for instance, use of thumbnails to enable image search[23] or projecting snippets of works in search engines,[24] to the extent that the use in question aligns with all the conditions of permissible quotations.

In terms of the form that a quotation can take, *Spiegel Online* instructs that the concept of permissible 'quotation' under Article 5(3)(d) includes hyperlinks to files that can be downloaded independently online. In this regard, there is no requirement that the quoted work is inextricably integrated through insertions or reproductions in footnotes into the work or other subject matter citing it. The Court relied on the usual

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[20] Ibid, [71] (affirming the position of the Advocate General); also see *Spiegel Online v Volker Beck*, Case C-516/17, 29 July 2019, ECLI:EU:C:2019:625 (Spiegel Online), [77]-[78].

[21] *Pro Sieben Media A.G. v Carlton U.K. Television and Another*, Court of Appeal (Civil Division), 17 December 1998 (UK); for a comment see: David Bradshaw, 'Copyright, Fair Dealing and the Mandy Allwood Case: the Court of Appeal Gets the Max out of a Multiple Pregnancy Opportunity' (1999) 19(5) *Entertainment Law Review* 125; Mark Haftke, 'Pro Sieben Media AG v Carlton UK Television Ltd [1999] 1 WLR 605 (CA)' (1999) 10(4) *Entertainment Law Review* 118; Jeremy Phillips, 'Fair Stealing and the Teddy Bears' Picnic' (1999) 10(3) *Entertainment Law Review* 57.

[22] See in general Pierre N. Leval, 'Toward a Fair Use Standard' (1990) 103 *Harvard Law Review* 1105; Jeremy Kudon, 'Form over Function: Expanding the Transformative Use Test for Fair Use' (2000) 80 *Boston University Law Review* 579; Edward Lee, 'Technological Fair Use' (2010) 83 *Southern California Law Review* 797; John Tehranian, 'Whither Copyright? Transformative Use, Free Speech, and an Intermediate Liability Proposal' (2006) *Brigham Young University Law Review* 1201.

[23] See, e.g., US cases *Kelly v Arriba Soft Corporation*, 336 F 3d 811 (9th Cir 2003); *Perfect 10 v Amazon.com*, 508 F 3d 1146, 15474.

[24] See, e.g., *Authors Guild, Inc. v Google, Inc.*, 804 F.3d 202 (2d Cir. 2015); *Authors Guild, Inc. v Google, Inc.,* 578 U.S. 849 (2016).

meaning of the term ‘quotation’ and upheld the position of the AG,[25] who deemed that the quotation exception requires a direct and close link between the quoted work and the defendant’s reflections, enabling an intellectual comparison and dialectic between the two. He did note however that quotation cannot be as extensive as to come in conflict with the normal exploitation of the work or prejudice the legitimate interests of the rightholder, in contravention with the three-step test articulated in Article 5(5) of the Information Society Directive (for a discussion of the EU three-step test, see Chapter 14). The purpose specificity of the quotation exception is meant to ensure compliance with the three-step test.

The kind of copyright-protected work

The exception of Article 5(3)(d) of the Information Society Directive does not specify the kinds of work that can be subject to unauthorized quotation. By contrast, it clarifies that quotations should ‘relate to a work or other subject-matter which has already been lawfully made available to the public’. This means that any kind of copyright-protected subject matter can be subject to copying for the purposes of quotation, including images, videos, and performances. The only limitation is that that subject matter should have previously been made lawfully available to the public. In that regard, the Court has noted that the use in question must be made in accordance with fair practice, to the extent required by the specific purpose, i.e. the use of the work should not be extended beyond the confines of what it necessary to achieve the informatory purpose of that particular quotation, and only if the quotation relates to a work which has already been lawfully made available to the public.[26] Although it is up to the national court to decide whether the content published by the politician on his website was lawfully made available to the online portal placing hyperlinks on it,[27] the case does affirm a wide scope on what qualifies as permissible quotation, despite the fact that there are numerous conditions that need to be met for the quotation to apply.

In *Spiegel Online,* where the CJEU had been called to assess the compatibility with EU law of an open-ended general copyright exception like the German 'free use', the Court held that

> the exception for quotations applies only if the quotation in question relates to a work which has already been lawfully made available to the public. That is the case where the work, in its specific form, was previously made available to the public with the rightholder’s authorisation or in accordance with a non-contractual licence or statutory authorisation.

This clarifies that the exception has no scope of application on unpublished works. The nature of the original work impacts on the applicability of the exception.

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[25] Opinion of Advocate General Szpunar in *Spiegel Online v Volker Beck*, Case C-516/17, 10 January 2019, ECLI:EU:C:2019:16, [43]; for a comment see Jonathan Griffiths, ‘European Union copyright law and the Charter of Fundamental Rights—Advocate General Szpunar’s Opinions in (C-469/17) *Funke Medien*, (C-476/17) *Pelham GmbH* and (C-516/17) *Spiegel Online’* (2019) 20(1) *ERA Forum* 35.
[26] *Spiegel Online*, [83].
[27] *Spiegel Online*, [91].

The amount and substantiality of the portion taken

In *Pelham,* the Court held that unauthorized samples, however short, may infringe a phonogram producer's rights. The reason is that they are considered to be reproductions 'in part' of the original work. However, the CJEU remarked that:

> where 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 unrecognisable to the ear, in a new work, […] such use does not constitute 'reproduction'.[28]

This means that when an extract is creatively used with a view to develop a new and distinct work it does not amount to an act of actionable copying.

The effect of the use upon the potential market

An important condition of the exception is that permitted quotations should be in accordance with fair practice. This factors a test of fairness into the permissibility of the exception. Although not addressed at the CJEU level, national case law on the quotation exception has considered the degree to which an allegedly infringing use competes with the exploitation of the original work. This is primarily a matter of reflecting on the permissibility of a given use in the light of the three-step test of Article 5(5) of the Information Society Directive, and in particular the need to ensure that an activity does not come in conflict with a normal exploitation of the work. Even though a distinct condition on the permissibility of quotations, the fact that a work has been published is also important in terms of understanding whether a particular use would amount to an act of unfair engagement with the work.

The interpretation of the quotation exception by the CJEU allows a liberal approach that arguably aligns with an understanding of the quotation exception as an open-ended, fair-use fashioned norm.[29] This is for three main reasons. First, it is not limited by purpose. The purposes of criticism and review are only indicative examples of permissible use,[30] allowing courts the discretion to develop a broad perspective of what amounts to permissible quotation. Second, there is no limitation on the kind of work that can be quoted, e.g., literary or dramatic work, to the extent that the original work has been previously published. Importantly, the exception is meant to be assessed from the perspective of fairness and as a result it introduces a degree of flexibility at the judicial level.

In this context, the Court's reasoning of fairness is incorporated in the analysis of the copyright balance, as reflected within copyright exceptions and limitations.

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[28] *Pelham,* [31].
[29] See in this regard (by reference to Article 10 of the Berne Convention) Lionel Bently and Tanya Aplin, 'Whatever Became of Global, Mandatory, Fair Use? A Case Study in Dysfunctional Pluralism' in Susy Frankel (ed.), *Is Intellectual Property Pluralism Functional?* (Cheltenham: Edward Elgar, 2019), 8.
[30] See in general Stavroula Karapapa, *Defences to Copyright Infringement* (Oxford: OUP, 2020); *Funke Medien*, [43].

The copyright balance: exclusive rights, exceptions and fundamental rights

Beyond the scope and meaning of the quotation exception under EU copyright, the CJEU also clarified the interplay between copyright and fundamental rights, crystallized in the so-called copyright balance. In *Funke Medien*, the Court ruled that

> freedom of information and freedom of the press, enshrined in Article 11 of the Charter of Fundamental Rights of the European Union, 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.

The effect of this clarification is that defendants in cases of copyright infringement cannot rely directly on the relevant fundamental rights on which copyright exceptions are premised, e.g., freedom of speech or freedom of the press. The balancing act between copyright and fundamental rights is deemed to have taken place at the legislative stage: it is legislators who balance rights in conflict and develop the relevant copyright exceptions and limitations as express manifestations of balance between rights.[31]

The Court stressed that copyright exceptions and limitations available under Article 5 of the Information Society Directive are

> specifically intended […] to ensure a fair balance between, on the one hand, the rights and interests of rightholders […] and, on the other, the rights and interests of users of works or other subject matter.[32]

By reference to the exceptions allowing quotations and news reporting, it held that they

> are specifically aimed at favouring the exercise of the right to freedom of expression by the users of protected subject matter and to freedom of the press, which is of particular importance when protected as a fundamental right, over the interest of the author in being able to prevent the use of his or her work, whilst ensuring that the author has the right, in principle, to have his or her name indicated.[33]

This means that, according to the reasoning of the CJEU, copyright's internal balance

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[31] See also in this regard the Opinion of the Advocate General Saugmandsgaard in *Frank Peterson v Google LLC et al,* Joined Cases C-682/18 and C-683/18, 16 July 2020, ECLI:EU:C:2020:586, [238]:

> where the Court both delimits those rights and specifies the scope of the exceptions and limitations, it seeks to arrive at a *reasonable* interpretation which safeguards the purpose pursued by those different provisions and maintains the 'fair balance' which the EU legislature intended to establish in the directive between various fundamental rights and opposing interests.

[32] *Funke Medien*, [70]; *Spiegel Online*, [54].

[33] *Funke Medien*, [60], [73]; *Spiegel Online*, at [45], [57], [72]. Also see *Eva-Maria Painer v Standard VerlagsGmbH and Others*, Case C-145/10, ECLI:EU:C:2011:798, [135].

between exclusive rights of copyright holders and freedom of speech is realized via copyright exceptions and limitations.[34]

This aligns with the position adopted by the AG. Having delivered opinions in all three cases, *Funke Medien*, *Pelham* and *Spiegel Online*, AG Szpunar held in *Funke Medien* that freedom of expression was paramount in defining the limits of the copyright protected materials at issue but could not serve as external limit to the protection offered by copyright, complementing the list of exceptions and limitations available under Article 5 of the Directive.[35] He maintained this position in his opinions in *Pelham* and *Spiegel Online*, where he rejected the idea that freedom of expression could serve as an external limit to copyright protection and held that it would be for the legislature to decide on the introduction of additional exceptions or limitations in the Information Society Directive,[36] with open-ended defences being deemed as detrimental to the objectives of harmonisation.[37]

The Court affirmed that external application of freedom of speech is not necessary, despite the undisputed relevance of fundamental rights in shaping EU copyright law. For instance, in *Funke Medien* freedom of expression was instrumental both in shaping the subject-matter of copyright protection by excluding non-original works of a merely informative nature and by informing the content of exceptions for the purposes of quotation and news reporting, featuring in Articles 5(3)(d) and 5(3)(c) of the Information Society Directive respectively.[38] In *Spiegel Online*, freedom of expression required interpreting the quotation exception in the context of hyperlinking, as a form of quotation of the protected work.[39] In *Pelham,* the Court interpreted the exclusive reproduction right and the quotation exception in the light of fundamental rights, holding that the quotation exception refers to uses that open a dialogue with the original work—an argument reflecting a Kantian understanding of copyright law.[40] In all three cases, the Court internalized the analysis of fundamental rights within the purpose and meaning of the copyright exception in a relatively liberal way,[41] being ‘in clear opposition with the [European Court of Human Rights] case law that mandates a case-by-case approach’.[42]

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[34] *Funke Medien*, [58], [70]; *Pelham*, [60]; *Spiegel Online*, [43], [54].

[35] Opinion of Advocate General Szpunar in *Funke Medien*, [38]-[41] and [70]-[71].

[36] Opinion of Advocate General Szpunar in *Pelham*, [54], [77] and [98].

[37] Opinion of Advocate General Szpunar in *Spiegel Online,* [63].

[38] *Funke Medien*, [24], [71], [73]-[76].

[39] *Spiegel Online*, [80].

[40] See in this regard Abraham Drassinower, *What's Wrong With Copying?* (Cambridge, Mass: HUP, 2015).

[41] See in this regard Christophe Geiger and Elena Izyumenko, ‘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!’ Centre for International Intellectual Property Research Paper Series, University of Strasburg, Paper No 2019-09, 11-13; also see Jonathan Griffiths, ‘Constitutionalising or Harmonising? The Court of Justice, the Right to Property and European Copyright Law’ (2013) 38 *European Law Review* 65.

[42] See e.g. *Ashby Donald and Others v France* [2013] ECHR 287; *Neij and Sunde Kolmisoppi v Sweden* (*The Pirate Bay*), no. 40397/12, 19 February 2013, CE:ECHR:2013:0219DEC004039712; also see Christophe Geiger and Elena Izyumenko, ‘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!’ Centre for International Intellectual Property Research Paper Series, University of Strasburg, Paper No 2019-09, 26.

This approach was also accompanied by discretion left to the Member States in defining the boundaries of permissible quotation and other copyright exceptions listed under Article 5 of the Information Society Directive. As the Court noted, unlike exclusive rights, such as reproduction and communication to the public, which have been subject to full EU harmonization, in the context of copyright exceptions and limitations, including the quotation exception, Member States enjoy 'significant discretion allowing them to strike a balance between the relevant interests'.[43]

A natural unfolding of the implications of the concept of the balance between copyright and fundamental rights as a balance between dual objectives[44] is that the CJEU affirmed the integral status of copyright exceptions and limitations as user rights. In order to be achieved, the copyright balance requires obtaining a just reward for the copyright holder whilst promoting the public interest. Holding copyright exceptions as user rights is an unprecedented declaration under EU copyright law and, although its substantive meaning has not yet been judicially discussed, it develops an unambiguous affirmation of the integral role of the public domain in copyright law.

The legal nature of the quotation exception

A ground-breaking insight on the legal nature of the exceptions and limitations listed in Article 5 of the Information Society Directive, including those premised on a freedom of expression rationale, such as the quotation exception, is that those exceptions or limitations do themselves confer rights on the users of works or of other subject matter.[45] In earlier cases, such as *Telekabel*[46] and *Technische Universität Darmstadt*,[47] the Court developed some timid insights on the affirmation of copyright exceptions as user rights. *Telekabel*, concerned a website blocking injunction to stop online copyright infringement and the Court expressly recognized the action for customers of Internet service providers that were affected by website blocking. The Court ruled that

> in order to prevent the fundamental rights recognised by EU law from precluding the adoption of an injunction such as that at issue in the main proceedings, the national procedural rules *must provide* a possibility for internet users to assert their rights before the court once the implementing measures taken by the internet service provider are known.[48]

In *Technische Universität Darmstadt*, the Court ruled that Member States were free to authorize digitization of works available in the collections of publicly accessible libraries, without the consent of the copyright holders, by these libraries to the extent of making these works available on dedicated terminals. As the Court remarked,

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[43] *Funke Medien*, [38], [42]-[43]; *Pelham*, [84]-[86]; *Spiegel Online*, [27]-[28].
[44] See in this regard the commentary of Abraham Drassinower on the *CCH* case: Abraham Drassinower, Taking User Rights Seriously, in Michael Geist (ed.), *In the Public Interest: The Future of Canadian Copyright Law* (Toronto: Irwin Law, 2005), 462, 467.
[45] *Funke Medien,* [70]; *Spiegel Online*, [54].
[46] *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH, Wega Filmproduktionsgesellschaft mbH*, Case C-314/12, ECLI:EU:C:2014:192 ('Telekabel').
[47] *Technische Universität Darmstadt v Eugen Ulmer KG*, Case C-117/13, ECLI:EU:C:2014:2196 ('Technische Universität Darmstadt').
[48] *Telekabel*, [57].

> [s]uch a right of communication of works […] would risk being rendered largely meaningless, or indeed ineffective, if those establishments did not have an *ancillary right* to digitise the works in question.[49]

Earlier judgments of the Court also developed the understanding that copyright exceptions ought to be understood as user rights. For instance, in *Painer*, a case concerning copyright subsistence in a portrait photograph, the Court advanced the idea that the quotation exception of Article 5(3)(d) of the Information Society Directive is intended to strike a fair balance between the right to freedom of expression of users of a work or other protected subject matter and the reproduction right conferred on authors; that fair balance is struck by favouring the exercise of the users' right to freedom of expression over the interest of the author in being able to prevent the reproduction of extracts from his work which has already been lawfully made available to the public, whilst ensuring that the author has the right, in principle, to have his name indicated.[50] A similar approach was followed in *Deckmyn* (see the discussion in Chapter 13), where the Court found that the parody exception is intended to strike a fair balance between the interests and rights of copyright holders and the rights of users of protected works or other subject-matter to freedom of expression.[51] The reference to fair balance in the aforementioned cases can be read as a timid affirmation of the equal weight of user rights against copyright's exclusivity.

It was not until *Funke Medien* and *Spiegel Online*, however, that the Court unequivocally declared that copyright exceptions are to be understood as rights of users. In particular, it held that 'although Article 5 of Directive 2001/29 is expressly entitled 'Exceptions and limitations', it should be noted that those exceptions or limitations do themselves confer rights on the users of works or of other subject matter'.[52] This can be seen as a turning point in the jurisprudence of the CJEU and national courts,[53] echoing the position of the Canadian Supreme Court in the famous *CCH* decision where it was held that '[t]he exceptions to copyright infringement [are] perhaps more properly understood as users' rights ....'.[54]

Before the CJEU quotation cases, the conceptualization of copyright exceptions and limitations as user rights was only sporadically recognized in the European Union

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[49] *Technische Universität Darmstadt*, [43] (emphasis added), [31].
[50] *Painer*, [134]-[135].
[51] *Johan Deckmyn and Vrijheidsfonds VZW v Helena Vandersteen and Others*, Case C-201/13, ECLI:EU:C:2014:2132, [27].
[52] *Funke Medien,* [70]; *Spiegel Online*, [54] (emphasis added).
[53] *CCH* (Canada); upheld in two further Canadian cases: *SOCAN v Bell Canada SOCAN*, 2012 SCC 36; *Alberta (educ.) v Canadian Copyright Licensing Agency*, 2012 SCC 37.
Limited recognition of fair use as a user right took place in the United States in *Baterman v Mnemonics, Inc*. 79 F.3d 1532, 1542, n.22 (11th Cir. 1996):

> Although the traditional approach is to view 'fair use' as an affirmative defense, this writer, speaking only for himself, is of the opinion that it is better viewed as a right granted by the Copyright Act of 1976. Originally, as a judicial doctrine without any statutory basis, fair use was an infringement that was excused - this is presumably why it was treated as a defense. As a statutory doctrine, however, fair use is not an infringement. Thus, since the passage of the 1976 Act, fair use should no longer be considered an infringement to be excused; instead, it is logical to view fair use as a right.

Also see in this regard, *SunTrust Bank v Houghton Mifflin Co.,* 268 F.3d 1257 n.3 (11th Cir. 2001).
[54] *CCH*, [12].

(EU). In fact, it is only very few Member States that expressly declare certain copyright exceptions and limitations mandatory against contractual override, clarifying that restrictive licensing terms shall be declared null and void.[55] The UK, for instance, following its 2014 copyright reform, expressly stipulates in its Copyright, Designs, and Patents Act (with regard to the quotation defence) that

> [t]o the extent that a term of a contract purports to prevent or restrict the doing of any act which, by virtue of subsection (1ZA), would not infringe copyright, that term is unenforceable.[56]

Declaring exceptions imperative against contractual restriction has also become a matter of EU copyright law recently, with the Digital Single Market Directive[57] expressly recognizing some of the copyright exceptions it introduces as mandatory against contractual override.[58] This Directive also stipulates that the complaint and redress mechanisms that online content-sharing service providers will have to provide at the national level shall not prejudice 'the rights of users to have recourse to efficient judicial remedies',[59] affirming to some extent the existence of positive user rights. Before the Digital Single Market Directive, the relationship of copyright exceptions and limitations with contractual or technological overridability has been subject to sporadic harmonization in the EU.[60]

Indeed, even though there may have been some attempts to address the relationship between exceptions and contract, national case law has so far been negative in affirming that exceptions qualify as positive rights of end users. National case law issued after the implementation of the Information Society Directive has been reluctant to recognize copyright exceptions as user rights, at least not in the form of actionable claims against the copyright holders. Relevant judgments were issued in the context of private copying where national courts clearly commented on the legal nature of the said exception to conclude that it merely functions as a defence against allegations for copyright infringement instead of a fully-fledged user right, in the form of actionable right to bring proceedings against the copyright holders.[61]

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[55] Belgium, Ireland, Portugal, and the United Kingdom.

[56] s.30(5) CDPA.

[57] 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, PE/51/2019/REV/1, OJ L 130, 17 May 2019 (Digital Single Market Directive).

[58] Ibid, Article 7(1).

[59] Ibid, Article 17(9).

[60] For most copyright exceptions and limitations, e.g. those included in the Information Society Directive, the relationship between permitted uses and contract is not expressly settled. However, certain exceptions under EU copyright are compulsory against contractual override. See, in particular, the Digital Single Market Directive, Article 7(1), and the Directive on Permitted Uses for Disabled Individuals (Directive 2017/1564), Article 3(5).
In other jurisdictions, like Canada, however, some exceptions were found to qualify as user rights: see *CCH* (Canada); see in this regard Michael Geist, 'The Canadian Copyright Story: How Canada Improbably Became the World Leader on Users' Rights in Copyright Law' in Ruth L. Okediji (ed), *Copyright Law in an Age of Limitations and Exceptions* (New York: Cambridge University Press, 2017) 169.

[61] Indicatively see: *Studio Canal et al v S. Penguin and Union Federale des Consommateurs Que Choisir*, Cour de Cassation, 19 June 2008, No 07-142777 (France); *Studio Canal et al v S. Penguin and Union Federale des Consommateurs Que Choisir*, Paris Court of Appeal, 4 April 2007, *Gaz. Pal.* 18 July 2007 No 199, 23 (France); *Studio Canal et al v S. Penguin and Union Federale des Consommateurs Que Choisir*, Cour de Cassation, 1st civil section, 28 February 2006, case No 549,

The idea that users have rights just as owners do and that users are equals whose rights deserve the same respect as owners' rights finds support in scholarship. As a matter of fact, the concept of user rights has been debated in literature for many years, with various scholars arguing towards the affirmation that certain copyright exceptions, notably those premised on a fundamental rights underpinning, such as the quotation exception, should be acknowledged as rights of the users.[62] This strand of literature would often invoke Wesley Hohfeld's theory on jural correlatives, according to which lawful users can have a claim against copyright holders when the various permissive rules have the status of rights.[63] Understanding copyright exceptions as user rights would have the implication that they are not merely deemed to be an exception to a rule, i.e. exclusive rights, hence not carried out by grace of the copyright holders. Although such defensive rules may not be transferrable or have correlative duties in a Hohfeldian sense, they still remain beyond the control of the copyright holders and are not deemed to be infringement by law.[64]

History too enables an understanding of user rights. Up to the early twentieth century, there was no need to introduce user rights in copyright because of the comparatively few exclusive rights. As Vaver notes, '[u]sers thus had rights to do what owners had no right to stop them from doing; user rights began where owner rights stopped.'[65] It would be primarily copying that was protected as an exclusive right and, even in cases of literal copying, there was no infringement unless the original work was unfairly appropriated.

There are various ways in which user rights in copyright law can be understood: positive rights to bring proceedings, entitlements that cannot be overridden by contract, or claims attracting their normative force from the fundamental rights on which they are underpinned. It is not yet clear what is the particular meaning that the CJEU will afford to copyright exceptions as user rights and perhaps this will be clarified in a new referral. However, its recognition of copyright exceptions and limitations as user rights seems to be a first step towards recognizing the importance of the user in copyright law and towards understanding defensive rules in copyright

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Bull. 2006 I No 126, 115 (Mulholland Drive) (France); Supreme Court (Cour de cassation), no 07-18778, 27 November 2008 (Phil Collins) (France); *Fnac Paris v UFC Que Choisir et autres,* Court of Appeal Paris (Cour d'appel Paris), 20 June 2007 (Phil Collins) (France)*; Mr. X and UFC Que Choisir v Warner Music France and FNAC Paris,* Paris District Court, 10 January 2006 (Phil Collins) (France); *L'ASBL Association Belge des Consomateurs Test Achats v La SA EMI Recorded Music Belgium et al*, Tribunal of First Instance of Brussels, 2004/46/A, 27 April 2004 (Belgium); *L'ASBL Association Belge des Consomateurs Test Achats v La SA EMI Recorded Music Belgium et al*, Brussels Court of Appeal, 9 September 2005, case 2004/AR/1649 (Belgium).

[62] See e.g. David Vaver, 'Copyright Defences as User Rights' (2013) 60(4) *Journal of the Copyright Society of the USA* 661; L. Ray Patterson and Stanley W. Lindberg, *The Nature of Copyright: A Law of User's Rights* (Athens, University of Georgia Press, 1991); Pascale Chapderlaine, *Copyright User Rights: Contracts and the Erosion of Property* (Oxford: Oxford University Press, 2017); Niva Elkin-Koren, 'Copyright in a Digital Ecosystem: A User Rights Approach' in Ruth L. Okediji (ed), *Copyright Law in an Age of Limitations and Exceptions* (New York: Cambridge University Press, 2017) 132.

[63] Wesley N. Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) *Yale Law Journal* 16, 30-31; Wesley N. Hohfeld, 'Fundamental Legal Conceptions as Applied to Judicial Reasoning' (2017) 26 *Yale Law Journal* 710.

[64] See in this regard David Vaver, 'Copyright Defences as User Rights' (2013) 60(4) *Journal of the Copyright Society of the USA* 661.

[65] Ibid, 670.

not negatively as exceptions but rather positively as rights of the users and hence integral to copyright law.

Conclusion

The quotation exception has a relatively broad scope under EU copyright law, as *Funke Medien*, *Pelham* and *Spiegel Online* illustrate, in that it is not subject to limits by purpose, nor by kind of work, nor by type of act. Importantly, the quotation exception, with its fundamental rights underpinning, has offered a judicial opportunity of elaborating on the legal nature of copyright exceptions and limitations. Refusing the application of defensive rules beyond those listed in Article 5 of the Information Society Directive, such as the direct application of fundamental rights, the CJEU reiterated that copyright has in place its internal mechanisms to achieve the balance between copyright and the exercise of fundamental freedoms. These mechanisms take the shape of copyright exceptions and limitations, which ultimately hold the integral status of rights of the users of protective works. Although the substantive meaning the legal nature of exceptions as user rights has not yet been judicially addressed, it develops an understanding of the centrality of the public domain in the EU and an evolution of our perception of defensive rules in EU copyright law, echoing a principle-based view on the theoretical justification underpinning copyright protection as a dialogue between authors and users.

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