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Jongsma, Daniel

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Fundamental Rights as External Constraints on Copyright Law: Horizontal Effect of the EU Charter after *Funke Medien* and *Spiegel Online*

Daniël Jongsma*

The author

Daniël Jongsma is a post-doctoral researcher at Hanken School of Economics (Helsinki, Finland). While writing this article the author received financial support from the research project Fairness, Morality and Equality in International and European Intellectual Property Law (FAME-IP), funded by the Academy of Finland. The issue at the centre of this contribution is also addressed in the author's doctoral dissertation, defended in January of 2020, and available online at <https://helda.helsinki.fi/dhanken/handle/10227/294110>.

This article

- The CJEU judgements in *Funke Medien* and *Spiegel Online* have been widely construed as rejecting the idea of fundamental rights as external constraints on copyright law. This appears to imply that the proper balance of (fundamental) rights and interests is exclusively struck by copyright law itself, where possible interpreted in light of those rights and interests. To the extent that an accommodating interpretation is not possible, one might fear a conflict with fundamental rights.
- I suggest that the rulings in *Funke Medien* and *Spiegel Online* must be understood narrowly. Firstly, they do not necessarily imply an outright rejection of horizontal direct effect. Secondly and arguably more importantly, those decisions did not concern the question of remedies. The *acquis communautaire* has established a flexible approach to remedies which allows them to be refused in appropriate circumstances. Consequently, disproportionate interferences with fundamental rights can be largely avoided.
- Although Member States likely possess a wide margin of discretion in tailoring remedies to the circumstances of the case, compliance with the EU Charter of Fundamental Rights demands that national courts in some cases refuse to enforce copyright. This article includes some suggestions as to the boundaries the Charter might set. Moreover, it is suggested that in Member States where national law does not provide courts with any discretion in terms of remedies, for instance by making

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the grant of a (final) injunction automatic, the offending provision of national law must be disapplied when necessary to ensure that national courts can strike a fair balance.

1 Introduction

Can fundamental rights function as external restrictions to copyright law, that is should certain uses be exempt from copyright infringement in order to safeguard such rights, even though no limitation or exception applies? This question has been extensively debated in academic circles for years, if not decades.[1] This debate essentially concerns the possible extent of horizontal effect of fundamental rights in disputes between private parties. Is their effect merely *indirect*, meaning that copyright law must be interpreted and applied insofar as possible in a manner that is consistent with those rights, or can fundamental rights also have horizontal *direct* effect, either by imposing subjective duties on private right holders or by requiring disapplication of provisions of copyright law when a consistent interpretation is not possible? The answer to this question is of particular relevance in copyright systems such as those in the EU, which work with a closed catalogue of limitations and exceptions.

On 29 July 2019, the Grand Chamber of the Court of Justice of the European Union (CJEU) handed down three landmark decisions concerning the interaction between copyright law and fundamental rights.[2] These decisions were widely anticipated, in no small part because in two of them, *Funke Medien* and *Spiegel Online*, the Court was expected to settle this debate. The Court appeared to unequivocally rule that fundamental rights cannot act as external constraints. Many commentators concluded not only that, as a result, any tension between copyright and fundamental rights must be resolved internally, but also that the proper safeguarding of fundamental rights may be in jeopardy given the inflexible system of limitations and exceptions in the EU.

This contribution aims to offer some further reflections one these assumptions. I suggest that although the CJEU has firmly rejected the possibility that Member States introduce limitations and exceptions with no basis in the InfoSoc Directive[3], it did not necessarily reject all possible forms of horizontal direct effect of fundamental rights. More importantly,

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[1] Notable European English-language contributions include, among many others, C. Angelopoulos, 'Freedom of expression and copyright: the double balancing act' (2008) Intellectual Property Quarterly 328, C. Geiger, 'Fundamental rights, a safeguard for the coherence of intellectual property law?' (2004) 35(3) International Review of Intellectual Property and Competition Law 268, C. Geiger and E. Izyumenko, 'Copyright on the human rights' trial: redefining the boundaries of exclusivity through freedom of expression' (2014) 45(3) International Review of Intellectual Property and Competition Law 316, P.B. Hugenholtz, 'Copyright and freedom of expression in Europe' in R. Cooper Dreyfuss, D. Leenheer Zimmerman and H. First (eds), *Expanding the Boundaries of Intellectual Property. Innovation Policy for the Knowledge Society* (Oxford University Press, Oxford 2001), p. 343-363, A. Peukert, 'The fundamental right to (intellectual) property and the discretion of the legislature' in C. Geiger (ed), *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar, Cheltenham, UK; Northampton, MA, USA 2015) and A. Strowel and F. Tulkens, 'Freedom of Expression and Copyright under Civil Law: Of Balance, Adaptation, and Access' in J. Griffiths and U. Suthersanen (eds), *Copyright and Free Speech. Comparative and International Analyses* (Oxford University Press, Oxford 2005), p. 287-314.

[2] Case C-469/17 *Funke Medien NRW* EU:C:2019:623, Case C-516/17 *Spiegel Online* EU:C:2019:625 and Case C-476/17 *Pelham and Others* EU:C:2019:624.

[3] 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, OJ L 167, 22 June 2001, p. 10–19

perhaps, the judgements did not concern the question of remedies. There are good reasons to conclude that EU law not only permits national courts to withhold certain remedies, notably (final) injunctions, but also requires them to do so when necessary to avoid a disproportionate interference with rights safeguarded by the Charter of Fundamental Rights of the European Union (EU Charter).

I first briefly discuss the *Funke Medien* and *Spiegel Online* judgements (Section 2) and the initial academic reception (Section 3). Next I consider more elaborately both the indirect effect of fundamental rights on the availability of remedies in case of copyright infringement (Section 4.1) and their possible (residual) direct effect even after *Funke Medien* and *Spiegel Online* (Section 4.2).

2 The judgements in *Funke Medien* and *Spiegel Online*

In both *Funke Medien* and *Spiegel Online* the enforcement of copyright clashed with the right to freedom of information and the freedom of the press. In *Funke Medien* the German State tried to enforce its copyright in confidential military status rapports against a newspaper who published these on its website. In *Spiegel* a national politician opposed the online publication of certain articles by him, which Spiegel Online had made available on its website in order to substantiate the allegation that the politician in question had misled the public about the contents of those articles. In both cases, the national court doubted that any of the explicit statutory exceptions applied. Since the defendants in the national proceedings were alleged to have infringed exclusive rights harmonized by the InfoSoc Directive, the national court asked the CJEU whether freedom of information and freedom of the press are capable of justifying a derogation from those exclusive rights beyond the exceptions or limitations provided for in article 5 of that directive.

The CJEU was clear in its rejection: "freedom of information and freedom of the press … are not capable of justifying, beyond the exceptions or limitations provided for in Article 5 … a derogation from the author's exclusive rights".[4] Its conclusion was largely supported by two arguments. First, more formally, it noted that the list of limitations and exceptions in article 5 of the InfoSoc Directive is exhaustive, and that permitting Member States to introduce limitations and exceptions beyond that list would undermine the effectiveness of the harmonization pursued by that directive.[5] Second, more substantively, it considered that the InfoSoc Directive itself aims to safeguard a fair balance of rights and interests, notably by introducing the list of limitations and exceptions in article 5, perhaps suggesting that there is little risk of a disproportionate interference with any fundamental right resulting from the implementation of the directive.[6]

This apparent rejection of fundamental rights as a basis for additional constraints on exclusive rights stood in contrast to the Court's willingness to interpret copyright law itself in light of fundamental rights. Generally, the Court emphasized that limitations and exceptions need not be interpreted restrictively, but in a way that "fully adheres to the fundamental rights enshrined in the Charter".[7] Specifically, the Court adopted an

[4] *Funke Medien*, para 64 and *Spiegel Online*, para 49 (both *supra* n 2).
[5] *Funke Medien*, para 62 and *Spiegel Online*, para 47 (both *supra* n 2).
[6] *Funke Medien*, paras 57-60 and *Spiegel Online*, paras 42-45 (both *supra* n 2).
[7] *Funke Medien*, para 76 and *Spiegel Online*, para 59 (both *supra* n 2).

interpretation of both the exception for the use in connection with the reporting of current events[8] and the quotation exception[9] that in principle covered the uses under consideration.[10] In both cases the CJEU also referred to the case law of the European Court of Human Rights (ECtHR) and the importance, identified by the latter Court, to take into account the nature of the "speech" involved.[11] Additionally, in *Moses Pelham*, the third judgement of the triad of 29 July 2019, the CJEU even limited the scope of the reproduction right granted to phonogram producers on account of protection of the freedom of the arts.[12]

3 Initial reactions: a potential danger to fundamental rights?

The CJEU's answer seems unequivocal. Hence, many commentators concluded: there is no room for fundamental rights as external constraints.[13] The conceptual nature of fundamental rights as external constraints is typically not clarified, but it is presumably intended to suggest that in appropriate circumstances users ought to be able to rely on

[8] Art. 5(3)(c), second case InfoSoc Directive.

[9] Art. 5(3)(d) InfoSoc Directive. See *Spiegel Online*, *supra* n 2, paras 75-84. At the same time, however, the Court held in *Pelham*, *supra* n 2, para 71 that "quotation" requires entering into a dialogue with the quoted subject-matter. Applied strictly, such an understanding of the concept of quotation appears overly restrictive of fundamental freedoms, notably the right to freedom of expression and freedom of the arts. See e.g. C. Geiger and E. Izyumenko, 'The constitutionalisation 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!' (2020) 51(3) International Review of Intellectual Property and Competition Law 282, p. 289 and M. Senftleben, 'Flexibility grave - partial reproduction focus and closed system fetishism in CJEU, Pelham' (2020) 51(6) International Review of Intellectual Property and Competition Law 751, p. 764-765.

[10] Meanwhile the German Federal Supreme Court has decided in favour of the freedom of the press in both the *Funke Medien* and *Spiegel Online* proceedings by applying the national implementation of the exception for reporting of current events. See, respectively, German Federal Supreme Court (First Civil Senate), 30 April 2020, I ZR 139/15 – *Afghanistan Papiere II* and German Federal Supreme Court (First Civil Senate), 30 April 2020, I ZR 228/15 – *Reformistischer Aufbruch II*.

[11] Cf. *Funke Medien*, para 74 and *Spiegel Online*, para 58 (both *supra* n 2), in which the CJEU, referring to the case law of the ECtHR, emphasizes "the need to take into account the fact that the nature of the 'speech' or information at issue is of particular importance, inter alia in political discourse and discourse concerning matters of the public interest".

[12] *Pelham*, *supra* n 2, paras 31-38.

[13] Cf., all using slightly different terminology, the contributions and case comments by Geiger & Izyumenko 2020, *supra* n 9, p. 302 (referring to an "external freedom of expression limitation"), B.J. Jütte, 'CJEU permits sampling of phonograms under a de minimis rule and the quotation exception' (2019) 14(11) Journal of Intellectual Property Law & Practice 827, p. 828 ("external corrective"), S. Kulk and P. Teunissen, 'Naar een nieuw fundament – Hoe het Handvest het auteursrecht hervormt (deel 2)' (2019) Tijdschrift voor Auteurs-, Media- & Informatierecht 149, p. 153 ("external exception"; "*externe exceptie*"), T. Mylly, 'Proportionality in the CJEU's Internet Copyright Case Law: Invasive or Resilient?' in U. Bernitz and others (eds), *General Principles of EU Law and the EU Digital Order* (Kluwer Law International, Alphen aan den Rijn 2019), p. 276 ("a derogation"), Senftleben 2020, *supra* n 9, p. 765 ("external correction tools"), T. Synodinou. 'Reflections on the CJEU's judgment in Spiegel online: is there a golden intersection between freedom of expression and EU copyright law? Part I' <http://copyrightblog.kluweriplaw.com/2019/09/23/reflections-on-the-cjeus-judgment-in-spiegel-online-is-there-a-golden-intersection-between-freedom-of-expression-and-eu-copyright-law-part-i/?doing_wp_cron=1592229520.1396710872650146484375> accessed on 10 September 2020 ("external limits") and T. Snijders and S. van Deursen, 'The Road Not Taken – the CJEU Sheds Light on the Role of Fundamental Rights in the European Copyright Framework – a Case Note on the Pelham, Spiegel Online and Funke Medien Decisions' (2019) 50(9) International Review of Intellectual Property and Competition Law 1176., p. 1182ff ("external limitation", at 1189).

those rights directly also in horizontal relations.[14] In other words, the CJEU is understood to have rejected horizontal direct effect of fundamental rights in the copyright context. Instead it is suggested that the Court has adopted an approach that exclusively relies on indirect effect, in which fundamental rights are taken into account in the course of interpretation of copyright law itself.

As I noted in the previous section, the CJEU indeed showed a willingness to interpret copyright law itself in light of fundamental rights in order to reach permissive outcomes. Nevertheless, a number of authors has questioned whether an approach that exclusively relies on indirect effect will be able to accommodate all uses that ought to be permitted from the point of view of fundamental rights. For several of them, the well-known *Scientology* decision by the Court of Appeal of The Hague serves as an example of an outcome that can no longer be reached under EU law.[15] In that decision the Dutch court considered that the unauthorized publication of theretofore unpublished internal documents from the Church of Scientology ought to be permitted in order to safeguard the right to freedom of information, in particular because those documents detailed a rejection of democratic values by the Church of Scientology. Because no statutory exception applied, the Court of Appeal based its decision directly on article 10 of the European Convention on Human Rights (ECHR), considering that the interference with the right to freedom of expression resulting from the enforcement of copyright was not "necessary within the meaning of article 10 ECHR".[16] *Scientology* is thus used to illustrate the problems the EU's closed system of limitations and exceptions will inevitably encounter when sealed off from fundamental rights scrutiny: it may exclude uses which ought not reasonably to be prohibited.

By outlawing decisions such as *Scientology*, the outcome in *Funke Medien* and *Spiegel Online* is also said to have placed the EU at odds with the approach dictated by the ECtHR. After all, the ECtHR held in *Ashby Donald* and *Neij and Sunde Kolmisoppi* that the conviction for copyright infringement in those cases constituted an interference with the defendants' right to freedom of expression as protected by article 10 ECHR and that such an interference must be "necessary in a democratic society"[17] in order to comply with the Convention.[18] Accordingly, it is argued that these ECtHR decisions require, or at least enable, national

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[14] Cf. M. Leistner, 'Das Urteil des EuGH in Sachen »Funke Medien NRW /Deutschland« – gute Nachrichten über ein urheberrechtliches Tagesereignis' (2019) Zeitschrift für Urheber- und Medienrecht 720, p. 725, and M. Stieper, 'Der Trans Europa Express ist aus Luxemburg zurück - auf dem Weg zu einer Vollharmonisierung der urheberrechtlichen Schranken' (2019) Zeitschrift für Urheber- und Medienrecht 713, p. 714, referring, respectively, to the rejection by the CJEU of a "direct founding of exceptions in fundamental rights" ("*eine grundrechtsunmittelbare Konstruktion von Ausnahmen*") and any justification of uses "by direct reference to fundamental rights" ("*durch unimittelbare Bezugnahme auf Grundrechten*").

[15] Geiger & Izyumenko 2020, *supra* n 9, p.300, Kulk & Teunissen 2019, *supra* n 13, p. 153 and Senftleben 2020, *supra* n 9, p. 765.

[16] Court of Appeal of The Hague, 4 September 2003, *Scientology*, Tijdschrift voor auteurs-, media- en informatierecht 2003, 217, para 8.4

[17] Cf. Art. 10(2) ECHR: "The exercise of [the right to freedom of expression …], may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are *necessary in a democratic society* … ." (emphasis added).

[18] Decision of the European Court of Human Rights (Fifth Section), in the case of *Ashby Donald and Others v. France*, Appl. No. 36769/08, of 10 January 2013 and Decision of the European Court of Human Rights (Fifth Section), in the case of *Neij and Sunde Kolmisoppi v. Sweden*, Appl. No. 40397/12, of 19 February 2013.

courts to conduct a case-by-case assessment of the compatibility of copyright enforcement with the protection afforded to fundamental rights under the ECHR.[19] Notably, both the highest courts in civil matters in France and the Netherlands have since held that lower courts must determine whether the enforcement of copyright respects fundamental rights, the latter court doing so while explicitly referring to article 10 ECHR as well as the judgement in Ashby Donald.[20] As a result, the CJEU is said to have placed national courts "at the crossroads", having to decide whether they abide by the standards of the ECHR or those of EU law.[21]

To sum up, it appears two general conclusions are drawn from the CJEU's judgements. First, that the CJEU has rejected any form of horizontal direct effect of fundamental rights. Instead any horizontal effect can only be indirect, through an interpretation of copyright law in light of fundamental rights. Second, such horizontal direct effect is nevertheless necessary to sufficiently safeguard the exercise of fundamental rights. By extension, this rejection may lead to unacceptable outcomes under the ECHR.

4 Safeguarding fundamental rights from overbroad copyright under EU law

I am not convinced either conclusion is correct. There is an argument to be made that the CJEU did not (necessarily) reject the proposition that right holders have duties that directly originate in rights protected by the EU Charter. Perhaps more importantly, however, it can be argued that irrespective of whether or not the CJEU must be understood as having rejected horizontal direct effect, such effect is not necessary to avoid most disproportionate fundamental rights incursions. I address this second assertion first.

4.1 Horizontal indirect effect and available remedies: flexibility in the acquis communautaire

Typically, recognition of fundamental rights as "external constraints" is not necessary to adequately safeguard the enjoyment of those rights. Whether a fundamental right such as the right to freedom of information is disproportionately interfered with depends for a large part on whether its enjoyment is actually impaired. As a rule, this will not be the case if copyright is unenforceable, that is if courts will refuse to enjoin the use in question and/or refuse to grant damages. Notably, *Funke Medien* and *Spiegel Online* did not concern the question of enforcement, but solely the closed nature of the system of limitations and exceptions put in place by the InfoSoc Directive.[22] It is submitted that, as a matter of EU law, national courts not only may refuse to grant a particular remedy, but are even required to

[19] Cf. Geiger & Izyumenko 2020, *supra* n 9, p. 300 and S. van Deursen and T. Snijders, 'The Court of Justice at the Crossroads: Clarifying the Role for Fundamental Rights in the EU Copyright Framework' (2018) 49 International Review of Intellectual Property and Competition Law 1080, p. 1091.

[20] French Supreme Court (First Civil Chamber), 15 May 2015, *Klasen*, English translation in IIC 2016, p. 856 and Dutch Supreme Court, 3 April 2015, NL:HR:2015:841, *GS Media v Sanoma*, paras 5.2.3-5.2.5 (it must be noted that the Dutch Supreme Court also based its conclusion on a number of CJEU judgements, which are discussed below at n 30ff and accompanying text).

[21] Snijders & Van Deursen 2019, *supra* n 13, p. 1189.

[22] Cf. in this regard also the case comments by P. Geerts. 'noot onder HvJ EU Funke Medien en Spiegel Online' <https://www.ie-forum.nl/artikelen/paul-geerts-noot-onder-hvj-eu-funke-medien-en-spiegel-online> accessed on 10 September 2020, para 11ff and D. Visser, 'Pelham, Funke en Spiegel Online: beperkingen en grondrechten in het EU-auteursrecht' (2019) Ars Aequi 887, p. 892. See also, although less emphatically, A. Kaiser and S. Scheuerer, 'The impact of fundamental rights on European copyright law – opinion on the CJEU decisions C-516/17 – Spiegel Online and C-469/17 – Funke Medien' (2019) Gewerblicher Rechtsschutz und Urheberrecht Internationaler Teil 1153, p. 1160.

do so when necessary to prevent a disproportionate interference with a fundamental right. Consequently, the threat to fundamental rights largely dissolves.

First of all, EU law permits the refusal of remedies even though an infringement of copyright has been established. This follows from the (partial) harmonization of remedies effected by both the InfoSoc Directive and the general Enforcement Directive[23]. Intrinsic to the framework put in place by those directives is a flexible approach to remedies. This flexibility follows first of all from their general provisions. Remedies must be "fair and equitable"[24] and "effective, proportionate and dissuasive"[25] as well as tailored to the "specific characteristics" of the case.[26] Notably, they ought not to "hamper freedom of expression, the free movement of information, or the protection of personal data, including on the internet".[27] This suggests remedies ought not to be granted automatically.

This conclusion is borne out by the specific provisions laying down minimum rules for the grant of damages and (final) injunctions in the Enforcement Directive, especially when interpreted in light of these general principles. As regards damages, article 13 of the Enforcement Directive requires Member States to ensure that the wilful infringer will be ordered to pay "damages appropriate to the actual prejudice suffered". Although making damages ostensibly obligatory in most cases, this formulation nevertheless permits a certain measure of flexibility because of its emphasis on actual prejudice. In a case like *Scientology*, and certainly also *Funke Medien*, the lack of any exploitative interest on the part of the right holder can support a court's conclusion that there is no prejudice to be compensated.[28] As regards injunctions, article 11 of the Enforcement Directive clearly stipulates that: "Member States shall ensure that … the judicial authorities *may* issue and injunction" (emphasis added). Injunctions ought not to be automatic. There is one counterargument, but it is weak. Article 12 specifies that Member States may provide that damages instead of an injunction may be granted if certain conditions are met, such as the infringer acting "unintentionally and without negligence". This may give rise to the argument that, *a contrario*, granting an injunction is mandatory if those conditions are not met. This argument, however, is at odds both with the clear text of article 11 as well as with the general spirit of the Directive outlined above.[29] Accordingly, the Enforcement and InfoSoc Directives allow Member States plenty of flexibility in terms of the grant of remedies.

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[23] Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (OJ L 157, 30 April 2004), corrigendum published in OJ L 195, 2 June 2004, p. 16–25.
[24] Art. 3(1) Enforcement Directive
[25] Art. 3(2) Enforcement Directive and art. 8(1) InfoSoc Directive.
[26] Recital 17 in the preamble to the Enforcement Directive.
[27] Recital 2 in the preamble to the Enforcement Directive.
[28] As to the lack of this interest, see also the Opinion of AG Szpunar in Case C-469/17 *Funke Medien NRW* EU:C:2018:870, para 58 in conjunction with para 61. Cf. also the national proceedings that gave rise to the pending reference in Case C-637/19, in which the court of first instance had held that the submission as evidence in court proceedings of a copyright protected work did amount to copyright infringement, but that the right holder had suffered no damages, and consequently dismissed the claim. On the national proceedings, see the Opinion of AG Hogan in Case C-637/19 *BY (Preuve photographique)* EU:C:2020:650, paras 15-17.
[29] Cf. R. García Pérez, 'Injunctions in intellectual property cases: what is the power of the courts?' (2016) Intellectual Property Quarterly 87, p. 94ff., M. Norrgård. 'The European Principles of IP Enforcement: Harmonisation Through Communication?' (2010) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1700584> accessed on 10 September 2020, p. 11-12, A. Ohly. 'Three principles of European IP enforcement law: effectiveness, proportionality, dissuasiveness'

EU law goes further than that. The Charter places meaningful limits on the exercise of discretion in this regard by the Member States, including national courts. Specifically, remedies ought to be denied as a matter of EU law if their grant will lead to a disproportionate limitation of a Charter right. Although the Enforcement Directive is principally an act of minimum harmonization, the CJEU has made clear in its well-known *Promusicae* decision that Member States must rely on an interpretation of that Directive that strikes a fair balance between the various (fundamental) rights and interests.[30] The CJEU will need to clarify the boundaries set by the Charter in respect of remedies against direct infringers: When does the (non-)grant of a particular remedy create a disproportionate interference with a Charter right? Ergo, when does it not strike a fair balance?

Member States, including national courts, may have a very wide margin of discretion in this regard. In a series of judgements concerning enforcement measures against third parties, mostly intermediaries,[31] the CJEU seems to suggest that an injunction is only precluded by EU law if it results in a violation of the essence or a "serious infringement" of a Charter right, using those terms seemingly interchangeably.[32] This implies that, *as a matter of EU law*, a remedy against a direct infringer must only be denied if it leads to a violation of the essence of, for example, the right to freedom of expression. Conversely, a remedy must be granted if its refusal leads to a violation of the essence of the right to (intellectual) property as safeguarded by article 17 of the Charter or the right to an effective remedy safeguarded by article 47. This use of the concept of essence is not without its problems, which cannot be

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(2009) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1523277> accessed on 10 September 2020, p. 8 and P. Teunissen, 'Van interpretatie tot harmonisatie: grondrechtenafwegingen in het auteursrecht' (2018) Intellectuele Eigendom en Reclamerecht 376, p. 384-385.

[30] Case C-275/06 *Promusicae* EU:C:2008:54, para 68.

[31] Case C-147/17 *Bastei Lübbe* EU:C:2018:841, the odd one out, concerned proceedings against a family member of the supposed infringer.

[32] See, notably Case C-314/12 *UPC Telekabel Wien* EU:C:2014:192, para 51ff and Case C-484/14 McFadden EU:C:2016:689, para 90ff in which the CJEU only really ascertains whether the essence of the rights under consideration is violated, and whether the proposed measure is suitable and necessary, in effect suppressing the proportionality *stricto sensu* analysis. See also Case C-70/10 *Scarlet Extended v SABAM* EU:C:2011:771, paras 48-49 and Case C-360/10 *SABAM v Netlog* EU:C:2012:85, paras 46-47, in which the CJEU considered that a "serious infringement" of the freedom to conduct a business by itself necessarily precluded a certain remedy (meaning the degree of interference with other rights was not considered), and Case C-580/13 *Coty Germany* EU:C:2015:485, para 35 and *Bastei Lubbe*, *supra* n 31, para 46, in which it similarly held that a "serious infringement" of articles 17 and 47 EU Charter implies no fair balance can be struck. I discuss the CJEU's use of proportionality analysis in these cases more in-depth elsewhere. See D. Jongsma, *Creating EU Copyright Law: Striking a Fair Balance* (Hanken School of Economics, Helsinki 2019), paras 108-110, 112-113 and 117 (available online at <https://helda.helsinki.fi/dhanken/handle/10227/294110>). Cf., however, M. Husovec, 'How Will the European Patent Judges Understand Proportionality?' (2020) 60 Jurimetrics Journal (forthcoming), who suggests that in these decisions the "Luxembourg judges are not undertaking constitutional review, but are optimizing the fairness of an outcome given the interests at stake", that is they determine what is proportionate not within the meaning of the EU Charter, but within the meaning of art. 3(2) of the Enforcement Directive. Given my assertion that these decisions turn on whether the essence of the Charter right has been violated, I ultimately do not agree with this conclusion. Husovec does touch on an interesting point: does the proportionality standard of art. 3(2) impose different boundaries (of secondary EU law) than the requirement of proportionality of the Charter (which is primary EU law)? This point will not be further addressed.

addressed in detail here.[33] Importantly, it is difficult to see how the concept of essence will be capable of setting meaningful boundaries. On the one hand, it seems unlikely that the grant of a specific remedy in a particular case will ever violate the essence of any right such as freedom of expression.[34] On the other hand, a refusal to grant an injunction in a specific case arguably does not violate the essence of either article 17, nor article 47 of the EU Charter.[35]

If the Charter is to be understood as imposing any meaningful limits on the availability of remedies, the CJEU ought to more closely assess their proportionality *stricto sensu*. However, to avoid full harmonization through interpretation of the Charter, this assessment should recognize that Member States have a certain margin of discretion, meaning the CJEU should exercise a certain level of restraint. Its approach could move along the following lines. On the one hand, the Court could consider that, in principle, the refusal to enjoin infringing use is a serious impairment of the rights to property and an effective remedy,[36] and that such a refusal can only be justified to avoid a limitation of a competing right that is also serious.[37] Although in those cases Member State discretion appears limited at best, such a serious limitation might be looming in cases where copyright enforcement would hinder (political) expression on a matter of great general interest.[38] On the other hand, the Court could recognize that the fundamental rights protecting the right holder are not always seriously impaired when a remedy is denied. This may be true in cases like *Scientology* and *Funke Medien*, in which enforcement is not used to pursue an interest that copyright intends to protect.[39] This recognition has (at least) two implications. First, if the interference with the rights of the right holder is not serious, the refusal to grant a remedy may be justified even if the (hypothetical) degree of interference with the competing right cannot be qualified as serious either. One could perhaps think of the artistic re-use of a work in order to create a new work.[40] Second, if the grant of a remedy *does* create a serious

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[33] See, e.g., the extensive analysis of CJEU case law by T. Tridimas and G. Gentile, 'The Essence of Rights: An Unreliable Boundary?' (2019) 20(6) German Law Journal 794.

[34] Admittedly, the serious infringement standard as applied in *Scarlet Extended* and *Netlog* (both *supra* n 32), although functionally equivalent to the essence test because it precludes balancing, seems broader than a "pure" essence test, which generally appears used by the CJEU to determine whether a particular measure "empties those rights of their content or calls their very existence into question" (K. Lenaerts, 'Limits on Limitations: The Essence of Fundamental Rights in the EU' (2019) 20(6) German Law Journal 779, p. 784).

[35] See Case C-170/13 *Huawei Technologies* EU:C:2015:477, para 57ff, in which the CJEU clarified that a refusal to enjoin a use that infringes a patent does not necessarily violate the Charter, even if "in principle, the proprietor may not be deprived of the right to have recourse to legal proceedings to ensure effective protection of his exclusive rights".

[36] Cf. in this regard the judgements in *Coty Germany*, *supra* n 32, paras 39-41 and *Bastei Lubbe*, *supra* n 31, para 51, in which the CJEU considered that the lack of legal protection offered by the national law in question constituted a serious infringement. As already pointed out, in these decisions the Court functionally equates such a serious infringement with a violation of the essence, meaning it – in my opinion incorrectly – paid no consideration to degree of interference with countervailing rights.

[37] Cf., by analogy, Case C-203/15 *Tele2 Sverige* EU:C:2016:970, paras 100-102.

[38] Such expression is entitled to special protection, not just under the ECHR, but also under EU law, as the CJEU itself appeared to emphasize in *Funke Medien* and *Spiegel Online*. See *supra* n 11.

[39] Cf. the Opinion of AG Szpunar in *Funke Medien, supra* n 28, para 58, who suggested that the enforcement by the German State served neither (i) to protect the personal relationship between author and work nor (ii) an interest in exploiting the work.

[40] Apolitical artistic expression arguably deserves substantial protection of its own, even if it does not carry the same weight as expression of political nature or concerning a debate of the general interest. In this regard, it

interference with the competing right that outweighs the impairment of the rights of the right holder, it *must* be denied as a matter of EU law (consider again the disclosure of a work in a matter of great public interest). The CJEU could leave national courts a certain margin of discretion in their qualification of the respective degrees of interference and provide guidance through the system of preliminary references. Moreover, within the boundaries set by EU law, Member States ought to be free to strike a balance, where appropriate by applying their national standards of fundamental rights protection.

By recognizing that remedies are not always automatic, violations of article 10 ECHR can in principle be avoided. The rulings in *Ashby Donald* and *Neij* do not impose an obligation to resolve the conflict between the right to freedom of expression and the right of the right holder to protection of their property through an "external" balancing analysis by way of horizontal direct effect specifically. The ECtHR reviews whether the *outcome* of the national legal proceedings complies with the (minimum standards laid down by the) Convention.[41] Although in subsequent cases the ECtHR might require that national courts examine the limitation placed on the right to freedom of expression "in accordance with the principles embodied in Article 10",[42] there is little reason to suspect that compliance with the Convention cannot be reached through a combined flexible approach to both copyright itself and to the grant of remedies. As I suggested above, the CJEU indicated in *Funke Medien* and *Spiegel Online* that it is not necessarily averse to a dialogue with Strasbourg.[43] Such a dialogue substantially reduces the chances of a conflict with the Convention, in particular also in light of the (particularly) wide margin of appreciation the States have in this regard.[44]

4.2 The CJEU and horizontal direct effect

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may be recalled that in *Pelham* the CJEU adopted a restrictive interpretation of the exclusive right of reproduction as granted to phonogram producers (see *supra* n 12 and accompanying text). On the arguably substantial protection of artistic expression under the ECHR, see A.J. Nieuwenhuis, 'The protection of artistic expression under article 10 of the European Convention on Human Rights' (2012) 14(3/4) Kunstrecht und Urheberrecht 110. Nevertheless, on this understanding of the limits set by EU law, the recent refusal by two French courts to dismiss an action for copyright infringement on grounds of freedom of expression and the freedom of arts in cases of apolitical appropriation art seems justifiable in light of the apparent intention to safeguard the works' exploitation. The decisions in question (Court of First Instance of Paris (Third Chamber), 9 March 2017, No. 15/01086, *Bauret v Koons* and Court of Appeal of Versailles (First Chamber), 16 March 2018, No. 15/06029, *Klasen*) are the subject of a critical discussion by C. Geiger, ''Fair Use' through Fundamental Rights in Europe: When Freedom of Artistic Expression allows Creative Appropriations and Opens up Statutory Copyright Limitations' (Center for International Intellectual Property Studies Research Paper No. 2018-09) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3256899> accessed on 14 September 2020.

[41] Cf. E. Dommering, 'De arresten Funke Medien, Spiegel Online en Pelham van het HvJ EU van 29 juli 2019' (2019) Tijdschrift voor Auteurs-, Media- & Informatierecht 185, p. 186.

[42] This approach is well-established in cases where a balance must be struck between the right to freedom of expression and the right to respect for private and family life or the objective of protecting the reputation of others. See, e.g., Decision of the European Court of Human Rights (First Section), in the case of *Reznik v. Russia*, Appl. No. 4977/05, of 4 April 2013, para 51.

[43] See, *supra* n 11 and accompanying text.

[44] The ECtHR held in both *Ashby Donald* and *Neij* (both *supra* n 18) that States benefit from a wide margin of appreciation given the fact that they must balance two Convention rights, which margin may become "particularly wide" depending on the nature of the expression (e.g. purely commercial vs. political) and the importance of the information it conveys (e.g. contributing to a debate of general interest).

Fundamental rights can thus largely be safeguarded by an interpretation of the *acquis* in light of fundamental rights. Additionally, however, there is an argument to be made that the direct effect of fundamental rights might still have a role to play, despite the CJEU's ostensible rejection thereof. In *Funke Medien* and *Spiegel*, the CJEU arguably did not really rule on the question of fundamental rights as external constraints by way of direct effect. Essentially, the CJEU was asked to address a much broader issue: may Member States as such introduce limitations or exceptions to safeguard fundamental rights, even beyond the exhaustive list in the InfoSoc Directive? Given the potential threat hereof to the (already shoddy) harmonization of limitations and exceptions, it is not very surprising that the CJEU answered this question in the negative. Although its answer at first sight also appears to rule out ad hoc exceptions by way of horizontal direct effect, there is a good reason to understand its ruling narrowly. In *Funke Medien* the issue is not about potential horizontal, but vertical direct applicability of the Charter. The applicability of the Charter in this scenario seems uncontroversial given the fact that the case concerns a Member State's interference with Charter rights that originates in provisions subject to EU harmonization.[45] The legitimate question is: does the prohibition by the German state of the publication of the confidential military status reports in question constitute a disproportionate interference with the right to freedom of information and the freedom of the media as guaranteed by the EU Charter? The complete lack of considerations by the CJEU in this regard suggests the Court was not at all concerned with the question of direct effect, but merely with the broader issue outlined above.

AG Szpunar, by contrast, had little trouble concluding that the enforcement by the German State of its copyright, not being necessary to attain any of copyright's objectives while also being "highly damaging" to freedom of expression, created a disproportionate interference with article 11 of the EU Charter and should therefore not be permitted.[46] He nevertheless hesitated when invited to apply the same approach in the horizontal scenario in *Spiegel*. Fearing the creation of an EU fair use-type norm based directly on fundamental rights, he suggested that horizontal direct effect is *only* appropriate where the essence of a right is infringed.[47]

Even if one understands the CJEU to have rejected (horizontal) direct effect of fundamental rights as a form of "external constraint", this does not rule out that those rights are directly effective in other scenarios. One can imagine (at least) three. First, in some Member States such as the Netherlands and Germany injunctions are traditionally granted automatically, meaning courts may not always be able to strike a fair balance by interpreting national law in light of fundamental rights. Second, although the implementation of most limitations and exceptions in the InfoSoc Directive is nominally optional, their application may in specific cases be required to avoid disproportionate interferences with fundamental rights.[48] Third,

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[45] Cf. the Opinion of AG Szpunar, *supra* n 28, para 44

[46] *Ibid.*, paras 58-64.

[47] Opinion of AG Szpunar in Case C-516/17 *Spiegel Online* EU:C:2019:16, paras 62-63. The term "essential content" used in the English language version of the Opinion derives from the French term for the concept of essence used in the EU Charter, "*contenue essential*". Cf. also his Opinion in Case C-476/17 *Pelham and Others* EU:C:2018:1002, para 98.

[48] Some have read into Case C-201/13 *Deckmyn and Vrijheidsfonds* EU:C:2014:2132 a confirmation that the Charter requires implementation of "optional" limitations and exceptions in the InfoSoc Directive. Further support for this position could be derived from *Funke Medien*, para 58, *Spiegel Online*, para 43 and *Pelham*,

restrictions on the exercise of fundamental rights might not stem from enforcement, but from practical encumbrances such as contractual restrictions and those created by technological protection measures. I only – briefly – address the first scenario.

Where, under national law, national courts do not enjoy the discretion inherent in the *acquis* to decide on the grant of an injunction, it may not be possible in cases that require it to rely on an interpretation of national law that strikes a fair balance. It is a trite observation that the Enforcement Directive itself cannot have direct effect in cases between private parties. The EU Charter, however, may require national courts to ignore provisions of national law that treat the grant of an injunction as automatic if that grant results in a disproportionate interference with a Charter right.

As the CJEU has recently made abundantly clear in a series of decisions in respect of article 21, article 31(2) and article 47, the EU Charter is well capable of producing effects in proceedings between private parties, including the obligation for national courts to disapply provisions of national law if it is not possible to adopt an interpretation of national law that is consistent with the Charter.[49] Charter rights may produce such direct effect if they are both mandatory and unconditional in that they need not to be made more specific by provisions of EU or national law. In that case they are sufficient in themselves to confer on individuals a right on which they may rely as such in disputes against other individuals.[50] The fact that a Charter right is open to limitation in accordance with article 52(1) of the EU Charter does not appear to by itself stand in the way of direct effect. In other words, the fact that the obligation flowing from the Charter is not concrete, but may depend on a balancing exercise, is not an obstacle to horizontal direct effect.

This latter point was emphasized in the judgement in *Egenberger*. *Egenberger* concerned the question to which extent national courts should be able to review whether, in a particular case, a difference in treatment on grounds of religion by a church (or similar establishment) is justified as a "genuine, legitimate and justified occupational requirement".[51] German law severely limited the possibility for such judicial review, granting churches a large degree of autonomy to determine whether the different treatment was justified.[52] The CJEU held that this was not only contrary to secondary EU

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para 60 (all *supra* n 2). Elsewhere I have argued that although the EU Charter likely requires that certain uses that fall within the scope of (some of) these optional provisions be permitted, even if they have not been transposed into national law, this does not mean those provisions are mandatory as such. This is because once implemented most, if not all, limitations and exceptions can be expected to also exempt uses whose prohibition would not violate the Charter. See Jongsma 2019, *supra* n 32, para 191.

[49] See Case C-414/16 *Egenberger* EU:C:2018:257, Joined Cases 569/16 and 570/16 *Bauer* EU:C:2018:871, Case C-684/16 *Max-Planck-Gesellschaft zur Förderung der Wissenschaften* EU:C:2018:874 and Case C-68/17 *IR* EU:C:2018:696.

[50] E.g. *Egenberger*, paras 76 & 78, *Bauer*, para 85, *Max Planck*, para 74 and *IR*, para 69 (all *supra* n 49).

[51] Art. 4(2) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2 December 2000, p. 16–22, in essence, permits Member States to maintain an exception to the prohibition of discrimination in respect of occupational activities within churches if "a person's religion or belief constitute[s] a genuine, legitimate and justified occupational requirement".

[52] Specifically, the German law under consideration only permitted a "plausibility" review, essentially permitting churches themselves to determine whether a person's religion or belief is a "genuine, legitimate and justified occupational requirement".

legislation, but that it also violated the EU Charter, specifically the prohibition of discrimination (art. 21 EU Charter) and the right to an effective remedy (art. 47 EU Charter). The CJEU considered that both rights are in themselves sufficient to confer on individuals a right on which they can rely in proceedings against other private parties, that national courts must ensure judicial protection flowing from those rights and that they must guarantee their full effectiveness by disapplying contrary provisions of national law.[53] Importantly, the CJEU held that this conclusion is not affected by the fact that the national court is called upon to strike a balance between competing fundamental rights and ensure compliance with the principle of proportionality.[54]

To the extent that a Charter right is mandatory and unconditional, it can thus be relied upon to set aside a provision of national law that constitutes a disproportionate interference with that right, also in proceedings between private parties.[55] Provisions that make the grant of an injunction mandatory upon a finding of infringement may bring about such a disproportionate interference, for instance with the right to freedom of expression (art. 11 EU Charter) and the freedom of arts (art. 13 EU Charter). These rights are both mandatory and unconditional, as they do not need further specification in EU or national law. Where courts have no freedom to deny the grant of an injunction, the judicial protection flowing from them is denied to users of copyright protected works if the granted injunction indeed causes a disproportionate interference with those rights. Consequently, it can be argued that in order to guarantee their full effectiveness, national courts must set aside such a provision of national law. As the CJEU confirmed in *Egenberger*, the fact that the national court must strike a balance between competing rights, including the right to (intellectual) property and to an effective remedy, in order to determine whether an injunction disproportionately interferes with a Charter right does not affect this conclusion.

5 Concluding remarks

The restrictive effect of fundamental rights on copyright is a vexing issue. It raises the spectre of judicial interference with the balance struck by the legislature. This may have been one reason why the CJEU avoided explicitly casting the issue raised by the German Federal Supreme Court in terms of direct effect. The Opinions of Advocate-General Szpunar had laid bare the difficulties that might arise in identifying an appropriate standard for determining in which cases horizontal direct effect is justified. In "a slightly horrified response to a full realisation of the potential consequences of the structure of reasoning employed in *Funke Medien*"[56], he resorted to the concept of essence as a way of delineating the boundaries of possible horizontal direct effect. As I have argued, relying on the concept of essence may not place any meaningful limits on the exercise of copyright.[57] Moreover, using the concept of essence as the sole criterion authorizes (very) serious interferences

[53] *Egenberger*, *supra* n 49, paras 76-79

[54] *Ibid.*, para 80.

[55] Cf. Lenaerts 2019, *supra* n 34, p. 789. See also his discussion of the judgements in *Bauer* and *Max Planck* (both *supra* n 49) concerning art. 31(2) EU Charter, which only partially produces direct effect in respects of those elements of the right which do not require more specific expression in EU or national law (at p. 790-792).

[56] Cf. J. 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 ERA Forum 35, p. 47.

[57] See *supra* n 34 and accompanying text.

with rights that fall short of a violation of the essence.[58] When the CJEU is confronted with this issue in the future, the Court ought not to follow its AG, whether it approaches the issue of the potential restrictive effect of fundamental rights on the enforcement of copyright in terms of (horizontal) direct effect, or indirectly as a limit on Member State discretion regarding the determination of available remedies. Any approach ought to both recognise the fact that the balance between exclusivity, remuneration and free use has in principle already been struck by the legislature, as well as that both the Enforcement and InfoSoc Directives leave Member States a certain degree of discretion in terms of implementation. Consequently, judicial restraint is in order. At the same time, fundamental rights ought not to be treated as minimum norms, which is the case with overreliance on the concept of essence. I have made a rudimentary suggestion as to where the boundaries set by EU law might lie, in which the seriousness of the interference with the affected rights is guiding – as it should be – and in which fundamental rights set real boundaries to the enforcement of copyright. As a result, the outcome reached by the Court of Appeal of the Hague in the *Scientology* case, instead of being contrary to EU law, might even be demanded by EU law, if not by direct effect, then by a flexible approach to remedies.

[58] Cf. Griffiths 2019, *supra* n 56, p. 48.