



DECONSTRUCTION OF HUMAN RIGHTS DIMENSIONS OF COPYRIGHT IN EUROPE

(Avrupa'da Telif Haklarının İnsan Hakları Boyutlarının Yapıçözümü)

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ABSTRACT

Courts, human rights bodies, legal scholars and human rights advocates have discussed the interface between human rights and intellectual property rights through multiple lenses. How has copyright, within the larger context of intellectual property rights, been conceptualised in the world of human rights? This article revisits this question along the lines of some fundamental international instruments, such as: the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union. Thus, it provides a deconstructive assessment on how the respective human rights bodies and courts have perceived and identified the human rights attributes of copyright with a new perspective.

Keywords: Intellectual property rights, Copyright, Human rights, Freedom of expression, Right to property, Moral rights, Financial rights.

ÖZ

Mahkemeler, insan hakları kuruluşları, hukukçu akademisyenler ve insan haklarını savunanlar, insan haklarıyla fikrî mülkiyet arasındaki ilişkiyi birçok farklı bakış açısıyla incelemektedirler. Telif hakkı, fikrî mülkiyet haklarının daha geniş bütünlüğü bağlamında, insan hakları dünyasında nasıl kavramlaştırılmaktadır? Bu çalışma, Avrupa İnsan Hakları Sözleşmesi ve Avrupa Birliği Temel Haklar Şartı gibi bazı temel uluslararası belgelerin satırları arasında bu soruyu yeniden ele almaktadır. Böylece bu çalışma, ilgili insan hakları kuruluşları ve mahkemelerinin telif haklarının insan hakları yönlerini nasıl algıladığına ve ayırt ettiğine dair yapı çözümüne dayalı bir değerlendirmek sunmaktadır.

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Anahtar Kelimeler: Fikri mülkiyet hakları, Telif hakkı, İnsan hakkı, İfade özgürlüğü, Mülkiyet hakkı, Manevî haklar, Malî haklar.

INTRODUCTION

Courts, human rights bodies, legal scholars and human rights advocates have discussed the interface between human rights and intellectual property rights through multiple lenses. Some commentators claim that intellectual property rights are a genre of human rights. Harry Goldsmith suggests that intellectual property rights are implicitly covered within international human rights treaties, noting for example that the protection of ‘moral and material interests of the author’ provided under Article 27 of the Universal Declaration of Human Rights (UDHR)² is analogous to the protection of intellectual property rights.³ Audrey Chapman reflects this view, arguing that Article 15(1)(c) of the International Covenant on Economic, Social, and Cultural Rights (ICESCR)⁴ is a form of intellectual property protection.⁵ Chapman concludes that as intellectual property rights are forms of fundamental human rights, they should be universally and effectively recognised, observed and guaranteed.⁶ In similar vein, Willem Grosheide notes that intellectual property law and human rights law share a related origin. He further argues that as intellectual property rights are recognised as private rights, they fall within the protection of general property rights provided by human rights instruments.⁷

Academics like Laurence Helfer,⁸ Christophe Geiger,⁹ Peter Yu,¹⁰

2 Universal Declaration of Human Rights, Article 27, G.A. Res. 217A (III), U.N. Doc. A/810 (Dec. 10, 1948) [hereinafter ‘UDHR’].

3 Harry Goldsmith, “Human Rights and Protection of Intellectual Property”, **Trademark and Copyright Journal of Research and Education** 12, no. 2, (1968):889.

4 International Covenant on Economic, Social and Cultural Rights, Article 15(1)(c), 993 UNTS 3 (16 December 1966) [hereinafter ‘ICESCR’].

5 Audrey R. Chapman, “Approaching Intellectual Property as a Human Right: Obligations Related to Article 15 (1) (c)”, in **Approaching Intellectual Property as a Human Right**, ed. Evgueni Guerassimov (UNESCO Publishing, 2001) 10.

6 Chapman, 30.

7 Willem Grosheide, “Intellectual Property Rights and Human Rights: Related Origin and Development” in **Intellectual Property and Human Rights: A Paradox**, ed. Willem Grosheide (Cheltenham, Edward Elgar Publishing, 2010) 14.

8 Laurence R. Helfer, “Toward a Human Rights Framework for Intellectual Property”, **Davis L Rev** 40, (2007): 971–1020.

9 Christophe Geiger, “Constitutionalising Intellectual Property Law? - The Influence of Fundamental Rights on Intellectual Property in the European Union”, **International Review of Intellectual Property and Competition Law** 37, no. 4, (2006): 371–406.

10 Peter K. Yu, “Reconceptualising Intellectual Property Interests in a Human Rights Framework”, **Davis L Rev** 40, (2007): 1039–1149. See also; Yu, Peter K. “Ten Common Questions About Intellectual Property and Human Rights”, **Georgia State University Law**



Lea Shaver¹¹, Abbe Brown¹² and Gabriele Spina Ali¹³ have provided frameworks for approaching the protection of intellectual property issues under the umbrella of human rights. Their different approaches examine the many circumstances in which intellectual property rights and human rights can conflict yet coexist, and which resolutions should be embraced when conflicts arise.

How has copyright, within the larger context of intellectual property rights, been conceptualised in the European human rights regime? In finding answers to this question, one must first seek a legal basis along the lines of some fundamental international instruments, such as the European Convention on Human Rights (ECHR)¹⁴ and the Charter of Fundamental Rights of the European Union (EU Charter)¹⁵. To this end, this article begins by analysing the legal framework of the ECHR and EU Charter, and the case law of the two European courts (namely, the European Court of Human Rights (ECtHR) and the Court of Justice of European Union (CJEU) by outlining the reasoning inherent in their analyses of the interface between copyright and human rights. It later provides a deconstructive assessment on how the mentioned courts have perceived and identified the human rights attributes of copyright. Thus, this article seeks to cast a new light on the foundational questions surrounding this debate and revisits the protection of copyright under different human rights regimes to elucidate practical (*de lege lata*) frameworks provided by the relevant human rights legislation and the interpretation of those norms by the respective human rights courts.

Apart from the main question of this article, the reader interested in a broader discussion of the interaction between intellectual property and human rights is directed to more specialized literature.¹⁶

Review 23, (2007): 710.

- 11 Lea Shaver, "The Right to Science and Culture" *Wisconsin Law Review* 1, (2010): 121-184; Lea Shaver and Caterina Sganga, "The Right to Take Part in Cultural Life: On Copyright and Human Rights" *Wisconsin International Law Journal* 27, no. 4, (2010): 637-662.
- 12 Abbe E. L. Brown, **Intellectual Property, Human Rights and Competition: Access to Essential Innovation and Technology** (Cheltenham, Edward Elgar Publishing, 2012).
- 13 Gabriele Spina Ali, "Intellectual Property and Human Rights: A Taxonomy of Their Interactions", *International Review of Intellectual Property and Competition Law* 51, no. 4, (2020): 411-445.
- 14 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) [hereinafter 'ECHR'].
- 15 Charter of Fundamental Rights of the European Union, 2010 OJ C 83/02 [hereinafter 'EU Charter'].
- 16 Christophe Geiger and Elena Izyumenko, "Shaping Intellectual Property Rights Through

I. ECHR

A. Legal Framework

As far as the ECHR is concerned, intellectual property rights have been protected under the auspices of the “right to peaceful enjoyment of possessions.”¹⁷ The concept of ‘possessions’ has been defined in broad terms by the ECtHR and the European Commission of Human Rights (Commission). The Strasbourg organs have extended it to a wide variety of concrete proprietary interests of economic value.¹⁸ The concept ‘possessions’ has an ‘autonomous’ meaning which is not restricted to ownership of physical goods: certain other rights and interests constituting assets can also be regarded as ‘property rights’, and thus as ‘possessions’ for the purposes of Article 1 of Protocol No 1 of the ECHR. Whether such interests qualify as possessions is independent from their formal meaning in domestic law.¹⁹

B. Case Law

1. Early Interpretations of the Commission

In *University of Illinois Foundation v Netherlands*,²⁰ the Commission rejected that the right to have the patent restored had no legal basis in either Dutch patent law or in the ECHR itself.²¹ The case concerned the cessation of a patent granted by the Dutch Patent Council due to the applicant’s failure to pay a patent maintenance fee on time.

Relying on the aforementioned principles, the Commission later

Human Rights Adjudication: The Example of the European Court of Human Rights”, *Mitchell Hamline Law Review* 46, no. 3, (2020): 527-612; Peter K. Yu, “Intellectual Property and Human Rights 2.0”, *University of Richmond Law Review* 53, (2019): 1375-1453. In the last two decades, at least six important volumes have been edited and published on the topic: (Jonathan Griffiths and Uma Suthersanen (eds), *Copyright and Free Speech*, (Oxford, Oxford University Press, 2005); Mpsai Sinjela (ed), *Human Rights and Intellectual Property Rights: Tensions and Convergences*, (Leiden, Martin Nijhoff Publishers, 2007); Grosheide, *Intellectual Property and Human Rights: A Paradox*; Laurence R. Helfer and Graeme W. Austin, *Human Rights and Intellectual Property: Mapping the Global Interface* (Cambridge, CUP, 2011); Christophe Geiger (ed), *Research Handbook On Human Rights And Intellectual Property*, (Cheltenham, Edward Elgar Publishing, 2015); and Paul L. Torremans (ed), *Intellectual Property and Human Rights*, (Zuidpoolingel, Kluwer Law International, 2020). The list of journal articles on the topic is countless.

17 ECHR Protocol 1 Article 1.

18 *Kopecný v Slovakia* ECHR 2004-IX.

19 *Iatridis v Greece* App no 31107/96 para 54 (GC); *Beyeler (n 525)* para 100; *Broniowski v Poland* ECHR 2004-V para 129 (GC); *Anheuser-Busch Inc v Portugal* App no 73049/01 (2007) 44 EHRR 42 (GC) para 63 [hereinafter ‘Anheuser Busch’].

20 *University of Illinois Foundation v Netherlands*, App. No. 12048/86 (Commission, 2 May 1988)

21 *Ibid.*



viewed patents as a possession under Article 1 of Protocol No 1 in *Smith Kline and French Laboratories Ltd v Netherlands*.²² The case was related to a compulsory licence granted by the Dutch patent office.²³ The Commission concluded that the Dutch compulsory licensing scheme was a justified interference with the right to property in patents. Hence no violation of the right to property was found.²⁴

The Commission also stated that the right to property also includes copyright in *Aral v Turkey*.²⁵ The subject of this case was a copyright dispute between two private parties. It concerned a copyright infringement lawsuit over artistic material created by the applicants for certain magazines. The trial court decided that all financial rights over the artistic material created by the applicants during their contract with the initial owner of the magazines belonged to the entrepreneur who subsequently purchased those magazines. This meant that those materials could not be published without the entrepreneur's permission. It derived from the work for hire doctrine that previously existed under the Turkish copyright law.²⁶ The applicants' appeals to overturn this decision were unsuccessful. In response to the applicants' challenge of the domestic courts' refusal to recognize the applicants' ownership in the artistic material, the Commission found that "no element in the case which would allow it to conclude that the courts acted in an arbitrary or unreasonable manner." Accordingly, no shortcoming attributable to the State in this respect was established.²⁷

22 *Smith Kline and French Laboratories Ltd v Netherlands*, App no 12633/87 (Commission, 4 October 1990) [hereinafter '*Smith Kline*'].

23 *Ibid.*

24 The Commission followed this position in *Lenzing AG v the United Kingdom* App no 38817/97 (Commission, 9 September 1998). This case was also related to a patent. However, in that case the 'possession' was not the patent as such, but the applications made by the applicant company in civil proceedings in which it had sought to change the British system of patent registry. Declaring the application was inadmissible due to being manifestly ill-founded, the Commission held that there had been no interference with the applicant company's right to the peaceful enjoyment of its possessions, as it had been given an opportunity to bring its claims concerning the patent to a court with full jurisdiction. *Ibid.* For another case that is related to patents see *British-American Tobacco Company Ltd v the Netherlands* App no 19589/92 (Commission, 20 November 1995).

25 *Aral v Turkey* App no 24563/94 (ECtHR, 14 January 1998) (admissibility decision) [hereinafter '*Aral*'].

26 Law No. 5846 of 5 December 1951 on Intellectual and Artistic Works Article 8(2) (amended).

27 *Geiger and Izyumenko*, 549-550. For the application concerning a licence contract on trade secrets under Article 1 of Protocol No. 1, which was viewed as manifestly ill-founded, see; *G & M v Germany*, App No 29818/96 (Commission, 20 May 1998).



2. Dima and Melnychuk

Until 2005, the full-time Court did not directly address this issue.²⁸ However, it was cautious to intervene in domestic courts' interpretation of copyright issues in its early cases. In the case of *Melnichuk v Ukraine*,²⁹ for example, the applicant brought a complaint about a publication of critical reviews of his book by a local newspaper which also refused to publish his reply to that criticism. Mr Melnychuk claimed that the critical reviews infringed his copyright. He further argued that the newspaper's refusal to publish his reply was an issue under Article 10 (freedom of expression) of the ECHR. After the national courts dismissed his case as "unsubstantiated", the applicant applied to the ECtHR by relying on Article 10 of the ECHR and Article 1 of its Protocol No 1 to the ECHR. The ECtHR viewed the applicant's complaint inadmissible as manifestly ill-founded. Referring to the applicant's failure to substantiate his copyright infringement claim, it observed that 'the national courts proceeded in accordance with domestic law, giving full reasons for their decisions' to dismiss the applicant's complaint.³⁰ Thus, their judgments was not seen arbitrary or manifestly unreasonable that would lead to breach of Article 1 of Protocol No 1.³¹

In a 2005 admissibility decision, *Dima v Romania*,³² the ECtHR again considered the scope of the right to property in a copyright case.³³ The case concerned a graphic artist, Viktor Dima, who worked in the Defence Ministry's plastic arts studio and developed the designs of a new national emblem and seal. He drew those designs in response to a competition that was held shortly after the fall of Romania's communist regime.³⁴ The Parliament later in 1992 chose a revised version of the design as the state emblem and seal, and specified Dima as the graphic designer in a

28 See; Laurence Helfer, "The New Innovation Frontier? Intellectual Property and the European Court of Human Rights", in *Intellectual Property And Human Rights, Enhanced Edition Of Copyright And Human Rights*, ed. Paul L. C. Torremans (Zuidpooslingel, Kluwer, 2008), 39. The ECtHR rejected to examine the merits of an Article 1 Protocol No. 1 claim concerning non-enforcement of a judgment that obliged a private company that was previously owned by the state to pay royalties to a patent holder. See; *Mihăilescu v Romania (dec.)*, App no 47748/99 (ECtHR, 26 August 2003).

29 *Melnichuk v. Ukraine*, App. no. 28743/03 (ECtHR, 5 July 2005) [hereinafter '*Melnichuk*'].

30 *Ibid*, para 3.

31 *Ibid*.

32 *Dima v Romania*, App no 58472/00 (ECtHR, 16 November 2005) (admissibility decision) [hereinafter '*Dima*'].

33 For a comprehensive academic commentary on the case see; Helfer, 'The New Innovation Frontier', 39-43.

34 *Dima*, paras 3-4.



statute published in Romania's official journal.³⁵ The government did not, however, pay him for his work. Upon his application, he received a series of letters from the Copyright Agency, informing him that he was the author of the graphic design and eligible to enjoy all rights in domestic copyright law. On the support of these positive statements, Dima filed three infringement actions in the Romanian courts against two private firms and a state-owned enterprise that had, for profit, reproduced and distributed coins by using the design.³⁶

The artist was frustrated by all domestic judicial venues, including the Supreme Court of Justice. Although that court acknowledged that he had personally created the design, it held that Dima did not have a copyright in the design of the state symbols. The court further reasoned that the Parliament, which had commissioned the designs, should be deemed the author of the work.³⁷ As an alternative ground, it held that state symbols could never be the subject of copyright either under the 1956 copyright statute which was in effect at the time Dima created the design, or under the 1996 statute.³⁸ The former did not exclude state symbols from copyright protection, while the latter expressly included such an exclusion rule.

Dima challenged these rulings as a violation of the right of property. The Court firstly stated that the right to property under Article 1 of Protocol No 1 protects copyright. However, it went on to hold that Dima was not entitled to any 'legitimate expectation' to 'acquire a possession' as author of the emblem because the existence of a valid copyright was, in the first place, an unresolved issue.³⁹ The Strasbourg Court reached this conclusion by acknowledging its 'limited power' to review allegations of legal or factual errors committed by national courts when interpreting domestic laws.⁴⁰ As Laurence Helfer points out, it is relevant that the Court did not try to 'second-guess the Romanian court's interpretation of domestic copyright law in a case whose facts were sympathetic to the creator.'⁴¹

35 Ibid, para 6.

36 Ibid, para 11-26.

37 Ibid, para 14.

38 Ibid, para 61-62.

39 Ibid, para 87.

40 Ibid, para 93.

41 Helfer, 'The New Innovation Frontier', 41.



3. Anheuser-Busch

Two years later, the Court extended its human right to property-oriented protection to trade marks and applications for registration of trade marks in the landmark case of *Anheuser-Busch Inc v Portugal*.^{42/43} This case has been so far the first and single authority of determining whether trade marks and applications for registration of trade marks have any premise in human rights discourse. Although it was related to trademarks, the reasoning of the Grand Chamber in this case deserves to be given full attention to understand how intellectual property is rationalised within the human right to property. The case of *Anheuser-Busch v Portugal* is merely the last venue of a protracted litigation on a trade mark between Anheuser-Busch Inc, which is an American public limited company producing beer and selling it under the brand name 'Budweiser' in a number of countries around the world, and Budejovický Budvar (Budvar), a brewer incorporated in the Czech Republic. In 1981, Anheuser-Busch applied to register 'Budweiser' as a trademark in Portugal. The Portuguese National Institute for Industrial Property did not grant the application, because prior to the date of this application 'Budweiser Bier' had been registered as a geographic designation of origin on behalf of the Czech company, Budejovický Budvar. In 1989, Anheuser-Busch sought a court order nullifying Budvar's registration of 'Budweiser Bier' as an appellation of origin, which was granted in 1995. Subsequently, the Portuguese registration office registered the "Budweiser" trademark on behalf of Anheuser-Busch. The Czech company appealed that decision, relying on the '1986 Agreement', a bilateral treaty between Portugal and Czechoslovakia (now applicable in the Czech Republic) which came into force in 1987, protecting registered designations of origin. After a series of appeals and counter appeals, the Portuguese Supreme Court upheld the revocation of the registration of the trade mark concerned, holding that the designation of origin 'Ceskebudejovický Budvar', which translated into German as 'Budweis' or 'Budweiss', was protected by the 1986

42 *Anheuser Busch*.

43 Klaus Beiter, "The Right to Property and the Protection of Interests in Intellectual Property – A Human Rights Perspective on the European Court of Human Rights' Decision in *Anheuser-Busch Inc. v Portugal*", *International Review of Intellectual Property and Competition Law* 39, no. 6, (2008): 714–721; Megan M. Carpenter, "Trademarks and Human Rights: Oil and Water? Or Chocolate and Peanut Butter", *Trademark Reporter* 99, (2009): 892–930; B. Goebel, "Trademarks as Fundamental Rights—Europe", *Trademark Reporter* 99, (2009): 931–955; Jennifer W. Reiss, "Commercializing Human Rights: Trademarks in Europe After *Anheuser-Busch v Portugal*", *Journal of World Intellectual Property* 14, no. 2, (2011): 176-201.



Agreement. The registration of '*Budweiser*' as a trademark on behalf of the applicant company was therefore revoked.⁴⁴

Anheuser-Busch then applied to the ECtHR, claiming that the Supreme Court ruling amounted to an unlawful deprivation of property in violation of its right to property under Article 1.⁴⁵ The Second Chamber of the Court held that although a trade mark could be a possession under Article 1, this provision applies only 'after final registration' of a trade mark. On appeal, however, the Grand Chamber partially reversed the Second Chamber's decision eventually concluding that both registered trademarks and trade mark applications of a multinational corporation fall within the ambit of Article 1 of Protocol No 1 of the ECHR that protects private rights to property. The Grand Chamber, in extending the protection of fundamental property rights, first established that intellectual property is a type of possession under Article 1 of Protocol No 1 of the ECHR.⁴⁶ It then held that a trade mark application, because it can be assigned and has commercial value, can be considered as a property right and also a 'possession' for the purposes of the Convention. According to the Grand Chamber, trademark registration applications constitute a 'legitimate expectation' for a bundle of financial rights and interests upon filing. Accordingly, the Grand Chamber unanimously concluded that the application for registration of a trademark should be considered as a possession.⁴⁷

On the particular facts presented, however, an overwhelming majority of the Grand Chamber, 15 votes to 2, held that Portugal had not violated Article 1 of Protocol No 1.⁴⁸

4. Balan

Unlike *Melnychuk* and *Anheuser-Busch*, an interference with the ECHR's right to property was established in an application on the

44 *Anheuser Busch*, para 12-24.

45 *Ibid*, para 46.

46 *Ibid*, para 72.

47 *Ibid*, para 78.

48 *Ibid*, para 87. Two separate opinions, one concurring, the other dissenting, were added to the judgment. Judges Elisabeth Steiner and Khanlar Hajiyev agreed with the Grand Chamber's judgment. The concurring judges noted that it was 'never a foregone conclusion' that the trade mark would be registered, given the 'complexities' of the law involved, so there could not be 'justified reliance'— a legitimate expectation—upon it. See; *Anheuser-Busch Inc v Portugal* Joint concurring opinion of Judges Steiner and Hajiyev paras 9-10. Judges Lucius Cafilich and Ireneu Cabral Barreto dissented. In their joint dissenting opinion they noted that the Court erred in its reasoning, when it deemed the conflict concerned as a 'private' conflict between private companies. See *Anheuser-Busch Inc. v Portugal* Joint dissenting opinion of judges Cafilich and Cabral Barreto paras 7-9.



registration of domain names that allegedly violated the trademark rights of third parties.⁴⁹ One year after *Anheuser-Busch*, the Court in *Balan v Moldova*⁵⁰ followed this line of reasoning and signalled some developments that might strengthen the hands of authors. In 1985 Pavel Balan published a photograph ‘Soroca Castle’, a well-known historical site in Moldova, in the album *Poliptic Moldav*, and received author’s fees for it.⁵¹ In 1996 the Ministry of Internal Affairs of Moldova (‘the Ministry’) used the photograph as a background for national identity cards. Balan was not consulted and did not agree to this use of his photograph.⁵² Then he requested the Ministry to compensate him for the infringement of his rights, as well as to conclude a contract with him for the future use of the photograph.⁵³ When the government rejected his requests for compensation, he initiated court proceedings for copyright infringement. The lower court, subsequently confirmed by the Supreme Court of Moldova, acknowledged his copyright and awarded him a modest compensation equivalent to 568 US dollars.⁵⁴ However, the government continued to use the photograph on identity cards without permission, ultimately leading Balan to sue for the financial loss caused by the unlawful use of his photograph and for compensation for infringement of his moral rights.⁵⁵ While the trial court agreed with Balan, the Court of Appeal, as confirmed later by the Supreme Court, rejected his claims – arguing that he had already been compensated by the earlier judgement. Furthermore, although the Supreme Court reaffirmed Balan’s copyright in the photograph, they added that an “identity card” was an official document which could not be subject to copyright.⁵⁶

Balan challenged the courts’ rulings before the ECtHR. He alleged that his rights under Article 1 of Protocol No 1 had been infringed as a result

49 The ECtHR held that the absolute prohibition on using the domain names and the duty to apply for their cancellation, instead of a duty to merely refrain from a specific infringement of the third parties’ trademarks, disproportionately interfered with the applicant’s right to property under Article 1 of Protocol No. 1 and recognized that domain names benefit from such protection. *Paeffgen GmbH v Germany*, App nos. 25379/04, 21688/05, 21722/05, 21770/05 (ECtHR, 18 September 2007).

50 *Balan v Moldova*, App no 19247/03 (ECtHR, 29 January 2008) [hereinafter ‘*Balan*’].

51 *Ibid*, para 7.

52 *Ibid*, para 8.

53 *Ibid*, para 9.

54 *Ibid*, para 10.

55 *Ibid*, paras 14-15.

56 *Ibid*, paras 16-18.



of the refusal by the Moldovan domestic courts to compensate him for an unlawful use of his work. The Fourth Section of the Court this time united to depart from the Court's assessment in a very similar case of *Dima v Romania*, while coming to the opposite conclusion: On the question whether Balan had a 'possession' protected by Article 1 of Protocol No 1, the Court emphasised that Balan's copyright in the photograph was upheld by the domestic courts. He thus had 'a right recognised by law and by a previous final judgment, and not merely a legitimate expectation of obtaining a property right.'⁵⁷ The ECtHR then found an interference with the copyright in a photograph in the unauthorised use of the photo by state authorities. In so doing, the unanimous judges dismissed the Government's erroneous argument that the official character of identity cards affects the copyright vesting in a photograph used as background on such cards.⁵⁸ In the following justification analysis, the Court examined 'whether the interference with the applicant's rights was proportionate to the aims pursued.'⁵⁹ It essentially explored whether there is any less interfering measure that is equally effective to achieve the stated goal and reasonably available to the state authorities concerned. With regard to this question, the Court stated that Moldova could achieve its aim of issuing identity cards certainly without the need to use Balan's copyrighted work without permission.⁶⁰ The ECtHR thus held that the Moldavian courts 'failed to strike a fair balance between the interests of the community and those of the copyright owner, placing on him an individual and excessive burden' which results in a violation of Article 1 of Protocol No 1.⁶¹

5. Ashby Donald and The Pirate Bay

The ECtHR, in its decisions in *Ashby Donald v France*,⁶² a case

57 Ibid, para 34.

58 Ibid, paras 38-40.

59 Ibid, para 44.

60 Ibid, para 45.

61 Ibid, para 46. Later in *Rapos v Slovakia*, which concerned a claim on payment of royalties for a design right, the ECtHR held that such a claim could not qualify as a possession for the purposes of Article 1 of Protocol No. 1 of the ECHR, where it was not determined by a final court decision. *Rapos v Slovakia*, App no. 25763/02 ECtHR, 20 May 2008) para 40.

62 *Ashby Donald and Others v France*, App no 36769/08 (ECtHR, 10 January 2013) [hereinafter '*Ashby Donald*']. For English translation of some part of the judgement see; "*Ashby Donald and others v France*", **International Review of Intellectual Property and Competition Law** 45, no. 3, (2014): 354-360. For academic commentaries on the judgement see; Christophe Geiger and Elena Izyumenko, "Copyright on the Human Rights' Trial: Redefining the Boundaries of Exclusivity Through Freedom of Expression", **International Review of Intellectual Property and Competition Law** 45, no. 3, (2014): 316-342; Paul L. C. Torremans, "*Ashby Donald and Others v France*, Application 36769/08, EctHR, 5th Section, Judgment of 10 January 2013",

relating to visual arts, fashion shows and photo-sharing, and in *Neij and Sunde Kolmisoppi v Sweden*,⁶³ a case involving file-sharing, acknowledged the value of these technologies from the perspective of freedom of expression.

In the *Ashby Donald* case, three fashion photographers - Robert Ashby Donald, Marcio Madeira Moraes and Olivier Claisse- made their way to Strasbourg to claim their right to freedom of expression on the fashion pictures.⁶⁴ Claisse had taken pictures at fashion shows in Paris in March 2003. Later, the photographs had been published on a website of an American fashion company Viewfinder run by the other two applicants without the consent of the fashion houses.⁶⁵ Following the publication of pictures, The French Fashion Federation and a number of haute couture companies⁶⁶ filed a complaint about the three photographers before the Central Brigade on the Suppression of Artistic and Industrial Counterfeiting (*Brigade centrale pour la répression des contrefaçons industrielles et artistiques*) for copyright infringement.⁶⁷ The photographers were accused by the Public Prosecutor before the Paris Criminal Court of counterfeiting under Articles of L. 335-2 and L. 335-3 of the French Intellectual Property Code (*Code de la Propriété Intellectuelle*) for unauthorised reproduction or public communication of those works.⁶⁸

Queen Mary Journal of Intellectual Property 4, no. 1, (2014): 95–99; Dirk Voorhoof and Inger Høedt-Rasmussen, “Copyright vs. Freedom of Expression, ECtHR (5th Section), 10 January 2013, Case of Ashby Donald and Others v. France, Appl. Nr. 36769/08, (2013)”, available at <http://echrblog.blogspot.co.uk/2013/01/copyright-vs-freedom-of-expression.html>; Dirk Voorhoof, “Freedom of Expression and The Right to Information: Implications for Copyright” in **Research Handbook on Human Rights And Intellectual Property**, 331–52.

63 *Neij and Sunde Kolmisoppi (The Pirate Bay) v Sweden* (2013) 56 EHRR SE19 [hereinafter ‘*The Pirate Bay*’]. Also, see; “‘Pirate Bay’ European Convention on Human Rights, Art. 10 – Neij and Sunde Kolmisoppi v. Sweden, 2013” **International Review of Intellectual Property and Competition Law** 44, no. 4, (2013): 724. For academic commentaries on the judgement see; Geiger and Izyumenko, 316-342; J. Jones, “Internet Pirates Walk the Plank with Article 10 Kept at Bay: Neij and Sunde Kolmisoppi v Sweden”, *EIPR* 35, no. 11, (2013): 695–700; Dirk Voorhoof and Inger Høedt-Rasmussen, “Copyright vs. Freedom of Expression II (The Pirate Bay): ECHR Decision of the ECtHR (5th Section) of 19 February 2013 Case of Fredrik Neij and Peter Sunde Kolmisoppi (The Pirate Bay) v. Sweden, Appl. Nr. 40397/12”, available online at <http://kluwercopyrightblog.com/2013/03/20/echr-copyright-vs-freedom-of-expression-ii-the-pirate-bay/>; Voorhoof, in **Research Handbook On Human Rights And Intellectual Property**.

64 *Ashby Donald*, para 4.

65 *Ibid*, para 7.

66 Including Chanel, Christian Dior, and Hermes.

67 *Ashby Donald*, para 8.

68 *Ibid*, para 9.



The first instance court acquitted the applicants on 17 June 2005.⁶⁹ Upon appeal by the civil parties and the public prosecutor, the Paris Court of Appeal reversed the decision, finding the applicants guilty as charged. The Court of Appeal also held that the photographers had infringed their copyright not only in the claimants' clothes but also in the fashion shows themselves.⁷⁰ The three fashion photographers were ordered by the Paris Court of Appeal of Paris to pay fines between 3,000 and 8,000 Euros and an award of damages to the French Design Clothing Federation and all five fashion houses, all together amounting to 255,000 Euros. They were also ordered to pay for the publication of the judgment of the Paris Court of Appeal in three professional newspapers or magazines.⁷¹ Thus, even catwalk was under copyright protection in France.

Before the Court of Cassation, the photographers argued that making the photographs available on the internet was allowed by the exception for the purposes of reporting current events (Article L. 122-5 9 of the IPC) and this also fell into their right to freedom of expression (Article 10 ECHR).⁷² In its judgment of 5 February 2008, the Court of Cassation simply dismissed the photographers' appeal by stating that the internal copyright exception of Article L. 122-5 9 did not apply to the seasonal fashion industry and that the Paris Court of Appeal has accordingly sufficiently justified its decision.⁷³ The photographers therefore lodged a complaint before the ECtHR, putting forward in particular that the fashion photographs were 'information' of general public interest under Article 10 of the ECHR. According to the applicants, the publication of the photographs on a website by a media organisation, even for sale, amounted to a proportionate exercise of freedom of expression. The ECtHR's answers to the photographers was not heralding.

In the *Ashby Donald* case, the ECtHR started its assessment by establishing that the applicant's convictions - regardless they resulted from a copyright infringement - comprised an interference with their right to freedom of expression.⁷⁴ Having identified the existence of an interference under Article 10(1), the ECtHR shifted its focus on to its

69 Ibid, para 10

70 Ibid, paras 11-13.

71 Ibid, paras 14-15.

72 Ibid, para 17.

73 Ibid, para 18.

74 Ibid, para 34.



famous “three-part test” under Article 10(2).⁷⁵ On the basis of Article 10(2) of the Convention, the exercise of freedom of expression may be subject to formalities, conditions, restrictions or penalties, only if they are ‘prescribed by law’, pursue one or more of the legitimate aims referred to in Article 10(2) of the Convention and are ‘necessary in a democratic society’.⁷⁶ The ECtHR was brief but clear in finding respectively that the interference by the national authorities was prescribed by law and pursued the legitimate aim of the ‘protection of rights of others’ (that is of the copyright holders) and the ‘prevention of crime.’⁷⁷ Then, the ECtHR directed its examination to the necessity of the interference – the so-called ‘necessity test’.⁷⁸

On whether the interference was necessary in a democratic society two considerations were conspicuous in the Court’s assessment. In *Ashby Donald*, the ECtHR firstly reviewed “the nature of information” and “the character of information” at issue.⁷⁹ On this score, the Court held that the information about fashion did not relate to a debate of general public interest. It went on to hold that the applicants’ expression was primarily commercial in nature. These findings ultimately led the Court to endorse that national authorities enjoy a particularly ‘wide margin of appreciation’ in evaluating local needs and conditions, if the nature and character of speech are similar to the present case.⁸⁰

When it came to the crux of the discussion, setting the appropriate standards of the so-called balancing copyright as a human right to property on the one hand and freedom of expression on the other, the Court preferred not to enter the murky waters between those competing fundamental rights. Once again, it underlined that when there are two

75 For further discussion of the ‘three-part test’ as a tool for assessing restrictions on freedom of expression, see, M Macovei, *Freedom of Expression: A Guide to The Implementation of Article 10 of the European Convention on Human Rights*(*Human Rights Handbooks No 2*) (Strasbourg, Council of Europe Publishing, 2001).

76 *Ashby Donald*, para 35.

77 *Ashby Donald*, para 36.

78 The test of ‘necess[ity] in a democratic society’ requires the Court to decide whether the ‘interference’ challenged corresponded to a ‘pressing social need’, whether it was proportionate to the legitimate aim pursued (‘proportionality test’) and whether the reasons given by the national authorities to justify it are relevant and sufficient (see, *Sunday Times v the United Kingdom*, App no 6538/74, (ECtHR, 26 April 1979) para 62. For further discussion of the ‘democratic necessity test’ see; Steven Greer, **The Exceptions to Articles 8 to 11 of the European Convention on Human Rights (Human Rights Files No 15)** (Council of Europe Publishing, 1997).

79 Geiger and Izyumenko, 2014, 321.

80 *Ashby Donald*, para 39.



competing interests that are both protected by the ECHR; the national authorities have a wide *margin of appreciation* to balance them. On this account, the ECtHR laid particular emphasis on the fact that ‘intellectual property benefits from the protection afforded by Article 1 of Protocol No 1 to the Convention’ and that in such a situation the state is accorded ‘a wide margin of appreciation.’⁸¹

Finally, the Strasbourg Court in *Ashby Donald* did not regard the fines and the substantial award of damages as disproportionate to the legitimate aim pursued, arguing that the applicants provided no evidence that these sanctions had “financially strangled” them.

Having established that the convictions applied were proportionate, it was held that the interference with the applicants’ freedom of expression was necessary in a democratic society. The Court nevertheless reached the conclusion in *Ashby Donald* that there was no violation of Article 10.⁸²

In *The Pirate Bay*, the complaint was brought by Fredrik Neij and Peter Sunde Kolmisoppi. During 2005 and 2006 they were both involved in the running of the website ‘The Pirate Bay’ (TBP), one of the world’s largest file sharing services on the Internet, which allows users to exchange digital material such as music, films and computer games. In January 2008, Neij and Sunde Kolmisoppi were charged with complicity to commit crimes in violation of the Copyright Act. Subsequently, several entertainment companies brought private claims within the proceedings. In April 2009, the Stockholm District Court sentenced Neij and Sunde Kolmisoppi to one year’s imprisonment and held them, together with the other defendants, jointly liable for damages of approximately 3.3 million Euros. On 26 November 2010, the Court of Appeal reduced the first applicant’s prison sentence to ten months and the second applicant’s sentence to eight months but increased their joint liability for damages to approximately 5 million Euros. Ultimately, the Supreme Court refused leave to appeal in February 2012. The applicants eventually applied to the ECtHR, claiming that their conviction for complicity to commit crimes in violation of the Copyright Act had breached their freedom of expression and information under Article 10 of the ECHR.⁸³

Similar to *Ashby Donalds*, the ECtHR concluded that the applicants’ convictions, despite deriving from a copyright infringement, was an

81 *Ashby Donald*, para 40; *The Pirate Bay*, paras 10-11.

82 *Ashby Donald*, para 45.

83 For details see; *The Pirate Bay*, paras 2-5.

interference with their right to freedom of expression.⁸⁴ The ECtHR went on to hold, however, that the interference was justified by the three conditions set out by Article 10(2) of the ECHR. Specifically, it was 'prescribed by law', as their convictions were rooted in the Copyright Act and the Penal Code, and related solely to copyright-protected digital material; it pursued the legitimate aims of protecting the rights of others and preventing crime; and it was also 'necessary in a democratic society'.⁸⁵ In *the TBP*, unlike *Ashby Donald*, the ECtHR stayed away from the question of whether the expression was of a commercial nature. Rather, it stressed that 'the safeguards afforded to the distributed material in respect of which the applicants were convicted cannot reach the same level as that afforded to political expression and debate'.⁸⁶

In relation to the necessity test, the ECtHR held that the applicants' interests in exchanging information had to be balanced against the rights of copyright owners to protect and prevent the free dissemination of their copyright-protected material; thus, while the applicants benefited from the right to freedom of expression under Article 10(1), the copyright owners benefited from the protection of Article 1 of the Protocol No 1 of the ECHR.⁸⁷ The ECtHR went on to observe that, in balancing those competing interests, the state has a wide margin of appreciation, the extent of which may vary depending on the type of information in dispute.⁸⁸ While information that is important to political expression and debate can expect heightened protection under Article 10, the nature of the information in dispute in this case served only to widen the margin of appreciation still further. A final consideration in the balancing of these competing interests was the term of imprisonment and financial liability imposed on the applicants. Not taking 'any action to remove the torrent files in question, despite having been urged to do so' and staying 'indifferent to the fact that copyright-protected works had been the subject of file-sharing activities via TPB' satisfied the ECtHR in rendering the sanctions imposed proportional. Having established that the convictions applied were proportionate, it was further held that the interference with the applicants' freedom of expression was necessary in a democratic society. The Court accordingly reached the conclusion that the application was 'manifestly ill-founded'.⁸⁹

84 *Ashby Donald*, para 34; *The Pirate Bay*, para 9.

85 *The Pirate Bay*, para 10.

86 *Ibid*, para 11.

87 *Ibid*.

88 *Ibid*.

89 *Ibid*.



In sum, the enforcement of copyright with respect to peer-to-peer networks represents a restriction, but, according to the ECtHR, a proportionate one, to the freedom to impart information. However, the Court did not reflect upon the impact of the decision on Internet users' rights.⁹⁰

6. Akdeniz

Subsequently, *Akdeniz v Turkey*,⁹¹ the ECtHR was confronted with an issue of blocking accessing to the websites myspace.com and last.fm because they were disseminating musical works in infringement of copyright.⁹² The applicant, who was regular user of the websites,

90 A further analysis with respect to the human rights aspects of the notice-and-takedown procedure and intermediary liability was provided by the ECtHR in *Delfi* [See; *Delfi AS v Estonia*, App. no. 64569/09 (ECtHR, 10 October 2013). The case was referred to the Grand Chamber in 17/02/2014: *Delfi AS v Estonia* App no 64569/09 (2015) ECHR 586 (GC).] In *Delfi*, the Grand Chamber of the ECtHR ruled that the holding of a newspaper portal liable for the comments of end users was not a violation of the freedom of expression, where the comments amount to hate speech and speech inciting violence. [For academic commentaries on the case see; Lisl Brunner, "The Liability of an Online Intermediary for Third Party Content The Watchdog Becomes the Monitor: Intermediary Liability after *Delfi v Estonia*", **Human Rights Law Review** 16, no. 1, (2016): 163-174; Tatiana-Eleni Synodinou, "Intermediaries' Liability for Online Copyright Infringement in The EU: Evolutions and Confusions", *Computer Law & Security Review* 31, (2015): 63-67; Martin Husovec, "ECtHR Rules On Liability of ISPs as A Restriction of Freedom of Speech", **Journal of Intellectual Property Law & Practice** 9, no. 2, (2014): 108-109; Martin Husovec, "General Monitoring of Third-Party Content: Compatible with Freedom of Expression?" **Journal of Intellectual Property Law & Practice** 11, no. 1, (2016) 17-20; Eileen Weinert, "Delfi AS v Estonia: Grand Chamber of the European Court of Human Rights Hands down Its Judgment: Website Liable for User-Generated Comments", *Entertainment Law Review* 26, no. 7, (2015): 246-250]. In *MTE [Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt (MTE) v Hungary*, App. no. 22947/13 (ECtHR, February 2, 2016)], the issue of the liability of a host provider, an online newspaper, for the comments of its readers has come before the ECtHR again. In this case, however, the ECtHR's chamber, while referring at a number of points in its judgment to the reasoning of the *Delfi* Grand Chamber, gave a new interpretive pattern for the *Delfi* ruling. Furthermore, new perspectives were adopted with regard to the notice-and-takedown system, which now seems to be legitimate in the eyes of the Court [For academic commentaries see; Christina Angelopoulos, "MTE v Hungary: New ECtHR Judgment on Intermediary Liability and Freedom of Expression" (March 5, 2016), available at <http://kluwercopyrightblog.com/2016/03/05/mte-v-hungary-new-ecthr-judgment-on-intermediary-liability-and-freedom-of-expression/>; Dirk Voorhoof and Eva Lievens, "Offensive Online Comments - New ECtHR Judgment", (February 15, 2016), available at <http://echrblog.blogspot.co.uk/2016/02/offensive-online-comments-new-ecthr.html>; Eileen Weinert, "MTE v Hungary: the first European Court of Human Rights ruling on liability for user comments after *Delfi AS v Estonia*", *Entertainment Law Review* 27, no. 4, (2016): 135-139]. In the *MTE* case, the Court ruled that holding an Internet intermediary liable for the infringing content (offensive statements that do not amount to hate speech) posted by its users indeed violated that intermediary's freedom of expression (*MTE*, para 91).

91 *Akdeniz v Turkey*, App no 20877/10 (ECtHR, 11 March 2014) (inadmissibility decision) [hereinafter '*Akdeniz*'].

92 *Ibid.* Prior to *Akdeniz*, in *Ahmet Yildirim*, upon an Internet user's application, the Court found that a measure resulting in a complete interception of access to Google sites in Turkey

complained about the collateral effects of blocking, which amounted, according to him, to a disproportionate response based on Article 10 of the ECHR. In *Akdeniz*, it was held that the applicant in the case could ‘without difficulty have had access to a range of musical works by numerous means without this entailing a breach of copyright rules.’⁹³ The Court also distinguished this case from *Ahmet Yildirim v Turkey*, as it involved copyright and commercial speech, where Member States have a wider *margin of appreciation*,⁹⁴ as opposed to political speech and the ability to participate in public debate. Whereas admitting the need to balance, in cases such as this one, the possibly conflicting copyright and freedom to receive information,⁹⁵ the Court nevertheless stated that the sole fact that the applicant—like other Turkish users of the two music-sharing websites—had been indirectly affected by blocking did not suffice for him to be regarded as a ‘victim’ for the Convention purposes.⁹⁶ The Court noted in particular that the blocking did not concern the applicant’s own website⁹⁷ and neither did it deprive the applicant of other—legitimate—ways of accessing the musical works at issue.⁹⁸ Consequently, the availability of accessible expressive alternatives for receiving information led the Court to find no violation.⁹⁹

II. THE EU HUMAN RIGHTS SYSTEM

A. Legal Framework

Within European Law, there is another important resonance of the ‘property rationale’ concerning the interface between human rights and intellectual property rights: it is rooted in the EU Charter. The EU Charter, unlike its predecessor, the ECHR, does not just include the human right

was violation of freedom of expression. *Ahmet Yildirim v Turkey* App no 3111/10 (ECtHR, 18 December 2012). This line of reasoning was later maintained in *Cengiz*, where the case concerned the blocking of the YouTube website. *Cengiz & Others v Turkey*, App nos 48226/10 and 14027/11 (ECtHR, 1 December 2015).

93 Ibid.

94 For academic commentaries on the concept of margin appreciation see; Andrew Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality* (Oxford, OUP, 2012); Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Antwerp, Intersentia, 2002).

95 *Akdeniz*, para 28.

96 Ibid, para 24.

97 Ibid, para 27.

98 The Court noted further that the websites were blocked because they did not comply with copyright legislation and that neither the collateral effects of blocking, nor the nature and the character of disseminated information were such as to raise an important question of general interest. Ibid, paras 25, 26 and 28.

99 Ibid.



to property in Article 17 (1), linguistically reminiscent of Article 1 of Protocol 1, but, importantly, also in Article 17(2) the short provision: ‘intellectual property *shall be* protected.’¹⁰⁰ Scholars have observed that this short statement was translated into French as ‘*la propriété est protégée*’ or into German as ‘*Geistiges Eigentum ist geschützt*.’¹⁰¹ If correctly translated, this would be ‘intellectual property *is* protected.’¹⁰² Highlighting the uncertainty concerning the scope of the protection, its interaction with the right to property and other human rights, Geiger calls this norm ‘a mysterious provision with an unclear scope.’¹⁰³ Although its language is modelled on an ‘enigmatic formula’¹⁰⁴, it has been argued that Article 17(2) should be construed as ‘confirmation’ that intellectual property is a species of human right to property under Article 17(1).¹⁰⁵

B. Case Law

1. From *Promusicae* to *Luksan*

The CJEU has engaged in clarifying the ambiguities of the conceptual nature of Article 17(2). It has been a little reluctant to theoretically justify the property doctrine in copyright in the four leading cases *Promusicae v Telefónica*,¹⁰⁶ *Scarlet Extended v SABAM*¹⁰⁷ and *SABAM v Netlog*,¹⁰⁸ and *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft mbH*.¹⁰⁹

100 EU Charter Article 17(2) (Emphasis added).

101 Christophe Geiger, “Intellectual Property Shall Be Protected!? Article 17(2) of the Charter of Fundamental Rights of the European Union: A Mysterious Provision with An Unclear Scope”, *European Intellectual Property Review* 31, no. 3, (2009): 115; Jonathan Griffiths and Luke McDonagh, “Fundamental Rights & European IP law – The Case of Art 17(2)”, in **Constructing European Intellectual Property**, ed. Christophe Geiger (Cheltenham, Edward Elgar, 2013), 80; Alexander Peukert, “Intellectual Property as an End in Itself?”, *European Intellectual Property Review* 33, no. 2, (2011): 69.

102 Geiger, 2009, 115; Griffiths and McDonagh, 80; Peukert, 2011, 69.

103 Geiger, 2009, 115.

104 Griffiths and McDonagh, 80.

105 Geiger argues that ‘Article 17(2) of the Charter could then be considered to be nothing more than a simple clarification of art.17(1), with the consequence that there would be absolutely no justification to *expand* remedies on this ground.’ See; Geiger, 2009, 116. Griffiths and McDonagh suggest that ‘Art 17(2) is subservient to the more generally worded Article 17(1).’ See; Griffiths and McDonagh, 81.

106 Case C-275/06 *Productores de Música de España (Promusicae) v Telefónica de España SAU* [2008] ECR I-00271 [hereinafter ‘*Promusicae*’].

107 Case C-70/10 *Scarlet Extended NV v Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM)* [2011] ECR I-11959 [hereinafter ‘*Scarlet Extended*’].

108 Case C 360/10 *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog NV* (CJEU, 16 February 2012) [hereinafter ‘*Netlog*’].

109 Case C-314/12 *UPC Telekabel Wien v Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft mbH* [2014] ECDR 12 [hereinafter ‘*Telekabel*’].

In *Promusicae*, the case concerned a court order to require Internet intermediaries to disclose certain information about the alleged infringers, where the CJEU held that EU law, including Article 17 (2) of the EU Charter, does not require an obligation to disclose personal data in civil infringement proceedings.¹¹⁰ In the cases of *Scarlet Extended* and *Netlog*, the CJEU held that the injunction to install the contested filtering systems ‘would result in a serious infringement of the freedom of the ISP concerned to conduct its business’ pursuant to Article 16 of the EU Charter, as it would require the ISP to install a complicated, costly, and permanent filtering system at its own expense,¹¹¹ although the protection of intellectual property is provided under Article 17 (2). In *Telekabel*, the case derived from an injunction requiring DNS blocking and blocking of a website’s current and future IP addresses, which provided downloading or streaming films of two production companies.¹¹² In this case, the CJEU held that the contested injunction restricted the intermediary’s free use of resources and imposed a significant cost affecting the organisation of activities and require complex technical solutions, but that it was justified when balanced with intellectual property rights.¹¹³

Article 17 (2) of the EU Charter was also used to untangle copyright and related rights in cinematographic works in *Luksan v van der Let*.¹¹⁴ In

110 *Promusicae*, para 70.

111 *Scarlet*, para 48; and *Netlog*, para 46. It is worth noting that the CJEU equally finds such an injunction to be ‘contrary to Article 3 (1) of the Enforcement Directive since it is ‘unnecessarily complicated’ and ‘costly’.

112 For commentaries on the case see; Gemma Minero, “European Union: case note on “UPC Telekabel Wien””, **International Review of Intellectual Property and Competition Law** 45, no. 7, (2014): 848-851; Joel Smith, Andrew Moir and Rachel Montagnon, “ISPs And Blocking Injunctions: UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH and and Wega Filmproduktionsgesellschaft mbH (C-314/12)”, **European Intellectual Property Review** 36, no. 7, (2014): 470-473; EU Focus, “ISP May Be Ordered To Block Website Infringing Copyright”, **EU Focus**, no. 319, (2014): 27-28; Tiffany Stirling, “Do Shoot The Messenger: Site-Blocking Injunctions Against Internet Service Providers Upheld by the CJEU UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft GmbH v Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft GmbH (C-314/12) [2014] E.C.D.R. 12”, **Entertainment Law Review** 25, no. 6, (2014): 219-221; Steven James, “Digesting Lush v Amazon and UPC Telekabel: Are We Asking Too Much Of Online Intermediaries?”, **Entertainment Law Review** 25, no. 5, (2014): 175-178; Christina Angelopoulos, “Are blocking injunctions against ISPs allowed in Europe? Copyright Enforcement in the post-Telekabel EU Legal Landscape”, **Journal of Intellectual Property Law & Practice** 9, no. 10, (2014): 812-821; Julia Hörnle, “On Whose Side Does the Internet Access Provider Stand? Blocking Injunctions Against Communication Service Providers. Case C-314/12, UPC Telekabel Wien GmbH v Constantin Film”, **Communications Law** 19, no. 3, (2014): 99-100.

113 *Telekabel*, paras 47, 50, 51.

114 Case C-277/10 *Martin Luksan v Petrus van der Let* (CJEU, 9 February 2012) [hereinafter ‘*Luksan*’].



2008, Martin Luksan, as scriptwriter and principal director, and Petrus van der Let, as commercial producer, concluded a 'directing and authorship agreement' for the production of a documentary film on the topic of German photography from the Second World War. In the agreement, copyright and exploitation rights were assigned to the producer, but the director preserved rights concerning the distribution of the documentary on digital networks, closed circuit television, and pay TV. However, once the film was shot, the producer made it available on the internet and assigned pay TV rights to a TV network.

Luksan sued the producer, contending that these forms of exploitation violated rights that were reserved to him in the contract and claiming that half of the statutory rights to remuneration were vested in him. Van der Let responded by arguing that a statutory assignment of those rights is provided to him by virtue of Paragraph 38(1) of the UrhG (copyright code) which grants all exclusive exploitation rights to the producer and therefore that the relevant provision in the contract was void. The producer also claimed the entire amount of remuneration rights, arguing that they necessarily share the fate of exploitation rights and that the statutory provision acknowledged the possibility of contrary agreements.

Several questions concerning the legitimacy of a national rule vesting exploitation rights in a cinematographic work in the producer rather than the director of that work were referred to the CJEU, essentially on the questions of 1) whether EU copyright law must be understood so that the principal director of a cinematographic or audio-visual work is directly entitled by law to own the main exploitation rights, and 2) whether Austrian copyright laws which allocate these exploitation rights exclusively to the film producer are inconsistent with EU law.¹¹⁵

After clarifying that, within EU law, the principal director is always considered an author of such works,¹¹⁶ this interpretative path followed by the CJEU made its way to Art.14*bis* of the Berne Convention which allows Berne Union countries to deny the principal director certain exploitation rights, such as those at issue in the main proceedings. On this account, the CJEU noted that the international agreement allows, but does not require, a similar provision. According to the CJEU, Member States are expected to refrain from adopting an optional measure which is contrary to EU law and '[a]ccordingly, they can no longer rely on the

115 Ibid, para 36.

116 Ibid, paras 37-53.

power granted by Article 14*bis* of the Berne Convention.¹¹⁷ In order to support this argument, the CJEU, by citing both the general right to property as well as the vague statement that intellectual property ‘shall be protected’, the Court found that:

‘[...]the principal director of a cinematographic work must be regarded as having lawfully acquired, under European Union law, the right to own the intellectual property in that work...In those circumstances, the fact that national legislation denies him the exploitation rights at issue would be tantamount to depriving him of his lawfully acquired intellectual property right.’¹¹⁸

The CJEU thus ruled that an interpretation of EU law based on the right in Art.14*bis* Berne Convention to grant certain exploitation rights in cinematographic works to persons other than the principal director *inter alia* would inevitably violate ‘the requirements flowing from Article 17(2) of the [EU Charter] guaranteeing the protection of intellectual property.’¹¹⁹

The CJEU also clarified whether the exploitation rights of cinematographic works under consideration, as well as the right to fair compensation provided under the ‘private copying’ exception (Article 5(2)(b) of Directive 2001/29), can be vested by law, originally and directly, in the principal director: While the former may be subject to a rebuttable presumption of transfer, the latter cannot be waived or transferred.¹²⁰

Following *Luksan*, one may argue that ‘national rules depriving authors of exploitation rights as a matter of law will inevitably contravene [fundamental] EU law.’¹²¹ Searching for substantive repercussions of the CJEU’s use of the language of fundamental rights, Jonathan Griffiths asserts that if the exploitation rights protected by copyright are understood as separate property interests, it may become possible to advocate that ‘the national rule at issue [i]s depriving the principal director of a number of property rights to which he ought to have been entitled.’¹²² For him, in the traditional approach of monist jurisdictions

117 *bid*, para 64.

118 *Ibid*, paras 69-70.

119 *Ibid*, para 71.

120 *Ibid*, paras 73-109.

121 Jonathan Griffiths, “Constitutionalising or Harmonising? The Court of Justice, the Right to Property and European Copyright Law”, *European Law Review* 38, no. 1, (2013): 76 (Brackets are mine).

122 Griffiths, 2013, 76.



such as Austria and Germany (where the various exploitation rights are understood as sub-elements of a more general entitlement to copyright or author's right), however, "the outcome might be different."¹²³

Griffiths further contends that 'the Court's conclusion on [A]rticle 17 is primarily rhetorical, serving to bolster the prior decision that the exploitation rights in question were to be allocated to authors as a matter of European copyright law.'¹²⁴ The impression stemming from the pragmatic use of this pithy property rhetoric by the CJEU, as Griffiths points out, was intensified by the fact that when the CJEU in *Luksan* held 'that national rules presuming the transfer of rights from authors to third parties (rather than vesting them automatically by operation of law) was consistent with the requirements of EU copyright law, the question of whether or not such presumptions were compatible with the fundamental right to property was not even discussed.' This kind of rule certainly comprises an interference with a property right and therefore should have been subjected to the CJEU's 'fair balance' test. In effect, in many cases, there might be little practical difference between an automatic vesting and a presumed transfer.¹²⁵ Similarly, the Court's judgement that the principal director of a cinematographic work was entitled, by operation of law, directly and originally, to fair compensation for private copying was not supported by reference to Article 17.

For that reason, the judgement has been characterised as 'inconsiderate'¹²⁶ and 'thinly reasoned.'¹²⁷ Whereas some other commentators have praised the *Luksan* decision by noting that 'it contributes to the development of a flexible system which, despite differences in national legislation, appears ready to face the economic, social, and technological challenges of our time.'¹²⁸

123 Ibid.

124 Ibid, 77.

125 Griffiths note that 'the Court's failure to consider this issue can perhaps be explained by the fact that such presumptions are to be found in the legislative *acquis*.' Ibid, 77.

126 Henning Grosse Ruse-Khan, "Overlaps and Conflict Norms in Human Rights Law: Approaches of European Courts to Address Intersections with Intellectual Property Rights", in **Research Handbook on Human Rights and Intellectual Property**, 78.

127 Griffiths, 2013, 76.

128 Stefano Barazza, "Authorship of Cinematographic Works and Ownership of Related Rights: Who Holds the Stage? *Martin Luksan v Petrus van der Let*, Case C-277/10, European Court of Justice (ECJ), 9 February 2012", **Journal of Intellectual Property Law & Practice** 7, no. 6, (2012): 396.



2. Deckmyn

Human rights discourse found a place in *Deckmyn v Vandersteen*,¹²⁹ where the CJEU defined the parody exception to copyright laws within Article 5(3)(k) of EU Directive 2001/29 (InfoSoc Directive).¹³⁰ The reference was made by the court of appeal of Brussels. In the case the Belgian politician Johan Deckmyn had copied a cover of Spike and Suzy, which also depicted Daniel Termont, the mayor of Ghent. The rights holders of the comic had sued Deckmyn for copyright infringement.¹³¹

The reference essentially concerned what conditions must be met for a derivative work to be considered a parody.¹³² Parodies are allowed under the Information Society Directive, in those countries that have indicated to apply the parody exception. The CJEU noted that the definition of the copyright exceptions was consistent throughout the EU and given “an autonomous meaning” within the Directive.¹³³ To qualify as a parody, the work must “evoke an existing work, while being noticeably different from it, and secondly, to constitute an expression of humour or mockery”.¹³⁴ The CJEU further held that the determination of whether a use of parody amounts to an exception requires striking a fair balance between the rights of the person who created the original work and the freedom of expression of the individual who is relying on the exception of parody.¹³⁵

It was also the first time that protection of the non-harmonized moral interests of authors have been considered in cases brought before the CJEU. In *Deckmyn*, the CJEU recognized the legitimate interest of authors in ensuring that their works are not associated with a racist and discriminatory message.¹³⁶

As Jonathan Griffiths recently observed, “the reference to ‘fair balance’ in *Deckmyn*, and other judgments of the Court, also disguises continuing uncertainty about significant aspects of the system of rights protection

129 Case C-201/13, *Deckmyn v Vandersteen* (CJEU, 3 September 2014) [hereinafter ‘*Deckmyn*’].

130 For commentaries on the case see; Daniël Jongsma, “Parody After *Deckmyn* – A Comparative Overview of the Approach to Parody Under Copyright Law in Belgium, France, Germany and The Netherlands”, *International Review of Intellectual Property and Competition Law* 48, (2017): 652–682, Eleonora Rosati, “Just a Laughing Matter? Why the Decision in *Deckmyn* is Broader than Parody”, *Common Market Law Review* 52, no. 2, (2015): 511-529.

131 *Deckmyn*, paras 7-12.

132 *Ibid*, para 13.

133 *Ibid*, para 15.

134 *Ibid*, para 20.

135 *Ibid*, para 27.

136 *Ibid*, para 31.



applicable in this context.”¹³⁷ The identification of the relationship between the rights protected under the EU Charter and the need to secure a fair balance, or proportionality, are left unaddressed.¹³⁸

3. McFadden

The case of *McFadden v Sony Music*¹³⁹ is another example of intermediary cases where the CJEU’s doctrine of ‘fair balance’ of competing human rights was examined. The central issue in *McFadden* was whether and to what extent a business providing free Wi-Fi to their customers can be held liable for copyright infringement which they committed.

Mr. McFadden, a German retailer, offered a free and unsecure WiFi service to the general public.¹⁴⁰ Back in 2010, his network was used to download a musical work owned by Sony Music.¹⁴¹ Upon receipt of a cease and desist letter, Mr. McFadden filed a lawsuit seeking an order to obtain a negative declaration (negative “*Feststellungsklage*”) to confirm that he was not liable.¹⁴² In reply, Sony Music counterclaimed for payment of damages, an injunction against the infringement of its rights and reimbursement of the costs of giving formal notice and court costs. After the German Court upheld the claims of Sony Music, Mr. McFadden appealed the decision.¹⁴³ In his appeal, he claimed that, according to Article 12(1) of the Directive 2000/31 (“E-Commerce Directive”), he qualified as a provider of an “information society service”, that is a “mere conduit” and was not liable for the information transmitted by a third party.¹⁴⁴ The German court referred the case to the CJEU for a preliminary ruling to advise on whether the exemption of liability for access providers, enshrined in Article 12(1) of the e-Commerce Directive and transposed into German law in Article 8(1) of the Law on electronic media, applied in this case.¹⁴⁵

137 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 ERA Forum* (2019) 20:35–50, 36.

138 Griffiths, 2019, 36-37.

139 Case C-484/14, *McFadden v Sony Music Entm’t Germany GmbH* (CJEU, Sept. 15, 2016) [hereinafter ‘*McFadden*’].

140 *Ibid*, paras 22-23.

141 *Ibid*, paras 25-26.

142 *Ibid*, paras 27-28.

143 *Ibid*, para 29.

144 *Ibid*, para 30.

145 *Ibid*, para 33.

The CJEU ruled that a copyright-holder might be capable of obtaining an injunction against an intermediary service provider to prevent an infringement by the transmission of information from a third party. It, however, held that it was not entitled to claim compensation from the service provider because of the infringement.¹⁴⁶

The CJEU also had to deal with the competing fundamental rights of a copyright-holder to intellectual property protection, the right of a service provider to conduct the business of supplying access to a communication network and the right to freedom of information of the recipients of that service.¹⁴⁷ To strike a 'fair balance' between the competing human rights, it was held that Sony might be capable of obtaining an injunction to force Mr. McFadden to password protect his service and to prevent the relevant copyright infringement from occurring.¹⁴⁸ In this way, information about users committing infringements could be obtained. Notably, the CJEU also confirmed that there is no general obligation on network access providers to monitor information that is transmitted over the network.¹⁴⁹ In other words, in this case the intermediary, such as Mr. McFadden, cannot be put under obligation to watch out whether users were using the service for illicit means.

4. Renckhoff

The current EU copyright system occasionally suffers from limited ability to adapt to the digital environment.¹⁵⁰ This is evident in the case of *Land Nordrhein-Westfalen v Renckhoff*.¹⁵¹ A student included

146 Ibid, para 79.

147 Ibid, para 82. Despite without providing no more than a paragraph, the fundamental rights of users, in particular their freedom of expression and of information, safeguarded by Article 11 of the EU Charter, was also brought into the fair balance test in Case C-160/15, *GS Media BV v Sanoma Media Netherlands BV* (CJEU, Sept. 8, 2016) para 31.

148 *McFadden*, para 99-100.

149 Ibid, para 87.

150 Ole-Andreas Rognstad, Christophe Geiger, Marie-Christine Janssens, Alain Strowel and Raquel Xalabarder, "The delicate scope of economic rights in EU copyright law: opinion of the European Copyright Society in light of case C-161/17, *Land Nordrhein-Westfalen v Renckhoff* (Cordoba Case)", **European Intellectual Property Review** 41, no. 6, (2019): 335.

151 Case C-161/17, *Land Nordrhein-Westfalen v Renckhoff* (CJEU, Aug. 7, 2018) [hereinafter '*Renckhoff*']. For academic commentaries on the judgement see; Bianca Hanuz, "Liability implications of extending the communication to the public right to third-party re-posting of images already freely available online with right holder permission", **European Intellectual Property Review** 41, no. 3, (2019): 190-196; Alexander Ross, "Case C-161/17 *Land Nordrhein-Westfalen v Dirk Renckhoff* - Court of Justice loses control of the concept of communication to the public", **Entertainment Law Review** 30, no. 1, (2019): 24-26; Rognstad, Geiger, Janssens, Strowel and Xalabarder.



Dirk Renckhoff's photograph of the city of Córdoba in an assignment with a reference to the travel portal featuring it, which her school subsequently made available on its website. Mr. Renckhoff subsequently sued the state of North-Rhine Westphalia in Germany, where the school is located. The photograph was originally published on the website of an online travel magazine with the consent of the photographer. The student downloaded the photograph and copied it into her assignment in a slide presentation.¹⁵²

The German Federal Court of Justice referred the case to CJEU seeking clarifications regarding the concept of 'communication to the public'. In *Renckhoff*, the CJEU ruled that the unauthorized re-posting of photographs constitutes a communication to the public and thus an infringement of copyright, even though they are freely made available in the first place.¹⁵³

In reaching this conclusion, the CJEU underlined that allowing the posting of a communication without requiring the consent of the copyright holder would impair the fair balance between the copyright holder's human right to intellectual property and users' right to freedom of expression and information under the EU Charter.¹⁵⁴ It additionally rejected the state of North-Rhine Westphalia's argument that the posting of the photograph was protected by the right to education and held that its finding that the communication by the pupil was to a "new public" was not based on whether or not the use of the photograph was educational but on the fact that the posting of the photograph on the school website made it accessible to all visitors to that website.¹⁵⁵

5. Funke Medien, Pelham and Spiegel Online

The influence of fundamental rights on the scope and limitations of copyright has recently been addressed by the CJEU in three seminal judgments *Funke Medien NRW GmbH v Bundesrepublik Deutschland*,¹⁵⁶ *Pelham GmbH v Hütter*¹⁵⁷ and *Spiegel Online GmbH v Beck*.¹⁵⁸

152 *Renckhoff* paras. 6-7.

153 *Ibid*, paras. 46-47.

154 *Ibid*, paras. 41.

155 *Ibid*, paras. 42-43.

156 Case C-469/17, *Funke Medien NRW GmbH v Bundesrepublik Deutschland* (CJEU, July 29, 2019) [hereinafter '*Funke Medien*'].

157 Case C-476/17, *Pelham GmbH v Hütter* (CJEU, July 29, 2019) [hereinafter '*Pelham*'].

158 Case C-516/17, *Spiegel Online GmbH v Beck* (CJEU, July 29, 2019) [hereinafter '*Spiegel Online*']. For a commentary on these judgments, see; Caterine Sganga, "A decade of fair balance doctrine, and how to fix it: copyright versus fundamental rights before the CJEU from Promusicae to Funke Medien, Pelham and Spiegel Online", *EIPR* 41, (2019): 682;



The case of *Funke Medien*, also known as *Afghanistan Papers*, concerned an unauthorized publication of military reports of the German government by a daily newspaper. This report particularly included information about the deployment of German armed forces abroad.¹⁵⁹ In order to prohibit the publication of such sensitive information, the German government sued the newspaper alleging that the newspaper had infringed its copyright over the reports. The German government's action was upheld both by the trial court and on appeal.¹⁶⁰

The case of *Pelham*, also known as *Metall auf Metall*, encompassed the question of unlicensed music sampling in the EU. It concerned the use of a sequence of rhythms from the music band Kraftwerk's 20-year-old song called '*Metall auf Metall*' in a new music composition entitled '*Nur mir*' produced by Mr Pelham and Mr Haas. The album including the song *Nur mir* was released on phonograms that were recorded by Pelham GmbH. The members of the music band argued that Pelham infringed their rights as phonogram producers by electronically sampling approximately two seconds of a rhythm sequence from '*Metall auf Metall*' and using that sample in a continuous loop in '*Nur mir*'.¹⁶¹ The music sampling concerned was found infringing by the German regular court, but accepted by the German Constitutional Court on the ground of freedom of artistic creativity. The case was then made its way to the German Federal Court of Justice, which referred the case to the CJEU.¹⁶²

Spiegel Online concerned a contentious article written by the German politician Volker Beck back in 1988. The article was published in a collection of articles after being subject to certain amendments by the publisher without the author's consent. Since then, Mr Beck has

Thom Snijders and Stijn 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", **International Review of Intellectual Property and Competition Law** 50, (2019): 1176–1190; Bernd Justin Jütte, "CJEU Permits Sampling of Phonograms under a De Minimis Rule and the Quotation Exception", **Journal of Intellectual Property Law & Practice** 14, no. 11, (2019): 827–829; Griffiths, 2019; Christophe Geiger and Elena Izyumenko, "Freedom of expression as an external limitation to copyright law in the EU: the Advocate General of the CJEU shows the way" **EIPR** 41, no. 3, (2019): 131-137; 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!", **International Review of Intellectual Property and Competition Law** 51, (2020): 282–306.

159 *Funke Medien*, paras 9-10.

160 *Ibid*, para 11.

161 *Pelham*, paras 14-17.

162 *Ibid*, paras 18-24.



totally distanced himself from the content of this article.¹⁶³ In 2013, the manuscript of the article was presented to Mr. Beck, who made the document available to various newspaper editors as evidence that his manuscript had been modified in the article published in the collection. He did not consent to the publication of the text by the media. However, he made both versions of the manuscript available on his own website.¹⁶⁴ In the meantime, the Internet portal Spiegel Online published an article in which it contented that the Mr Beck had deceived the public, because the main content in the manuscript had not been amended. In addition, the two versions of the manuscript were made available for download in full text, through hypertext links.¹⁶⁵ Mr Beck sued for copyright infringement, claiming that the availability of the full texts of his article on Spiegel Online constituted copyright infringement. He won both in the trial court and on appeal.¹⁶⁶

The main question underlying the references in all three cases was whether an external freedom of expression review of EU copyright law was admissible. More specifically, the CJEU was invited provide an opinion on whether freedom of the media (in *Funke Medien* and *Spiegel Online*) and freedom of the arts (in *Pelham*) can be accepted as exceptions or limitations to the exclusive rights of authors or phonogram producers beyond the list of codified in Article 5 of the Directive 2001/29/EC (InfoSoc Directive).¹⁶⁷

In these three cases, the CJEU has affirmed the position of the Advocate General¹⁶⁸ and has firmly denied the idea of complementing the list of Article 5 of the InfoSoc Directive with any external freedom of expression exception.¹⁶⁹ For the CJEU, EU copyright law already has internal safeguards that provide for sufficient protection for freedom

163 *Spiegel Online* para 10.

164 *Ibid*, para 11.

165 *Ibid*, para 12.

166 *Ibid*, para 13.

167 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 (InfoSoc), OJ L 167 of 22 June 2001, p. 10.

168 CJEU, 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; CJEU, 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 CJEU, Opinion of Advocate General Szpunar in *Spiegel Online GmbH v. Volker Beck*, C-516/17, 10 January 2019, EU:C:2019:16.

169 *Funke Medien*, para 64; *Pelham*, para 65; and *Spiegel Online*, para 49.

of expression against copyright.¹⁷⁰ In the CJEU's line of reasoning, the application of fundamental rights as external limits to copyright protection on several grounds would endanger harmonization of EU copyright law, legal certainty and consistent application of copyright exceptions and limitations.¹⁷¹

The CJEU has, however, been open to accept that freedom of expression might shape EU copyright law's internal contours.

In *Funke Medien*, the CJEU attributed two roles to the freedom of expression. Firstly, it was used to shape copyright law's subject-matter by excluding non-original works of a purely informative/factual nature from copyright protection. This was done through the idea/expression distinction and the requirement of originality.¹⁷² Secondly, it was used to delineate what should be regarded as exceptions for the purposes of quotation and news reporting under Articles 5(3)(d) and 5(3)(c) of InfoSoc Directive.¹⁷³

In *Pelham*, the CJEU again used not only freedom of expression and but also freedom of the arts as an interpretation tool in two ways. Firstly, these human rights were relied upon to make sense of the exclusive right of reproduction.¹⁷⁴ The CJEU confirmed that the technique of sampling is a form of artistic expression, which is covered by freedom of the arts as protected in Article 13 of the Charter. For the CJEU, a fair balance must be struck between the interests of the holders of copyright and related rights and the interests and fundamental rights of users.¹⁷⁵ In the present case, as the CJEU stresses, when a user exercises his right to freedom of the arts, and transform the sound sample into a new work so it is unrecognisable to the ear and produces a distinct artistic creation, it is not a 'reproduction'.¹⁷⁶ Secondly, these human rights were used to define the boundaries of the quotation exception. The CJEU stated that the quotation exception would potentially cover recognizable, but 'dialogic' use of the original work subject to certain other conditions in the light of fundamental rights.¹⁷⁷ Thus, it was held in *Pelham* that, although seen within the framework of

170 *Funke Medien*, paras 58, 70; *Pelham*, para 60; and *Spiegel Online*, paras 43, 54.

171 *Funke Medien*, paras 62-63; *Pelham*, paras 63-64; and *Spiegel Online*, paras 47-48.

172 *Funke Medien*, para 24.

173 *Funke Medien*, paras 71, 73-76.

174 *Pelham*, paras 31, 37, 39.

175 *Ibid*, para 34.

176 *Ibid*, para 39.

177 *Ibid*, paras 71-72.



freedom of arts, sampling without permission could infringe a phonogram producer's rights, subject to certain conditions.

In *Spiegel Online*, the meaning and scope of 'news reporting' and 'quotation' exceptions under EU copyright law were analysed in the light of freedom of expression. The news reporting exception was interpreted as 'not requir[ing] the rightholder's consent prior to the reproduction or communication to the public of a protected work.'¹⁷⁸ An interpretation of the quotation exception, further, led the CJEU to rule that hyperlinking could be regarded as a form of quoting a work.¹⁷⁹ Thus, the CJEU came to the conclusion that use of a protected work for the purpose of reporting current events and quotation does not, in principle, require authorization.

A notable aspect of the CJEU's judgments in *Funke Medien* and *Spiegel Online* was its affirmation that the exceptions and limitations of Article 5 of the InfoSoc Directive confer rights on the users of works.¹⁸⁰ This is not the first time that the CJEU has referred to copyright exceptions as "users' rights."¹⁸¹ By doing so, the CJEU clearly does not view exceptions and limitations as simple liberties or "privileges" recognised by the legislation in favour of users. It also seems that the CJEU has left a considerable room to the national courts in defining the boundaries of those exceptions that have not been harmonized, such as the exceptions for the purposes of quotation and news reporting.¹⁸²

III. COPYRIGHT AS A HUMAN RIGHT?

A. In General

Regardless of the various arguments that have been advanced against recognising intellectual property rights as human rights, the aforementioned human rights instruments and courts have articulated unequivocal commitment to protect some interests in intellectual creations. While these instruments and decisions seem to strongly suggest that intellectual property rights can be rationalised as human rights, this is however not always the case. This conclusion seems to accord with the basic insight, which is, as Drahos argues, that it is indeed problematic to conclude that all intellectual property rights – by virtue of their universal

178 *Spiegel Online*, para 63.

179 *Ibid*, para 80.

180 *Funke Medien*, para 70; and *Spiegel Online*, para 54.

181 See, for example: Case C-117/13, *Technische Universität Darmstadt v Eugen Ulmer KG* para 43; *Deckmyn*, para 26; *Telekabel*, paras 55-57, 64.

182 *Funke Medien*, para 43; and *Spiegel Online*, para 28



recognition - qualify as human rights.¹⁸³ He points to the limited life of intellectual property rights and further accentuates that few observers would argue that a state that has failed to enact a trade mark system has violated a human right.¹⁸⁴ This analytical path would suggest that only some elements of copyright and thus some interests embedded within them could be conceptualised as human rights. Thus, each human rights regime needs a closer look through a nuanced lens so as to find out the answer to this question.

Frustratingly, neither the ECtHR nor the CJEU have explained why they have viewed intellectual property rights, including copyright, as possessions under the relevant fundamental rights norms. Accordingly, the Courts' case law does not contribute to the current understanding of why and how copyright can/should qualify for human rights protection in accordance with their fundamental rights legislation. Apparently, this question will be settled through a case-by-case analysis, and it is necessary to wait for future cases to make a deeper analysis.

However, the structure of Article 1 Protocol 1 of the ECHR and Article 17(2) of the EU Charter provide a specific foundation for protecting intellectual property rights as human rights. The property notion under these articles has enabled the Courts to creatively characterise (or exclude from protection) a few areas (subject matters) of copyright as human rights in various situations.¹⁸⁵ Within the ECHR system, these include: the artistic material (drawings) in certain magazines (*Aral*), the book (*Melnychuk*), the designs of a new national emblem and seal (*Dima*), a photograph of a historic castle (*Balan*), the catwalk and clothes displayed in a fashion show (*Ashby Donald*), musical works, films and computer games (*the Pirate Bay*) and musical works (*Akdeniz*). Within the EU Charter system, these involve: musical works (*Promusicae*, *Scarlet*, *Netlog*, *McFadden* and *Pelham*), cinematographic works (*Luksan* and *Telekabel*) the cover of the *Suske en Wiske* comic book (*Deckmyn*), the photograph of the city of Córdoba (*Renckhoff*), government reports (*Funke Medien*) and the article in a book (*Spiegel Online*). It is also clear that copyright, patents, trade marks, and even trade mark applications, have been viewed as possessions.

183 Peter Drahos, "Intellectual Property and Human Rights", *Intellectual Property Quarterly* 3, (1999): 361.

184 *Ibid*, 366.

185 Also, the word used as an unregistered trade mark for beer and the application for the registration of this mark (*Anheuser-Busch*).



In attaining these conclusions, notwithstanding repeatedly emphasising an autonomous meaning of ‘possessions’ under Article 1, the ECtHR first and foremost has relied on national law in order to describe whether an asset or a claim having an economic value for its owner is legally recognised within the ECHR system. In *Anheuser Busch*, for example, it determined whether the trade mark application conferred financial interests and rights by making reference to Portuguese law.¹⁸⁶ Similarly in *Balan*, in deciding whether the applicant had a copyright and thus a human right to property in his book and photograph was settled by referring to the assessment and acceptance of the domestic courts on this account.¹⁸⁷ In *Ashby Donald*, the question of whether fashion shows and clothes were copyrighted and therefore possessions was determined by just approving the national law’s assessment.¹⁸⁸ The Strasbourg Court has continuously assigned interpretation of national intellectual property law to the national courts and generally eschewed reviewing their decisions in that regard.¹⁸⁹ Consequently, it has not constituted its own understanding of what a possession is within the meaning of Article 1 of Protocol 1 at a human rights level, independently from how national laws style their intellectual property laws.

After the *Ashby Donald* and *The Pirate Bay* judgments, some commentators in Europe concurred in arguing that copyright enforcement is open to external limitations stemming from human rights,¹⁹⁰ although copyright protection was subjected to human rights scrutiny in *Ashdown v Telegraph Group Ltd*¹⁹¹ well before these two cases. For these commentators,¹⁹² the Strasbourg Court attained this outcome by the so-called ‘balancing paradigm.’¹⁹³ The ECtHR itself refers to this concept in its reasoning in *Ashby Donald*.¹⁹⁴ Indeed, the Court has left the door ajar for a human rights review of copyright enforcement for certain types of speeches, especially political speeches, affecting the general public interest. However, this review is made from within the human rights

186 *Anheuser Busch*, paras 76-78, 83.

187 *Balan*, para 34.

188 *Ashby Donald* (n 166) para 36.

189 *Ruse-Khan*, 82.

190 Geiger and Izyumenko, 2014, 318.

191 *Ashdown v Telegraph Group Ltd* [2002] Ch 149.

192 Geiger and Izyumenko, 2014, 318, 330-335.

193 For the comprehensive analysis of this concept see; Helfer, ‘Towards a Human Rights Framework for Intellectual Property’, 46-51.

194 *Ashby Donald*, para 40.

context, and unless national courts follow a similar line of reasoning as in *Ashdown*, it seems difficult to argue that such an external limitation is implemented.

Balancing paradigm is one that is also familiar to the CJEU's 'a fair balance' test. However, this rhetoric surrounding the oft-repeated balancing paradigm might have puzzled the policymakers, judges, and commentators¹⁹⁵ about its outcomes, even though the way it was implemented had nothing to do with balancing at all. In a balancing exercise, the competing interests are given weight on an equal footing. In order to call something balanced, the competing interests should have the same weight on each side of a measuring scale. Curiously, the former Commission had previously considered this type of conflict in the case of *Soci te Nationale De Programmes FRANCE 2 v France*.¹⁹⁶ In this case, it accepted that copyright formed a legitimate limitation on freedom of expression under Article 10(2). However, no reference to Article 1 of the First Protocol as a basis for the copyright protected interest was made. Virtually seven years before its decision in *Smith Kline*, the Commission had not considered any need to balance between the two human rights as protected under the Convention. By conferring a constitutional mandate to intellectual property enforcement, the Strasbourg Court has come to this point through progressively elevating intellectual property rights, specifically copyright, to the status of a human right and recognising a stronger claim for them than the competing interests such as freedom of expression. This is a natural outcome of the win/lose ideology in trying a dispute. These courts in reality did not perform a balancing exercise, rather it resolved the conflict between copyright as a form possession and freedom of expression by just picking, or approving to choose, one of them.

195 Christophe Geiger for example contends that tensions between property and freedom must be brought into a balanced relationship and that this reasoning offers possibilities for a balanced development of intellectual property law generally [Geiger, 'Constitutionalising Intellectual Property Law? - The Influence of Fundamental Rights on Intellectual Property in the European Union', 386]. Likewise, Daniel Gervais argues that conflicts between copyright and rights such as the right to privacy or to information imply striking a balance [Daniel J. Gervais, "Making Copyright Whole: A Principled Approach to Copyright Exceptions and Limitation", *University of Ottawa Law & Technology Journal* 5, (2008): 1]. Finally, Laurence Helfer and Graeme Austin suggest that striking the appropriate balance between recognising and rewarding human creativity and innovation and ensuring public access to these fruits of those endeavours poses the 'central challenge' when bringing together the two regimes of human rights and intellectual property [Helfer and Austin, 507].

196 *Soci te Nationale De Programmes FRANCE 2 v France* App No 30262/96 (Commission, 15 January 1997). Also, see; *N V Televizier v The Netherlands* App no 2690/65 (Commission, 3 October 1968).



Alexander Peukert, amongst others, points out that the basic logic behind the balancing paradigm, namely that competing interests are of equal rank, is ‘conceptually flawed and should be replaced by a justification paradigm’ noting that:

‘[The balancing paradigm] fails to explain according to which normative criteria a conflict between fundamental rights is to be resolved. What such weighing without a scale will yield is not foreseeable, and it automatically tends to lead to ad-hoc interventions with weak if any foundation in positive law. When it comes to conflicts between the fundamental right to property and other fundamental rights such as the freedom of expression, the balancing paradigm is particularly inappropriate: The reason for this specific defect is that the balancing paradigm rests upon the assumption that all fundamental rights are of equal normative value, and that there is no hierarchical order between them.’¹⁹⁷

According to Peukert, intellectual property protection should be justified (*ex ante* justification), before it enters into effect, since ‘the legislature encroaches upon the public domain.’¹⁹⁸ Once the legislature introduces new intellectual property norms, then an interference with them should be justified (*ex post* justification).¹⁹⁹ Through a normative lens under the rule of law it becomes possible to prevent ‘ad hoc decisions’ and promote ‘criticism and review by forcing the court into a structured, transparent reasoning.’²⁰⁰ He thinks that ‘the role of the judiciary’ in justifying the expansion and limitation of intellectual property ‘is relatively limited’ as opposed to the role of the legislature, even though advocates of the balancing paradigm suggest otherwise.²⁰¹

Griffiths, on the other hand, thinks that the ‘dramatic “constitutionalisation” of European copyright law [in *Luksan*, as well as in *Scarlet*] has been predominantly cosmetic, designed to offer rhetorical support for its harmonisation agenda.’²⁰² For him, this is just for

197 Alexander Peukert, “The Fundamental Right to (Intellectual) Property and the Discretion of the Legislature” in **Research Handbook on Human Rights And Intellectual Property**, 135 (Internal notes omitted).

198 *Ibid*, 140.

199 *Ibid*.

200 *Ibid*, 141.

201 *Ibid*.

202 Griffiths, 2014, 77.



‘provid[ing] rhetorical cover for the expansion of its own jurisdiction.’²⁰³ Indeed, in contrast to the artificial self-restraint created by the ECtHR itself, the CJEU has been bolder in utilising a more general competence to determine both the appropriate boundaries of property rights and the compatibility of any interference with Article 17.

Therefore, despite the aforementioned appraisals of human rights courts and institutions, quite difficult, yet glaring, questions, ranging from the conceptual ground of protection and the existence of corporate ‘human’ rights, to the very definition of when copyright is protected under the umbrella of human rights, remains. How exactly does one ascribe human rights attributes to copyright?

The inclusion of intellectual property in the category of fundamental rights is obviously linked to broader trends towards ‘propertisation’ in intellectual property law. Being critical of this ‘maximalist tendency’, Peukert cautions that behind this semiotic metamorphosis there lies a ‘self-sufficient property logic’ that has been built into intellectual property law.²⁰⁴ Does this tendency fit into intellectual property theory?

Yet even if an intellectual property right, and therefore a copyright, does qualify as a human right with all the sweeping interests that are assured, neither the aforementioned instruments nor their exegeses provide adequate guidance as to how such a right and the interests imbued into its protection regime should be juxtaposed to other rights that require access to the fruits of creativity. What are these interests, and how can they be protected under the mantle of those human rights regimes? The next section will seek answers to these questions.²⁰⁵

B. Moral Interests

Willem Grosheide underscores that most of current copyright scholarship perceives moral rights as human rights.²⁰⁶ To this end, reference is made to several human rights instruments.²⁰⁷ Of course there is some truth in this broad argumentation, but on what basis and

203 Ibid, 78.

204 Peukert, 68-69.

205 See also: Paul L. C. Torremans, “Is Copyright a Human Right?”, *Michigan State Law Review*, (2007): 277.

206 Willem Grosheide, “Moral Rights”, in *Research Handbook on the Future of EU Copyright*, ed. Estelle Derclaye (Cheltenham, Edward Elgar Publishing, 2009), 247-48.

207 For example, UDHR Article 27, ICESCR Article 15(1)(c), International Covenant on Civil and Political Rights 1996 (ICCPR) Article 19, ECHR Article 1 Protocol 1, EU Charter Article 17(2).



to what extent can moral rights be safeguarded under various human rights regimes? How did moral rights historically spring into copyright laws and how have they been reflected in those instruments' protection philosophies?

The protection of the author's moral interests stems from the idea that authors are inherently identified with their creations:²⁰⁸ moral rights shield the author through his work by giving recognition and protection to creative integrity, reputation and personality.²⁰⁹ The advent of moral rights in modern sense may perhaps be traced back to the highly romantic French legal concept of *le droit d'auteur*, first embodied as a 'literary and artistic property' in the Laws of 1791 and 1793.²¹⁰ The author's right essentially emerged from the Enlightenment. This was 'the product of rationalist philosophy, which saw an author's intellectual creation as an emanation of his personality/individuality-in metaphysical terms, his[her] very soul.'²¹¹ Use of an author's work without permission was seen as equivalent to an assault on his/her spirit. This understanding tends to presume a moral link between the protection and a work. Therefore, works lacking sufficient creativity will not attract the protection of *droit d'auteur*. Since it has been conceptualised as 'the most sacred right of man,' 'in extreme cases normative judgments of intrinsic merit may even be applied.'²¹² From its revolutionary origins, the concept of moral rights (*droit moral/droits moraux*) flourished 'through elaboration of the prerogatives' in the jurisprudence of the French courts during the course of the 19th century.²¹³ It was gradually introduced in the first half of the twentieth century into the copyright laws of continental-European countries of the civil law tradition.²¹⁴

Since its inception as a legal ground for the protection of authors, lawyers in different jurisdictions have converged in identifying five broad categories of moral rights: 1) the right of attribution-paternity

208 Yu, 'Reconceptualising Intellectual Property Interests in a Human Rights Framework', 1081-1083.

209 Gillian Davies and Kevin Garnett, **Moral Rights**, (Sweet & Maxwell, 2010), 3.

210 Elizabeth Adeney, **The Moral Rights of Authors and Performers: An International and Comparative Analysis** (Oxford, OUP, 2006), 165; Davies and Garnett, 16.

211 Simon Newman, "The Development of Copyright and Moral Rights in the European Legal Systems", **European Intellectual Property Review** 33, no. 11, (2011): 682.

212 Ibid, 682.

213 Adeney, 165.

214 It should be noted that the French dualist theory of the author's right diverges from the German monist or unitary approach. See; Davies and Garnett, 24-27.



(*droit de paternité*),²¹⁵ 2) the right of disclosure (*droit de divulgation*),²¹⁶ 3) the right of respect or right of integrity (*droit à l'intégrité*),²¹⁷ 4) the right of retraction (*droit au retrait et droit au repentir*),²¹⁸ and 5) the right of access (*droit d'accès*).²¹⁹ These rights are now widely recognised in varying degrees in 162 different jurisdictions throughout the world.²²⁰ Certain moral rights - the right of attribution and the right of integrity - have been given international recognition in Article *6bis* of the Berne Convention.²²¹ In 1996 the WTTP introduced international protection for certain moral rights in favour of performers for the first time.²²²

With regard to Article 1 Protocol 1 of the ECHR, there is no clue in the ECtHR's case law as to whether the right to property extends to moral rights. Legal scholarship is however separated into two camps.²²³ While some suggest that Article 1 Protocol 1 covers only the economic value of a possession,²²⁴ others argue that Article 1 Protocol 1 also protects moral rights.²²⁵ These commentators also think that moral rights — even without any case law on point— could be protected by Article 8 of the Convention

215 The right of attribution is the right to claim authorship of the protected work (see; Davies and Garnett, 5).

216 The right of disclosure is the right to determine when the work is ready for public dissemination and in what form the work will be disseminated (see; Davies and Garnett, 6).

217 The right of integrity is the right to prevent the distortion, mutilation, or other modification of the work in a manner prejudicial to the author's honour or reputation (see; Davies and Garnett, 6).

218 The right of retraction is the right to withdraw the work from public dissemination and public use (see; Davies and Garnett, 6).

219 The right of access is the right to demand access to a work from the original owner of the work or to a copy of the work (see; Davies and Garnett, 6).

220 Davies and Garnett, 4, ft 4, 955-1016.

221 Bern Convention Article *6bis* reads as follows: '[T]he author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honour or reputation.'

222 WTTP Article 5 states that: '[T]he performer shall, as regards his live aural performances or performances fixed in phonograms, have the right to claim to be identified as the performer of his performances, except where omission is dictated by the manner of the use of the performance, and to object to any distortion, mutilation or other modification of his performances that would be prejudicial to his reputation.'

223 Helfer, 42.

224 Ali Riza Coban, **Protection of Property Rights Within the European Convention on Human Rights**, (Ashgate Publishing, 2004), 149-150.

225 J. Drexler, "'Constitutional Protection of Authors' Moral Rights in the European Union - Between Privacy, Property and the Regulation of the Economy'", in **Human Rights and Private Law: Privacy**, ed. Katja S. Ziegler, (Hart Publishing, 2006)(cited by Geiger, 'Constitutionalizing' Intellectual Property Law?' 383 ft 54).



on the protection of privacy.²²⁶ An extensive analysis of the Strasbourg Court's previous case law evidences that the Court's understanding of possession covers a wide range of rights, claims and interests which may be classified as assets.²²⁷ Exploring the meaning of possessions in the ECtHR's case law on Article 1 Protocol 1, Bernadette Rainey, Elizabeth Wicks and Clare Ovey quite recently note that 'all manner of things which have an *economic value*' qualify as property rights.²²⁸ This demonstrates that only 'economic interests' stand out in the Court's analysis.

Indeed, it is difficult to imagine that any kind of possession of property in the form of an asset confers upon its owner a right to be identified as the creator of that property (paternity right) or to challenge misattribution as author of that property (false attribution of work). Nor does it include a claim that enables its owner to sue infringers who have subjected his or her property, *inter alia* an asset, to derogatory treatment (integrity right). Equally, owners of property have no such privacy right, which can be found in copyright law, over their property, because the subject that they own is inherently overt (privacy rights in photograph and films). One may still, however, identify a possession under an exclusive right or claim, instead of a possession in a certain category of the subject material (e.g. literary, artistic, dramatic or musical works, or etc.) of copyright, which empowers it to obtain those moral interests. This kind of approach still seems ill-founded and unjustifiable, because ownership of a claim and ownership of a thing are quite distinct concepts. Likewise, because the ECtHR only guarantees economic interests, a claim right for the protection of moral interests would be thrown out due to the lack of pecuniary consequences for its holder. This understanding can also lead to questions like: are all rights property rights? Even though the owners of property do not establish a personal link with the thing that they own or the thing does not serve a purpose to distinguish them as a creator of it among others, it is interesting that some scholars still expand the protection of property to moral interests, which have always been historically strictly detached from 'economic' interests on intellectual creations. Therefore, it might be argued that moral interests are not inherently suitable for the protection under the shield of the human right to property.

226 Drexl, 173–74; Geiger, 'Constitutionalizing' Intellectual Property Law?' 383.

227 Bernadette Rainey, Elizabeth Wicks, and Clare Ovey, *Jacobs, White & Ovey: The European Convention on Human Rights* (Oxford, OUP, 7th edn, 2017), 551 (Emphasis added).

228 For examples see; Rainey, Wicks, and Ovey, 551-552.

The CJEU has recognised the right of integrity where the work is associated to a racist and discriminatory message (*Deckmyn*).²²⁹ As it, apart from this example, has remained silent in relation to moral interests, the same account would be valid for the EU Charter, as genealogic connections between the two treaties would lead the underpinning economic-oriented ideology of the ECHR to resonate in the EU Charter.

C. Material Interests

The history of copyright suggests that classical economic rights in copyright have been governed under six broad categories: the reproduction right, the distribution right, the rental and lending right, the right of communication to the public (the right to performance), related economic rights (performers' economic rights, resale right-*droit de suite*) and the right of adaptation. These rights have been enshrined in different forms in international treaties, most notably the Berne Convention,²³⁰ the WIPO Copyright Treaty,²³¹ the Rome Convention,²³² the WIPO Performance and Phonogram Treaty 1996 (WPPT),²³³ the TRIPs Agreement,²³⁴ and in various EU directives, specifically the Software

229 See also the AG Szpunar's opinion in the case *Spiegel Online GmbH v Volker Beck* para 79, where the moral right of communication of the work to the public was associated with Article 10 of the EU Charter, establishing freedom of thought.

230 The Bern Convention recognises the following economic rights empowering copyright holders to control some certain activities: 1) Article 8 (the right of translation) 2) Articles 9 and 14 (the right to reproduction); 3) Articles 11, 11ter and 14 (the right of public performance and communication); 4) Article 11bis (the right of broadcasting); 5) Article 12 and 14 (the right of adaptation); 6) Article 14 (the right of distribution of cinematographic works) and 6) Article 14ter (*droit de suite*).

231 WIPO Copyright Treaty contains the following economic rights: 1) Article 6 (the right of distribution); 2) Article 7 (the rental right); and 3) Article 8 (the right of communication to the public). These provisions are to be without prejudice to the relevant provisions of the Bern Convention (WCT Article 8).

232 Economic rights in neighbouring media works were initially regulated by the Rome Convention as follows: 1) Article 10 (the right of reproductions of producers of phonograms) and 2) Article 13 (the right of fixation, rebroadcast, reproduction and public communication of broadcasters).

233 WIPO Performance and Phonogram Treaty distinguishes between the rights of performers and producers: 1) Article 6 (the right to broadcast and communication with the public, and the right to fixation of performers); 2) Article 7 (the right of reproduction of performers); 3) Article 8 (the right of distribution of performers); 4) Article 9 (performers' rental rights); 5) Article 10 (the right to make available of performers); 6) Article 11 (the right of reproduction of producers); 7) Article 12 (the right of distribution of producers); 8) Article 13 (producers' rental rights); 9) Article 14 (the right to make available of producers).

234 In terms of economic rights, the TRIPs Agreement refers to the Bern Convention (TRIPs Agreement Article 9(1)). However, it extends rental rights to computer programs and films in Article 11. It also restates the minimum rights for phonogram producers and broadcasters in Article 14(1)(2).



Directive,²³⁵ the Rental and Lending Rights Directive,²³⁶ the Satellite Broadcasting Directive,²³⁷ the Database Directive,²³⁸ the Resale Rights Directive²³⁹ and the Information Society Directive,²⁴⁰ as well as in national statutes. The substantive nature and types of these economic rights differ from one jurisdiction to another.²⁴¹ As well as generating a complex and inconsistent system of rights, the aggregate and responsive way in which economic rights have been crafted has also yielded a degree of overlap between them. The similitude of interests in protection shields between the right of reproduction and the right of adaptation, and the distribution right and rental and lending right are the most significant examples of this overlap.²⁴² In effect, any adaptation of a work at least requires the use of the original work.

With regard to the ECHR system, no clear indication can be found in the ECtHR's reasoning. In its copyright cases, on the other hand, the material interests tried by the ECtHR, without making a clear distinction among material interests that might be protected as possessions, have been the right of reproduction (*Aral, Melnychuk, Balan, Dima, and Ashby Donald*) and the right to communicate the work to the public (i.e. *Aral, Melnychuk, Balan, Dima, Ashby Donald, The Pirate Bay* and *Akdeniz*). Given the fact that the ECtHR has embraced a purely economic-oriented and

235 Directive 91/250/EEC has been repealed and replaced by this Directive. See; Council Directive 2009/24/EC of 23 April 2009 on the legal protection of computer programs [2009] OJ L 111/16 Article 4(a) (the right to reproduction); Article 4(b) (the right to adaptation) and Article 4(c) (the right to distribution).

236 Directive 92/100/EEC has been repealed and replaced by this directive. See; Council Directive 2006/115/EC of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property [2006] OJ L 376/28 Article 3 (rental rights), Article 7 (the right to fixation), Article 8 (the right to communication) and Article 9 (the right to distribution).

237 Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission [1993] OJ L 248/15 Articles 2 and 4.

238 Council Directive 96/9/EC of 11 March 1996 on the legal protection of databases [1996] OJL 077/20 Article 5(a) (the right to reproduction); Article 5(b) (the right to adaptation); Article 5(c) (the right to distribution) and Article 5(d) (the right to public performance and communication).

239 Council Directive 2001/84/EC of 27 September 2001 on the resale right for the benefit of the author of an original work of art [2001] OJ L 272/32.

240 InfoSoc Directive Article 2 (the right to reproduction); Article 3(1) (the right to communication); Article 3(1)(b)-(d) (rental rights); Article 3(1)-(2)(a)-(d) (the right to make available); Article 4(1) (the right to distribution); and Article 4(2) (the right to adaptation).

241 Ansgar Ohly, "Economic Rights", in **Research Handbook on the Future of EU Copyright**, 212-41.

242 Ibid, 218, 220.

broad understanding in extending the concept of possession to a wide range of rights and interests which may be classified as assets, any state intervention to interests giving an economic gain to the copyright holder would be considered as a violation of Article 1 of Protocol 1. This analytic path still adds very little to current understanding to find out clear-cut results for the question of which material interests would be protected in the world of human rights.

Apart from its judgement in *Luksan*, the CJEU, like the ECtHR, has not distinguished among material interests.²⁴³ It was content with holding that copyrights of the referring courts' home countries shall fall within the ambit of Article 17(2). In these cases, it has overseen the right of reproduction, the right to make the work available to the public (i.e. *Promusicae*), and the right of protection against secondary infringement (i.e. *Scarlet*, *Netlog* and *Telekabel*). In *Luksan*, *Renckhoff*, *McFadden*, *Pelham* and *Spiegel Online*, however, it positioned certain exploitation rights (such as reproduction right, satellite broadcasting right and any other right of communication to the public through making works available to the public) under Article 17(2). It is not clear whether this difference in the CJEU's analysis was intentional or mere negligence. This ambiguity in the CJEU's reasoning about material interests is no guarantee of their demise. Despite the lack of sufficient clarification, in the light of its case law *in toto*, however, the CJEU would arguably be ready to see any enforceable economic right under copyright laws of EU member states as human rights through its market-oriented perspective.

CONCLUSION

Is copyright a human right? The current state of scholarship and case law on the interfaces between copyright and human rights presents a patchwork and haphazard picture. Certain economic interests without maximum limits in copyrights, as well as patents and trade marks, qualify as human rights in the ECtHR's case law. The *Anheuser-Busch*, *Ashby Donald* and *The Pirate Bay* cases evidence that even the small fortunes that

243 In *Promusicae*, it held that: 'It should be recalled that the fundamental right to property, which includes intellectual property rights such as copyright (see, to that effect, Case C-479/04 *Laserdisken ApS v Kulturministeriet* [2006] ECR I-8089 para 65), and the fundamental right to effective judicial protection constitute general principles of Community law.' See para 62. It was equally straightforward in *Scarlet* and *Netlog* in reasoning that: 'The protection of the right to intellectual property is indeed enshrined in Article 17(2) of the Charter of Fundamental Rights of the European Union ('the Charter')." See *Scarlet* (n 903) para 43 and *Netlog* (n 904) para 41. It followed this brevity in *Telekabel* as well '(i) copyrights and related rights, which are intellectual property and are therefore protected under Article 17(2) of the Charter.' See para 47.



can be earned from intellectual property rights can be seen as economic interests deserving human rights protection. However, moral interests in copyright falter in the ECHR and EU Charter regime. The ECHR and EU Charter extend legal remedies for protecting the human rights of corporations. Equally, the ECHR and the EU Charter adopt an economic-oriented approach, accordingly they envision intellectual property rights – and copyright in particular- as commodities and a means of investment. As Emberland highlights, '[i]t would be meaningless to disconnect the Convention's democratic model from core values of a capitalist system.'²⁴⁴ These two human rights regimes have acknowledged that in some circumstances copyright as protected human rights may contradict other human rights norms, but none has provided an appropriate and extensive legal method to resolve the conflict.

The fragmentation of international law is often considered a source of normative and institutional conflict. The cases explained above further demonstrate that copyright law and human rights, at least some attributes of them, seem to be mutually reinforcing, in addition to the more popular narrative in which copyright somehow negates or overrides human rights. This does not however change the fact that the overly fragmented clusters of international human rights architecture have enabled *divergent* positions in the interpretation of the interfaces between copyright and human rights. The situation is also exacerbated by the inadequate interpretations of intellectual-property-related human rights norms due to deeper differences about the nature and function of human rights in a political society. The preceding discussion accordingly shows how different, but also overlapping, analyses leave out some foundational questions on the paradoxical co-existence and conflict of intellectual property rights and human rights.

244 Marius Emberland, *The Human Rights of Companies: Exploring the Structure of ECHR Protection*, (Oxford, OUP, 2006), 42.



RESOURCES:

“Ashby Donald and others v France”, **International Review of Intellectual Property and Competition Law** 45, no. 3, (2014): 354-360.

““Pirate Bay” European Convention on Human Rights, Art. 10 – Neij and Sunde Kolmisoppi v. Sweden, 2013” **International Review of Intellectual Property and Competition Law** 44, no. 4, (2013): 724.

ADENEY, Elizabeth. **The Moral Rights of Authors and Performers: An International and Comparative Analysis**,s (Oxford, OUP, 2006).

ALÌ, Gabriele Spina. “Intellectual Property and Human Rights: A Taxonomy of Their Interactions”, **International Review of Intellectual Property and Competition Law** 51, no. 4, (2020): 411-445.

ANGELOPOULOS, Christina. “MTE v Hungary: New ECtHR Judgment on Intermediary Liability and Freedom of Expression” (March 5, 2016), available at <http://kluwercopyrightblog.com/2016/03/05/mte-v-hungary-new-ecthr-judgment-on-intermediary-liability-and-freedom-of-expression/>.

ARAI-Takahashi, Yutaka. **The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR** (Antwerp, Intersentia, 2002).

BARAZZA, Stefano. “Authorship of Cinematographic Works and Ownership of Related Rights: Who Holds the Stage? **Martin Luksan v Petrus van der Let, Case C-277/10, European Court of Justice (ECJ), 9 February 2012**”, **Journal of Intellectual Property Law & Practice** 7, no. 6, (2012): 396.

BEITER, Klaus. “The Right to Property and the Protection of Interests in Intellectual Property – A Human Rights Perspective on the European Court of Human Rights’ Decision in Anheuser-Busch Inc. v Portugal”, **International Review of Intellectual Property and Competition Law** 39, no. 6, (2008): 714–721.

BROWN, Abbe E. L. **Intellectual Property, Human Rights and Competition: Access to Essential Innovation and Technology** (Cheltenham, Edward Elgar Publishing, 2012).

BRUNNER, Lisa. “The Liability of an Online Intermediary for Third Party Content The Watchdog Becomes the Monitor: Intermediary Liability after Delfi v Estonia”, **Human Rights Law Review** 16, no. 1, (2016): 163-174,

CARPENTER, Megan M. “Trademarks and Human Rights: Oil and Water? Or Chocolate and Peanut Butter”, **Trademark Reporter** 99, (2009): 892–930.



CHAPMAN, Audrey R. "Approaching Intellectual Property as a Human Right: Obligations Related to Article 15 (1) (c)", in **Approaching Intellectual Property as a Human Right**, ed. Evgueni Guerassimov (UNESCO Publishing, 2001).

COBAN, Ali Riza. **Protection of Property Rights Within the European Convention on Human Rights**, (Ashgate Publishing, 2004).

DAVIES, Gillian and Kevin Garnett. **Moral Rights**, (Sweet & Maxwell, 2010).

DRAHOS, Peter. "Intellectual Property and Human Rights", **Intellectual Property Quarterly** 3, (1999): 361.

EMBERLAND, Marius. **The Human Rights of Companies: Exploring the Structure of ECHR Protection**, (Oxford, OUP, 2006).

EU Focus, "ISP May Be Ordered To Block Website Infringing Copyright", **EU Focus**, no. 319, (2014): 27-28.

GEIGER Christophe. "Constitutionalising Intellectual Property Law? - The Influence of Fundamental Rights on Intellectual Property in the European Union", **International Review of Intellectual Property and Competition Law** 37, no. 4, (2006): 371-406.

GEIGER, Christophe and Elena Izyumenko. "Copyright on the Human Rights' Trial: Redefining the Boundaries of Exclusivity Through Freedom of Expression", **International Review of Intellectual Property and Competition Law** 45, no. 3, (2014): 316-342.

GEIGER, Christophe (ed). **Research Handbook on Human Rights and Intellectual Property**, (Cheltenham, Edward Elgar Publishing, 2015).

GEIGER, Christophe and Elena Izyumenko. "Freedom of expression as an external limitation to copyright law in the EU: the Advocate General of the CJEU shows the way" **EIPR** 41, no. 3, (2019): 131-137.

GEIGER, Christophe and Elena Izyumenko. "Shaping Intellectual Property Rights Through Human Rights Adjudication: The Example of the European Court of Human Rights", **Mitchell Hamline Law Review** 46, no. 3, (2020): 527-612.

GEIGER, Christophe 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!", **International Review of Intellectual Property and Competition Law** 51, (2020): 282-306.



GEIGER, Christophe. "Intellectual Property Shall Be Protected!? Article 17(2) of the Charter of Fundamental Rights of the European Union: A Mysterious Provision with An Unclear Scope", **European Intellectual Property Review** 31, no. 3, (2009): 115.

GERVAIS, Daniel J. "Making Copyright Whole: A Principled Approach to Copyright Exceptions and Limitation", **University of Ottawa Law & Technology Journal** 5, (2008): 1

GOEBEL, B. "Trademarks as Fundamental Rights—Europe", **Trademark Reporter** 99, (2009): 931–955; Jennifer W. Reiss, "Commercializing Human Rights: Trademarks in Europe After Anheuser-Busch v Portugal", **Journal of World Intellectual Property** 14, no. 2, (2011): 176-201.

GOLDSMITH, Harry. "Human Rights and Protection of Intellectual Property", **Trademark and Copyright Journal of Research and Education** 12, no. 2, (1968): 889.

GREER, Steven. **The Exceptions to Articles 8 to 11 of the European Convention on Human Rights (Human Rights Files No 15)** (Council of Europe Publishing, 1997).

GRIFFITHS, Jonathan and Luke McDonagh. "Fundamental Rights & European IP law – The Case of Art 17(2)", in **Constructing European Intellectual Property**, ed. Christophe Geiger (Cheltenham, Edward Elgar, 2013), 80.

GRIFFITHS, Jonathan and Uma Suthersanen (eds). **Copyright and Free Speech**, (Oxford, Oxford University Press, 2005).

GRIFFITHS, Jonathan. "Constitutionalising or Harmonising? The Court of Justice, the Right to Property and European Copyright Law", **European Law Review** 38, no. 1, (2013): 76.

GRIFFITHS, Jonathan. "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", **ERA Forum** 20, (2019): 35–50.

GROSHEIDE, Willem. "Moral Rights", in **Research Handbook on the Future of EU Copyright**, ed. Estelle Derclaye (Cheltenham, Edward Elgar Publishing, 2009), 247.

GROSHEIDE, Willem. "Intellectual Property Rights and Human Rights: Related Origin and Development" in **Intellectual Property and Human Rights: A Paradox**, ed. Willem Grosheide (Cheltenham, Edward Elgar Publishing, 2010).



GROSHEIDE, Willem. **Intellectual Property and Human Rights: A Paradox**, (Cheltenham, Edward Elgar Publishing, 2010).

HANUZ, Bianca. "Liability implications of extending the communication to the public right to third-party re-posting of images already freely available online with right holder permission", **European Intellectual Property Review** 41, no. 3, (2019): 190-196.

HELPER, Laurence R. "Toward a Human Rights Framework for Intellectual Property", **Davis L Rev** 40, (2007): 971-1020.

HELPER, Laurence R. "The New Innovation Frontier? Intellectual Property and the European Court of Human Rights", in **Intellectual Property And Human Rights, Enhanced Edition Of Copyright And Human Rights**, ed. Paul L. C. Torremans (Zuidpoolingel, Kluwer, 2008), 39.

HELPER, Laurence R. and Graeme W. Austin. **Human Rights and Intellectual Property: Mapping the Global Interface** (Cambridge, CUP, 2011).

HÖRNLE, Julia. "On Whose Side Does the Internet Access Provider Stand? Blocking Injunctions Against Communication Service Providers. Case C-314/12, UPC Telekabel Wien GmbH v Constantin Film", **Communications Law** 19, no. 3, (2014): 99-100.

HUSOVEC, Martin. "ECTHR Rules On Liability of ISPs as A Restriction of Freedom of Speech", **Journal of Intellectual Property Law & Practice** 9, no. 2, (2014): 108-109.

HUSOVEC, Martin. "General Monitoring of Third-Party Content: Compatible with Freedom of Expression?" **Journal of Intellectual Property Law & Practice** 11, no. 1, (2016) 17-20.

JAMES, Steven. "Digesting Lush v Amazon and UPC Telekabel: Are We Asking Too Much Of Online Intermediaries?", **Entertainment Law Review** 25, no. 5, (2014): 175-178; Christina Angelopoulos, "Are blocking injunctions against ISPs allowed in Europe? Copyright Enforcement in the post-Telekabel EU Legal Landscape", **Journal of Intellectual Property Law & Practice** 9, no. 10, (2014): 812-821.

JONES, J. "Internet Pirates Walk the Plank with Article 10 Kept at Bay: Neij and Sunde Kolmisoppi v Sweden", **EIPR** 35, no. 11, (2013): 695-700.

JONGSMA, Daniël "Parody After Deckmyn – A Comparative Overview of the Approach to Parody Under Copyright Law in Belgium, France, Germany and The Netherlands", **International Review of Intellectual Property and Competition Law** 48, (2017): 652-682.



JÜTTE, Bernd Justin. “CJEU Permits Sampling of Phonograms under a De Minimis Rule and the Quotation Exception”, **Journal of Intellectual Property Law & Practice** 14, no. 11, (2019): 827–829.

LEGG, Andrew. **The Margin of Appreciation in International Human Rights Law: Deference and Proportionality** (Oxford, OUP, 2012).

MACOVEI, M. **Freedom of Expression: A Guide to The Implementation of Article 10 of the European Convention on Human Rights (Human Rights Handbooks No 2)** (Strasbourg, Council of Europe Publishing, 2001).

MINERO, Gemma. “European Union: case note on “UPC Telekabel Wien””, **International Review of Intellectual Property and Competition Law** 45, no. 7, (2014): 848-851.

NEWMAN, Simon. “The Development of Copyright and Moral Rights in the European Legal Systems”, **European Intellectual Property Review** 33, no. 11, (2011): 682.

OHLY, Ansgar. “Economic Rights”, in **Research Handbook on the Future of EU Copyright**, 212–41.

PEUKERT, Alexander. “Intellectual Property as an End in Itself?”, **European Intellectual Property Review** 33, no. 2, (2011): 69.

PEUKERT, Alexander. “The Fundamental Right to (Intellectual) Property and the Discretion of the Legislature” in **Research Handbook on Human Rights and Intellectual Property**, 135.

RAINEY, Bernadette, Elizabeth Wicks, and Clare Ovey. **Jacobs, White & Ovey: The European Convention on Human Rights** (Oxford, OUP, 7th edn, 2017).

ROGNSTAD, Ole-Andreas, Christophe Geiger, Marie-Christine Janssens, Alain Strowel and Raquel Xalabarder. “The delicate scope of economic rights in EU copyright law: opinion of the European Copyright Society in light of case C-161/17, Land Nordrhein-Westfalen v Renckhoff (Cordoba Case)”, **European Intellectual Property Review** 41, no. 6, (2019): 335.

ROSATI, Eleonora. “Just a Laughing Matter? Why the Decision in Deckmyn is Broader than Parody”, **Common Market Law Review** 52, no. 2, (2015): 511-529.

ROSS, Alexander “Case C-161/17 Land Nordrhein-Westfalen v Dirk Renckhoff - Court of Justice loses control of the concept of communication to the public”, **Entertainment Law Review** 30, no. 1, (2019): 24-26.



RUSE-KHAN, Henning Grosse. “Overlaps and Conflict Norms in Human Rights Law: Approaches of European Courts to Address Intersections with Intellectual Property Rights”, in **Research Handbook on Human Rights and Intellectual Property**, 76.

SGANGA, Caterine. “A decade of fair balance doctrine, and how to fix it: copyright versus fundamental rights before the CJEU from Promusicae to Funke Medien, Pelham and Spiegel Online”, **EIPR** 41, (2019): 682.

SHAVER, Lea. “The Right to Science and Culture” *Wisconsin Law Review* 1, (2010): 121-184.

SHAVER, Lea and Caterina Sganga, “The Right to Take Part in Cultural Life: On Copyright and Human Rights” **Wisconsin International Law Journal** 27, no. 4, (2010): 637–662.

SINJELA, Mpasi (ed). **Human Rights and Intellectual Property Rights: Tensions and Convergences**, (Leiden, Martin Nijhoff Publishers, 2007).

SMITH, Joel, Andrew Moir and Rachel Montagnon. “ISPs And Blocking Injunctions: UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH and and Wega Filmproduktionsgesellschaft mbH (C-314/12)”, **European Intellectual Property Review** 36, no. 7, (2014): 470-473.

SNIJDERS, Thom and Stijn 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”, **International Review of Intellectual Property and Competition Law** 50, (2019): 1176–1190.

STIRLING, Tiffany. “Do Shoot The Messenger: Site-Blocking Injunctions Against Internet Service Providers Upheld by the CJEU UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft GmbH UPC Telekabel Wien GmbH (“UPC”) v Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft GmbH (C-314/12) [2014] E.C.D.R. 12”, **Entertainment Law Review** 25, no. 6, (2014): 219-221.

SYNODINOU, Tatiana-Eleni. “Intermediaries’ Liability for Online Copyright Infringement in The EU: Evolutions and Confusions”, *Computer Law & Security Review* 31, (2015): 63-67.

TORREMANS Paul L. C. (ed). **Intellectual Property and Human Rights**, (Zuidpoelsingel, Kluwer Law International, 2020).



TORREMANS, Paul L. C. "Ashby Donald and Others v France, Application 36769/08, ECtHR, 5th Section, Judgment of 10 January 2013", **Queen Mary Journal of Intellectual Property** 4, no. 1, (2014): 95–99.

TORREMANS, Paul L. C. "Is Copyright a Human Right?", **Michigan State Law Review**, (2007): 277.

VOORHOOF, Dirk and Eva Lievens. "Offensive Online Comments - New ECtHR Judgment", (February 15, 2016), available at <http://echrblog.blogspot.co.uk/2016/02/offensive-online-comments-new-ecthr.html>;

WEINERT, Eileen. "Delfi AS v Estonia: Grand Chamber of the European Court of Human Rights Hands down Its Judgment: Website Liable for User-Generated Comments", **Entertainment Law Review** 26, no. 7, (2015): 246-250.

WEINERT, Eileen. "MTE v Hungary: the first European Court of Human Rights ruling on liability for user comments after Delfi AS v Estonia", **Entertainment Law Review** 27, no. 4, (2016): 135-139.

YU, Peter K. "Intellectual Property and Human Rights 2.0", **University of Richmond Law Review** 53, (2019): 1375-1453.

YU, Peter K. "Reconceptualising Intellectual Property Interests in a Human Rights Framework", **Davis L Rev** 40, (2007): 1039–1149.

YU, Peter K. "Ten Common Questions About Intellectual Property and Human Rights", **Georgia State University Law Review** 23, (2007): 711.