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Exceptions as users' rights in EU copyright law*

Maurizio Borghi

Abstract

The paper explores possible ways of construing copyright exceptions as users' rights within the EU legal framework. It discusses some basic principles on the legal nature of exceptions, and then focuses more specifically on EU law and the jurisprudence of the Court of Justice of the European Union (CJEU). The paper shows that the CJEU has moved away from a strict interpretation of exceptions as "derogations" to general principles of copyright protection, towards recognition of exceptions as bearing autonomous legal status. Indeed, in its recent jurisprudence, the Court has interpreted statutory exceptions and limitations both as independent sources of rights and as statements of fundamental rights recognized in the EU Charter. These include, most notably, freedom of expression and information. While the approach has the potential to lead to full recognition of users' rights, EU law is bound by the recognition of intellectual property as a fundamental right in the highly controversial Article 17(2) of the EU Charter. The Court has repeatedly cautioned against an "absolutist" approach to this provision. Accordingly, this paper argues that exceptions to copyright should be better understood as justified "control" of the use of property, rather than forms of "dispossession" in the public interest. Against this background, two central provisions of the recent DSM Copyright Directive are examined, namely: the prohibition of contractual override and the provisions made for the use of out-of-commerce works by cultural institutions. The paper concludes by clarifying the conditions upon which these provisions can be construed as strong statements in favour of users' rights, and thereby achieve their intention to promote certain free uses of copyright works.

1. Introduction

The notion of balancing rights and interests of authors with broader public interest goals has long dominated the copyright discourse worldwide, certainly since the advent of "the digital". The concept appeared probably for the first time in a legal text in the Preamble of the WIPO Copyright Treaty 1996. Initially employed as a guiding principle in the effort to *maintain* a supposedly pre-existing balance endangered by the threat of the digital, it has come to denote the will to *achieve* a new and better balance to fit the demands of digital culture.¹ Accordingly, exceptions and limitations to copyright have rapidly gained momentum as a central element of this narrative. In this connection, one of the key questions is whether, and to what extent, copyright exceptions should and could be construed as fully-fledged rights that can be claimed by the relevant beneficiaries, and that place certain proactive obligations on copyright holders.² If construed as users' rights, exceptions would not only function as affirmative defences against copyright infringement, but

* This paper is an extended version of the chapter "Exceptions as users' rights?", to be published in E. Rosati (ed.) *The Routledge Handbook of EU Copyright Law* (Routledge: 2021).

¹ See R. Burrell & A. Coleman *Copyright Exceptions: The Digital Impact* (Cambridge University Press: 2005), p. 187-191.

² The term "users' rights" was introduced as early as in the 1990s by L.R. Patterson & S.W. Lindberg *The Nature of Copyright: A Law of Users' Rights* (University of Georgia Press: 1991). For critical discussion see J. Ginsburg "Authors and Users in Copyright", 45 *J. Copyright Soc'y U.S.A.*, 1 (1997).

would impose certain duties not to interfere or to take actions that restrict users' entitlements over certain uses of works.³

At least three lines of arguments have been advanced to support the construal of copyright exceptions as users' rights. From a theoretical point of view, it has been argued that conceptualizing users' entitlements as rights is both doctrinally possible and necessary to capture their fundamental (and not just ancillary) role in copyright law.⁴ Moreover, in a socio-legal perspective, the notion of users' rights reflects the growing importance of users in the so-called copyright ecosystem, their increasingly active role in a participative culture which goes beyond passive consumption of content.⁵ Finally, from a more instrumental, policy-making perspective, the language of users' rights has been seen as a useful "rhetorical tool" to induce legislators and judiciary alike to interpret copyright exceptions liberally and generously.⁶

While users' rights have traditionally found little support in the EU copyright harmonization agenda, recent developments at both judicial and legislative level are indicative of a possible change in attitude. This paper explores a possible way to construe exceptions as users' rights within the EU copyright framework. It proceeds in four steps. Firstly, it presents some basic general principles to define the legal nature of so-called exceptions to copyright. It then focuses more specifically on EU law and the jurisprudence of the Court of Justice of the European Union (CJEU), before making a critical evaluation of the balance of fundamental rights under the EU Charter.⁷ Finally, it considers two significant statements in support of a users' rights approach in the recent Directive on Copyright in the Digital Single Market (DSM Copyright Directive), namely the exception for the use of out-of-commerce works⁸ and the provision that makes certain exceptions non overridable by contract.⁹

2. Remarks on the legal nature of copyright exceptions

Rules and exceptions

As a general consideration, the definition of an exception in any legal system presupposes a situation where what is "excepted" would otherwise be within the scope of the rule. Exceptions are needed when the rule is defined in such a way as to include something that the legislator wishes instead to exclude. Accordingly, the codification of exceptions in statutory law largely depends on the language used to define the rule in the first place or – more precisely – on the level of generality at which the rule is set forth in the legislation. This, in turn, depends not only on the discretion of

³ G. Pessach, "Reverse Exclusion in Copyright Law – Reconfiguring Users' Rights" (2011), Available at SSRN: <https://ssrn.com/abstract=1813082> (last accessed 28 July 2020), p. 4.

⁴ See in particular H. Breakey "User's rights and the public domain", *Intellectual Property Quarterly*, 3, 2010, 312, and A. Drassinower "Taking User Rights Seriously" in M. Geist (ed.) *In the Public Interest: the Future of Canadian Copyright Law* (Irwin Law: 2005), 462.

⁵ N. Elkin-Koren, "Copyright in the Digital Ecosystem, A User Rights Approach" in R. Okediji (ed.) *Copyright Law in an Age of Limitations and Exceptions* (Cambridge University Press: 2017), 133.

⁶ R. Burrell & A. Coleman *Copyright Exceptions: The Digital Impact*.

⁷ Charter of Fundamental Rights of the European Union, Charter of Fundamental Rights of the European Union OJ C 326, 26.10.2012, p. 391–407.

⁸ Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, OJ L 130, 17.5.2019, p. 92–125, Article 8.

⁹ *Ibid.*, Art. 7(1).

the legislator, but also on objective factors such as the limits imposed by natural language and legal concepts, as well as the need to express norms in a clear and comprehensible way.¹⁰

For example,¹¹ in an imaginary copyright system where the basic rule is defined as “authors have the exclusive right to reproduce a substantial part of their work”, there would be little need to codify an exception whereby “it is however permitted to reproduce insubstantial parts of it”. The specification that insubstantial reproduction does not amount to infringement is only strictly necessary, if at all, in a copyright system where the rule is expressed at a higher level of generality – for instance as “authors have the exclusive right to reproduce their works”. Even so, there would remain some hesitation to call insubstantial reproduction an “exception”, that is to say something that, as a rule, would fall within the scope of copyright. Regardless of the language used by the legislator, insubstantial reproduction is something that is excluded *ad initio* from the scope of author’s exclusive rights and is therefore better characterized as a “scope limitation”, rather than an exception properly so-called.¹² Yet the scope of the right can be defined with greater specificity, for example a legislator could say: “authors have the exclusive right to reproduce a substantial part of their work *for purposes other than criticism or review*.” Does this imply that reproduction for purposes of criticism or review is not a mere derogation from the rule, but rather an integral part to the definition of the scope of the right? This is, in fact, the view that the Canadian Supreme Court took in its well-known endorsement of users’ rights in copyright law:

Procedurally, a defendant is required to prove that his or her dealing with a work has been fair; however, the fair dealing exception is perhaps more properly understood as an integral part of the *Copyright Act* than simply a defence. Any act falling within the fair dealing exception will not be an infringement of copyright. The fair dealing exception, like other exceptions in the *Copyright Act*, is a user’s right. In order to maintain the proper balance between the rights of a copyright owner and users’ interests, it must not be interpreted restrictively.¹³

In the reasoning of the Court, fair dealing is an “integral part” of copyright law in the sense that it is part of the very definition of the scope of author’s exclusive rights. To reflect this function and role in the copyright system, it must be construed as a right in turn, namely a users’ right which is balanced against the rights of the copyright owner.

Exceptions, scope limitations, and users’ rights

Despite the above, not all “exceptions” are equally integral to the definition of right, so that their classification under the rubric of “exceptions” or “scope limitations” is entirely dependent on the level of generality chosen by the legislator to define the right. To build on the example made in the previous section, the definition of the right can improve in specificity by adding, for instance: “...or

¹⁰ See F. Schauer, “Exceptions”, *University of Chicago Law Review* 58, no. 3, 871.

¹¹ The argument presented here builds on A. Drassinower, “Exceptions Properly So-Called”, in Y. Gendreau & A. Drassinower (eds.) *Langues et Droit d’Auteur / Language and copyright* (Bruylant/Carswell: 2010), 205.

¹² *Ibid.*, p. 217. On the distinction between scope limitations and exceptions, see also S. Karapapa, *Defences to Copyright Infringement* (Oxford University Press: 2020), p. 18-23.

¹³ *CCH Canadian Ltd. v. Law Society of Upper Canada* [2004] SCC 13, par. 48. The Court went on to cite approvingly, Professor Vaver’s statement that “User rights are not just loopholes. Both owner rights and user rights should therefore be given the fair and balanced reading that befits remedial legislation” (D. Vaver, *Copyright Law* Toronto: Irwin Law, 2000, p. 171). For a thorough discussion of the implications see A. Drassinower “Taking User Rights Seriously”, 462. See also M. Geist, “The Canadian Copyright Story: How Canada Improbably Became the World Leader on Users’ Rights in Copyright Law”, in R. Okediji, *Copyright Law in an Age of Exceptions and Limitations* (Cambridge University Press: 2017), 169-205.

for purpose other than preservation by publicly accessible libraries.” However, the level of specificity of the rule cannot be increased indefinitely, and not just for practical reasons of clarity of the law. Reproduction for preservation by public libraries reflects interests such as access to culture, education, and knowledge. Although closely related to copyright, those interests are *distinct and different* from those that define the scope of authorial entitlements. Reproduction for the purpose of preserving cultural heritage does not contribute to the definition of author’s rights in the same way as reproduction for criticism or review does. Rather, it invites reflection on the encounter of author’s rights with other juridical interests.¹⁴

To be sure, a clear dividing line between “integral” and “external” exceptions cannot be drawn, as most (if not all) known statutory exceptions are, to a various extent and degree, *both* limitations that define the scope of copyright *and* expressions of interests belonging to different juridical orders.¹⁵ While the Canadian Supreme Court based its argument on the assumption that the first of these two elements has logical priority (namely, that fair dealing is *essentially* a scope limitation), this is by no means the only possible way to construe copyright exceptions as users’ rights. Entitlements to certain permitted uses can equally be construed as “rights” on the ground of the superior interests that they represent. The argument in this case would not be that the act in question is beyond the scope of authorial entitlements, but that it is, so to speak, *above* them.

3. Construing users’ rights in the EU copyright framework

The approach taken by EU legislation and jurisprudence *vis-à-vis* users’ rights reflects the twofold character of exceptions, i.e., as internal scope limitations and as expression of other juridical interests.

From derogations to autonomous sources of rights

Until recently, CJEU jurisprudence has almost consistently interpreted exceptions as “derogations” to the general principles established by secondary legislation on copyright and related rights, and as such requiring “strict” interpretation.¹⁶ In this connection, the Court has limited itself to mechanical application of a principle established in settled case law of other areas of EU law, without engaging in specific considerations about copyright exceptions.

However, in *Padawan*, a case on the private copying exception, a different approach began to emerge. The Court took the view that by purchasing media equipment on which a levy fee has been charged, private users are “rightly presumed” to take full advantage of all functionalities of such equipment, including making copies.¹⁷ While not explicitly endorsing a “users’ right” argument, the Court’s reasoning may be seen as approximating the compensated private copying exception to a fully-fledged right, in that the purchase of levied media equipment creates a presumption that a right to make private copies is actually vested in the purchaser.¹⁸ That this was not just a momentary flirtation with the idea of users’ rights is confirmed by the language used by the Court in subsequent rulings on copyright exceptions. In *Technische Universität Darmstadt*, the Court explicitly referred

¹⁴ A. Drassinower, “Exceptions Properly So-Called”, 221-222.

¹⁵ For a taxonomy of rights and interests in EU copyright exceptions, see J. Pila and P. Torremans *European Intellectual Property Law* (Oxford University Press: 2016), p. 339.

¹⁶ *Infopaq International A/S v Danske Dagblades Forening*, Case C-5/08 (2009), par. 56, *ACI Adam v Stichting de Thuis kopie*, Case C-435/12 (2014), par. 22.

¹⁷ *Padawan SL v Sociedad General de Autores y Editores de Espana (SGAE)*, Case C-467/08 (2010), par. 55.

¹⁸ S. Karapapa “*Padawan v SGAE*: a right to private copy?” *European Intellectual Property Review*, 33(4), 2011, 252.

to beneficiaries of exceptions for libraries and educational establishments as having “rights” pursuant to those exceptions.¹⁹ The language was then upheld and clarified with the exact same words in *Funke Medien* and *Spiegel Online*, where the Court observed:

although article 5 of Directive 2001/29 is expressly entitled “Exceptions and limitations”, it should be noted that those exceptions or limitations do themselves confer rights on the users of works or of other subject matter. [...] In addition, that article is specifically intended [...] to ensure a fair balance between, on the one hand, the rights and interests of rightholders, which must themselves be given a broad interpretation [...] and, on the other, the rights and interests of users of works or other subject matter.²⁰

The line of argument inaugurated by *Padawan* consists in recognizing statutory exceptions not just as derogations from the rights of the copyright holders but as autonomous sources of rights in turn, which can, in principle, be balanced against rights of copyright holders on equal footing. While maintaining that rights of copyright holders must be given a “broad interpretation”, the Court recognized that exceptions can equally confer rights on the users, i.e. the beneficiaries of such exceptions.

Copyright users as beneficiaries of exceptions

Beneficiaries of a copyright exceptions have subjective entitlements that exempt them from infringement when performing certain acts in relation to works or other protected subject matter. Rights of this kind are typically subjective and not transferable. However, to a certain extent, such entitlements can be extended to other subjects, depending on judicial interpretation of the norm. For example, the users’ right to private copying may exempt third parties that make copies on users’ behalf.²¹ More precisely, in such and similar cases the third party does not acquire a right but rather a permission to benefit from “spill overs” of the users’ right without incurring liability. The extent to which those spill overs can be legitimately exploited by other subjects is a further defining feature of users’ rights. This point raises further issues that are beyond the scope of this paper, such as the appropriation of users’ rights’ benefits by private corporations that are often in a position to create proprietary or quasi-proprietary entitlements around those benefits.²²

The CJEU has so far construed the beneficiary of an exception strictly, without leaving much room to the possibility of transferring to third parties the benefits of an exception. The approach is consistent with the way in which the Court has interpreted the notions of “author” and “rightholder” in EU legislation. For example, in a case on fair compensation for reprography and private copying, the Court ruled that the term “rightholder” in the Information Society Directive must be interpreted strictly and cannot be extended to “publishers of works created by authors”, especially where those publishers are “under no obligation to ensure that the authors benefit, even indirectly, from some of

¹⁹ *Technische Universität Darmstadt v Eugen Ulmer*, Case C-117/13 [2014], par. 43-44.

²⁰ *Funke Medien v Bundesrepublik Deutschland*, Case C-469/17 [2019], par. 70, and *Spiegel Online v Volker Beck*, Case C-516/17 [2019], par. 54. For a thorough analysis see C. Geiger & E. Izyumenko “The constitutionalisation of intellectual property law in the EU and the *Funke Medien*, *Pelham* and *Spiegel Online* decisions of the CJEU: progress, but still some way to go!” *International Review of Intellectual Property and Competition Law (IIC)*, 51(3), 2020, 282.

²¹ S. Karapapa. *Defences to copyright infringement*, 275.

²² See M. Borghi, “Reconstructing fairness: the problem with fair use exclusivity” in D. Gervais (ed.) *Fairness, Morality and Ordre Public in Intellectual Property* (Elgar: 2020), 53.

the compensation of which they have been deprived”.²³ To the Court, the benefit of receiving fair compensation for reprography and private copying is a prerogative of the status of author and Member States are not allowed to extend, albeit partially, this prerogative to other subjects.²⁴

In a similar vein, benefits of an exception cannot be extended to subjects other than the beneficiaries defined by primary legislation. The Court has adhered to this principle in *VCAST*, where it ruled that the provider of remote video-recording service cannot avail itself of the private copying exception for reproductions made by its customers. The reasoning of the Court was that it was the company, and not the customers, who actually made the copies, so that no exception for private copying could apply in the first place.²⁵ Similarly, strict limits to the use of copies made by virtue of an exception were imposed in *Ranks and Vasiļevičs*, a referral by a Latvian criminal court on the resale of back-up copies of computer programs.²⁶ Even though a lawful acquirer of a computer program is entitled to *both* resell the program, by virtue of exhaustion of the copyright holder’s distribution rights,²⁷ and to make a back-up copy of that program, he is not allowed to resell back-up copies without the authorization of the copyright holder. To the Court,

a back-up copy of a computer program may be made and used only to meet the sole needs of the person having the right to use that program and [...], accordingly, that person cannot – even though he may have damaged, destroyed or lost the original material medium – use that copy in order to resell that program to a third party.²⁸

The defendants’ argument that such a restriction on the use of back-up copies would render ineffective the rule of exhaustion of rights had no bearing on the Court’s conclusion.

The strict interpretation followed by the Court in *VCAST* and *Ranks and Vasiļevičs* may be seen as indicative of a general approach to copyright exceptions primarily as expression of fundamental rights of the beneficiary. Those rights typically belong to individuals rather than to corporate entities, and are non-transferable to other subjects. In this respect, uses that exceed the main purpose of an exception to protect fundamental rights of the beneficiary are excluded from the scope of the exception.

Expressions of fundamental rights

Recent CJEU jurisprudence has increasingly affirmed the role of fundamental rights in shaping the scope of copyright protection. In addition to interpreting statutory exceptions as independent source of rights, the Court has acknowledged their role as bulwarks of the fundamental rights of users.²⁹

²³ *Hewlett-Packard Belgium v Reprobel*, Case C-572/13 [2013], par. 43. The EU legislator has seen fit to “correct” the Court’s decision on this point by expressly allowing Member States to “provide that where an author has transferred or licensed a right to a publisher, such a transfer or licence constitutes a sufficient legal basis for the publisher to be entitled to a share of the compensation for the use of the work made under an exception or limitation to the transferred or licensed right” (Directive 2019/790 on Copyright in the Digital Single Market, Article 16).

²⁴ For a discussion of the status of author in EU law see M. Borghi “Author”, in A. Bartolini, R. Cippitani, & V. Colcelli (eds.) *Dictionary of Statutes within EU Law* (Springer: 2019), 49.

²⁵ *VCAST Limited v RTI SpA*, Case C-265/16 [2017]. A similar technology was found infringing on broadcasters’ rights in the USA, *American Broadcasting Cos., Inc. v. Aereo, Inc.*, 573 U.S. 431 (2014).

²⁶ *Ranks and Vasiļevičs v Finanšu un ekonomisko noziegumu izmeklēšanas prokuratūra*, Case C-166/15 [2016].

²⁷ *UsedSoft GmbH v Oracle International Corp.*, Case C-128/11 [2012].

²⁸ *Ranks and Vasiļevičs*, Case C-166/15, par. 43.

²⁹ E. Rosati *Copyright and the Court of Justice of the European Union* (Oxford University Press: 2019), 57.

Accordingly, the source of users' rights is not (only) secondary copyright legislation, but (also, and more importantly) primary law on fundamental rights.

Earlier examples of this approach can be found in the Advocate General (AG)'s opinions endorsed by the Court, according to which the main *raison d'être* of the private copying exception is the fact that copyright holders' control over uses of their protected works made by lawful users would be an "unacceptable interference with the private life" of those persons.³⁰ "Lawful users" are here seen as vested with an entitlement, namely the making of copies for personal use, that derives from a fundamental right *as persons*.³¹

After the entry into force of the Lisbon Treaty and the legally binding EU Charter, the CJEU has increasingly relied upon the rights enshrined in the latter in its interpretation of copyright legislation, including exceptions and limitations. Additionally, while until the 2010s all referrals in this area of copyright law were about temporary reproduction and private copying (mainly in relation to fair compensation), a broader range of exceptions has attracted judicial scrutiny in the last decade. These include parody,³² quotation,³³ reporting of current events,³⁴ educational use,³⁵ library use,³⁶ public security,³⁷ as well as the exceptions to rights in computer programs³⁸ and databases.³⁹ Likewise, the Court has ruled on other general aspects, such as the distinction between "limitations" and "exceptions"⁴⁰ and the discretion of Member States to introduce exceptions not provided for by EU law.⁴¹ In most of these cases, the Court has referred to the Charter as a guiding framework to interpret EU copyright law and operate the required "fair balance" between competing rights and interests.

Fair balance and proportionality

³⁰ Opinion of the Advocate General Szpunar in *EGEDA v Administracion del Estado*, Case C-470/14, par. AG15, and *VCAST Limited v RTI SpA*, Case C-265/16, par. AG61.

³¹ "Respect for private and family life" is recognized in the European Convention on Human Rights, Art. 8, and in the Charter of Fundamental Rights of the European Union, Art. 7.

³² Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L 167, 22.6.2001, p. 10–19, Art. 5(3)(k), *Deckmyn v Vandersteen*, Case C-201/13 [2014].

³³ *Ibid.*, Art. 5(3)(d), *Eva-Maria Painer v Standard Verlags*, Case C-145/10 [2013], *Spiegel Online v Volker Beck*, Case C-516/17 [2019], *Pelham v Hütter*, Case C-476/17 [2019] and *Funke Medien v Bundesrepublik Deutschland*, Case C-469/17 [2019].

³⁴ *Ibid.*, Art. 5(3)(c), *Spiegel Online v Volker Beck*, Case C-516/17 [2019] and *Funke Medien v Bundesrepublik Deutschland*, Case C-469/17 [2019].

³⁵ *Ibid.*, Art. 5(3)(a), *Land Nordrhein-Westfalen v Renckhoff*, Case C-161/17 [2018].

³⁶ *Ibid.*, Art. 5(3)(n), *Technische Universität Darmstadt v Eugen Ulmer*, Case C-117/13 [2014].

³⁷ *Ibid.*, Art. 5(3)(e), *Eva-Maria Painer v Standard Verlags*, Case C-145/10 [2013].

³⁸ Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (Codified version), OJ L 111, 5.5.2009, p. 16–22, Art. 5 and 6, *SAS Institute v World Programming*, Case C-406/10 [2012] and *Ranks and Vasiļevičs v Finanšu un ekonomisko noziegumu izmeklēšanas prokuratūra*, Case C-166/15 [2016].

³⁹ Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, OJ L 77, 27.3.1996, p. 20–28, Art. 6 and 8, *Ryanair v PR Aviation*, Case C-30/14 [2015].

⁴⁰ *VG Wort v Kyocera*, Joined Cases C-457/11 and C-460/11 [2013]. On the inconsistencies in the Court's argument in this case, see J. Pila & P. Torremans *European Intellectual Property Law*, 342–343.

⁴¹ *Soulier and Doke v Premier Ministre*, Case C-301/15 [2016] and *Funke Medien v Bundesrepublik Deutschland*, Case C-469/17 [2019].

The principle of “fair balance” is part of primary EU legislation on copyright and related rights.⁴² Within this framework, the Court has progressively moved from an internal interpretation of the relevant legislation (directives) towards a balance between fundamental rights. On the side of the copyright holders, these include the rights to property,⁴³ which is frequently coupled with the right to an effective remedy.⁴⁴ Other authorial interests can occasionally play a role, such as the interest to ensure that the work is not associated with a discriminatory message.⁴⁵ These rights have been balanced against users’ rights primarily represented by privacy⁴⁶ and data protection⁴⁷ and, in relation to exceptions, freedom of expression and/or information.⁴⁸ Other rights have also been addressed by the Court in relation to specific exceptions, such as the right to education.⁴⁹ However, a range of fundamental rights can be in principle part of the assessment, such as the right of freedom of the arts⁵⁰.

As seen earlier, copyright exceptions represent either internal limitations of author’s rights or an expression of heterogenous rights and interests of users – or both. As far as the EU system of exceptions is concerned, for example, it may be argued that the exception for temporary, technology-dictated reproductions is better conceptualized as an internal limitation of the reproduction right rather than a fully-fledged exception to that right.⁵¹ Other exceptions incorporate rights that are heterogenous to copyright, to a greater or lesser degree. In this case, balancing requires an assessment of the impairment to which each of the rights is subject through the exercise of the other right. Such exercise corresponds to a principle of proportionality, whereby the right that, in the specific circumstances, suffers proportionally less impairment should give way to the other.⁵² When interpreting the scope of application of copyright exceptions, proportionality takes on the meaning of an assessment, on balance, of the impairment of the copyright owner’s property

⁴² Directive 2001/29/EC, Rec. 31. On the application of the “fair balance” principle, see C. 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”, *European Intellectual Property Review*, 41(11), 2019, 683 and E. Rosati *Copyright and the Court of Justice of the European Union*, 52-54.

⁴³ Charter of Fundamental Rights of the European Union, Art. 17(2).

⁴⁴ *Ibid.*, Art. 47.

⁴⁵ *Ibid.*, Art. 21(1) “Non-discrimination”. See *Deckmyn v Vandersteen*, Case C-201/13 [2014], par. 30-31.

⁴⁶ *Ibid.*, Art. 7 “Protection for private and family life”. See *Bastei Lübbe GmbH v Strotzer*, Case C-149/17 (2018), par. 48-49.

⁴⁷ *Ibid.*, Art. 8 “Protection of personal data”. See *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)*, Case C-70/10 (2011), par. 50 and *SABAM v Netlog*, Case C-360/10 (2012), par. 48.

⁴⁸ *Ibid.*, Art. 11. See also Directive 2001/29/EC on Copyright in the Information Society, Rec. 3: “harmonisation [...] relates to compliance with the fundamental principles of law and especially of property, including intellectual property, and freedom of expression and the public interest.” See *Land Nordrhein-Westfalen v Renckhoff*, Case C-161/17 [2018], par. 41; *Deckmyn v Vandersteen*, Case C-201/13 [2014], par. 25; *Spiegel Online v Volker Beck*, Case C-516/17 [2019], par. 42.

⁴⁹ *Land Nordrhein-Westfalen v Renckhoff*, Case C-161/17 [2018], par. 43.

⁵⁰ EU Charter, Art. 13. See Opinion of the AG Øe in *Peterson v YouTube and Elsevier v Cyando*, Joined Cases C682-18 and C-683/18, par. 241. For a comprehensive assessment of fundamental rights and exceptions see J. Pila and P. Torremans *European Intellectual Property Law*, p. 339.

⁵¹ Directive 2001/29/EC, Art. 5(1). In the same sense, see S. Karapapa, *Defences to Copyright Infringement*, p. 113-116.

⁵² A. Drassinower, “Exceptions property so-called”, p. 235. With reference to EU copyright exceptions, see also J. Pila and P. Torremans *European Intellectual Property Law*, p. 341-342.

right *by effect* of the exercise of the users' freedom of expression, vis-à-vis the reciprocal impairment suffered by the users' rights *by effect* of the exercise of the property right of the owner.

Proportionality is a principle that applies in every copyright system, as long as balancing of rights is concerned. The distinctive feature of EU copyright law is that any assessment of reciprocal impairment of rights is bound by the statutory definition of intellectual property protection as a fundamental right, namely in principle a right of the same category (if not the same stature) of freedom of expression, information, education and other individual liberties protected as human rights. Accordingly, any "balance of rights" under EU copyright law must set out from a definition of the nature and scope of intellectual property as a fundamental right.

4. Intellectual property as fundamental right

A "human" right?

The elevation of intellectual property to the status of fundamental right is the end result of a long process which started post-World War II with the inclusion of "protection of the [author's] moral and material interests" in the Universal Declaration of Human Rights of 1948,⁵³ a principle subsequently reiterated in the International Covenant on Economic, Social and Cultural Rights of 1976.⁵⁴ Significantly, both the Declaration and the Covenant refer to protection of *interests*, not "rights". Indeed, in these earlier formulations, authors of scientific, literary, or artistic productions are not vested with rights (let alone property rights) *in* their creations, but with a more general entitlement in having moral and material interests in those creations "protected". Nothing is said on the legal definition of those interests or on how such protection should take effect. More importantly, the provisions in both documents apply to "everyone" who is an "author", suggesting that interests belonging to subjects other than human beings, such as corporate entities, are not entitled to protection as human rights.⁵⁵

These limitations to the scope of rights under international human rights law did not inhibit the progressive expansion of the language of "copyright as human right" at either policy or judicial level.⁵⁶ This expansion was in turn paralleled by an increasing, though weakly-reasoned, attribution of "human rights" to corporations and legal persons in general, a tendency that emerged originally in US jurisprudence and is now reflected in a number of provisions of the EU Charter.⁵⁷ Subsequently, the elevation of intellectual property *as such* to the status of fundamental right, which can certainly be described most pertinently as a successful history of lobbying from intellectual property industries,⁵⁸ culminated with the insertion of the notoriously elusive second paragraph of

⁵³ Universal Declaration of Human Rights, Article 27(2).

⁵⁴ International Covenant on Economic, Social and Cultural Rights, Article 15(c). See generally P. Torremans (ed.) *Intellectual Property and Human Rights* (Kluwer Law, 2008).

⁵⁵ As convincingly argued by P.K. Yu, "Challenge to the Development of a Human Rights Framework for Intellectual Property", in P. Torremans (ed.) *Intellectual Property and Human Rights*, p. 77. See also G. Ghidini *Rethinking Intellectual Property: Balancing Conflicts of Interest in the Constitutional Paradigm* (Edward Elgar, 2018). According to Ghidini, "when vested in firms, [fundamental rights] should systemically be ascribed to the sphere of freedom of enterprise" (Ibid., p. 13).

⁵⁶ P. Torremans, "Copyright (and Other Intellectual Property Rights) as Human Right", in P. Torremans (ed.) *Intellectual Property and Human Rights*, 195.

⁵⁷ M. Ricolfi "La proprietà intellettuale e le libertà antagoniste" in F. Caggia & G. Resta *I diritti fondamentali e il diritto privato* (Roma Tre: 2019), p. 206-207.

⁵⁸ P. Torremans, "Copyright (and Other Intellectual Property Rights) as Human Right", p. 201.

Article 17 (“Right to property”) in the EU Charter, which reads “intellectual property shall be protected”.⁵⁹

Making sense of Article 17(2) of the EU Charter: not an absolute right

Article 17(2) of the EU Charter is part of the “right to property” established by Article 17. Its interpretation should be based on its predecessor, namely Article 1 of the Protocol to the European Convention on Human Rights (ECHR) and the related jurisprudence of the European Court of Human Rights (ECtHR).⁶⁰ Moreover, as acknowledged by the Court of Justice, the interpretation of fundamental rights

draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or to which they are signatories.⁶¹

This suggests that the norm must also be read in light of the provisions laid down in the Declaration and the Covenant on the protection of “moral and material interests” of authors.⁶²

The two key components of the right to property, as enshrined in the EU Charter and in the more detailed provision of the Protocol to the ECHR, are the general prohibition of dispossession, subject to the exception of “public interest”, and the right of the State to control that the use of property is made “in accordance with the general interest”. Both components, “dispossession” and “control”, are balanced against the public interest, but in a different way; dispossession cannot occur *unless* a superior justification of public interest intervenes, while control of use is a State’s default prerogative *insofar as* it is necessary to pursue the general interest.

When it comes to intellectual property, the distinction between dispossession and control is crucial to determine whether a statutory or judicial limitation to intellectual property is an interference with the “peaceful enjoyment”⁶³ of such form of property and, if so, if it does constitute an unnecessary and unjustified control of its use or, worse, a dispossession.

While intellectual property rights constitute a form of “possession” under EU law,⁶⁴ the question of what amounts to “deprivation of possession” in relation to copyright is far from undisputed. For instance, in *Luksan* the Court found that national legislation which excludes the principal director of a film from the exercise of certain exclusive rights and remuneration rights provided for by the Information Society Directive deprives the film director of her possession of lawfully acquired

⁵⁹ C. 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” [2009] *European Intellectual Property Review* 115.

⁶⁰ M. Ricolfi, “Commento all’Art. 17 – La protezione della proprietà intellettuale”, in R. Mastroianni *et al* (eds.) *Carta dei diritti fondamentali dell’Unione Europea* (Giuffrè: 2017), 337.

⁶¹ *Booker Aquaculture Limited (trading as Marine Harvest McConnell) v The Scottish Ministers* Joined Cases C-20/00 and C-64/00

⁶² M. Ricolfi, “Commento all’Art. 17”, p. 341-341. See also C. Geiger, “The Constitutional Dimension of Intellectual Property”, in P. Torremans (ed.) *Intellectual Property and Human Rights*, p. 101.

⁶³ Protocol No. 1 to the European Convention on Human Rights, Art. 1 (“Every natural or legal person is entitled to the peaceful enjoyment of his possessions”).

⁶⁴ Including, controversially, trade marks. See M. Ricolfi, “Trademarks and Human Rights”, in P. Torremans (ed.) *Intellectual Property Law and Human Rights*, 4th ed. (Kluwer: 2015), 593.

intellectual property rights.⁶⁵ In contrast, it may be argued that the exhaustion of rights in the EU after the first sale in one Member State cannot be regarded as a “deprivation of possession” of such rights.⁶⁶ In one of the first mentions of Article 17(2) in a copyright case, *Scarlet Extended v SABAM* (2011), the Court made a straightforward statement that has since been reiterated on various occasions:

there is *nothing whatsoever* in the wording of Article 17(2) of the Charter or in the court’s case law to suggest that the intellectual property rights enshrined in that article are inviolable and must for that reason be protected as *absolute rights*.⁶⁷

The Court has since strictly adhered to a non-absolutist reading of Article 17(2) in various ways. For example, in *Pari Pharma* it rejected the claimant’s argument that public disclosure of data from clinical dossiers under the transparency policy of the European Medicines Agency (EMA) violates Article 17(2) since those data form part of the claimant’s trade secrets protected as intellectual property by Article 39(2) of the TRIPS Agreement.⁶⁸ While in this case the claimant failed to show that the information in question was protectable as a trade secret, the Court confirmed that the EMA has the right to redact dossiers, according to EU transparency rules, without having to consult the applicant in order to prevent disclosure of trade secrets. In *Cofemel*, the Court even espoused a minimalist reading of Article 17(2) which, in the opinion of the Court, would state little more than the fact that “subject matter constituting intellectual property qualifies for protection under EU law”, without apparently any implication as to whether the EU legislator is bound to ensure the same level of protection to every qualifying subject matter.⁶⁹

These cases demonstrate that protection of intellectual property can give way “by default” to other interests recognized by EU law, such as transparency in the public interest and autonomy of EU legislation. The same principle should apply, by analogy, to copyright exceptions and limitations.

The effect of Article 17(2) on exceptions and limitations

Article 17(2) cannot, in general, be interpreted as supporting a narrow construal of existing exceptions to intellectual property right.⁷⁰ Indeed, as seen before, the CJEU has never suggested this could be the case. In *Technische Universität Darmstadt*, the Court held that an exception does not cease to apply for the simple reason that the copyright holder offers a licensing agreement for the act covered by the exception.⁷¹ This means that the exercise of an intellectual property right

⁶⁵ *Luksan v Petrus van der Let*, Case C-277/10 (2012), par. 68-70.

⁶⁶ P. Mysoor “Exhaustion, non-exhaustion and implied licence” *International Review of Intellectual Property and Competition Law (IIC)*, 2018, 49(6), 663, p. 656.

⁶⁷ *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)*, Case C-70/10 (2011), par. 43 (emphasis added). The same principle has been reaffirmed in *SABAM v Netlog*, Case C-360/10 (2012), par. 41, in *UPC Telekabel*, Case C-314/12 (2014), par. 61 and, in relation to exceptions, in *Pelham*, Case C 476/17 (2019), par. 33. See also the Opinion of Advocate General Saugmandsgaard Øe in *Constantin Film v YouTube*, Case C-264/19 (2020), par. AG52.

⁶⁸ *Pari Pharma GmbH v European Medicines Agency (EMA)*, T-235/15, ECLI:EU:T:2018:65

⁶⁹ *Cofemel – Sociedade de Vestuário SA v G-Star Raw*, Case C-683/17 (2019), par. 38.

⁷⁰ As convincingly argued in J. Griffith and L. McDonagh “Fundamental Rights and European IP Law – the case of Art 17(2) of the EU Charter”, in C. Geiger (ed.) *Constructing European IP: Achievements and New Perspectives* (Elgar: 2012), 75.

⁷¹ *Technische Universität Darmstadt v Eugen Ulmer*, Case C-117/13 [2014], par. 32.

protected under Article 17(2) does not justify an interpretation that would deprive statutory exceptions of their effectiveness.

Based on what we have seen in the previous section about the distinction between “deprivation of possession” and “control of use”, exceptions should be generally construed as forms of lawful control instead of dispossession in the public interest. For example, the scope of the private copying exception can be defined as a balance between two forms of “peaceful enjoyment” of possession: on the one hand, the author’s ownership of intellectual property rights *on the work*; on the other, the physical possession of the *copy* of the work by the person who has lawfully acquired it.⁷² The author’s right to own the work finds a limitation in the acquirer’s legitimate expectation to enjoy the purchased copy to the full extent, and this includes making back-up copies or a format shift to make it playable on various devices. The CJEU decision in *Padawan* supports this approach.⁷³

Accordingly, Article 17(2) should be read as an impediment to *significant and disproportionate* curtailment of existing intellectual property rights, such as those caused, for instance, by *disproportionately broad* applications of existing exceptions by the legislature or judiciary of Member States, or the introduction of new exceptions by EU legislature which *disproportionately* curtail the rights or interests of the copyright owners. For example, in 2014 the UK government introduced a narrowly construed exception for private copying without any mechanism for compensating copyright holders.⁷⁴ When the law was challenged in court, one of the arguments submitted by the claimants was that the provision constituted an “expropriation” under Art. 1 of Protocol 1 to the ECHR. In support, citing case law from the ECtHR on expropriation without compensation, the claimants submitted that “this curtails the discretion of the state to take expropriating decisions without very careful scrutiny by a reviewing court”.⁷⁵ The national court quashed the law, primarily on the grounds that the evidence taken into consideration by the government was insufficient to conclude that harm was so minimal as to allow the exclusion of the obligation to fairly remunerate the copyright holders. While the court did not consider it necessary to refer the question to the CJEU, it could be reasonably assumed that EU law would preclude a non-compensated private copying exception. This may in fact be considered a disproportionate interference in the rights protected by Article 17(2).⁷⁶

5. Users’ rights after the DSM Copyright Directive

The DSM Copyright Directive has introduced certain provisions that represent, qualitatively more than quantitatively, a significant expansion of the scope of exceptions and limitations in EU

⁷² A similar balance defines the scope of other limitations as well, most notably the exhaustion doctrine. See P. Mezei *Copyright Exhaustion. Law and Policy in the United States and the European Union* (Cambridge University Press: 2018), p. 158-160.

⁷³ S. Karapapa “*Padawan v SGAE: a right to private copy?*” *European Intellectual Property Review*, 33(4), 2011, 252, p. 260.

⁷⁴ Copyright and Rights in Performances (Personal Copies for Private Use) Regulations 2014/2361 (*repealed*). On the legislative history, see S. Karapapa “A copyright exception for private copying in the United Kingdom”, *European Intellectual Property Review*, 35(3), 2013, 129-137.

⁷⁵ *R. (British Academy of Songwriters, Composers and Authors and others) v Secretary of State for Business, Innovation and Skills* [2015] Bus. L.R. 1435, par. 133.

⁷⁶ See the Opinion of Advocate General Jääskinen in *Stichting de ThuisKopie v Opus Supplies Deutschland GmbH and others*, Case C-462/09, par. AG25 (“A Member State cannot allow private copying and impose the obligation of compensation on private individuals unless they establish systems that effectively ensure that the compensation is paid [or] the rightholders would be deprived of the protection afforded to them by art.17(2) of the Charter of Fundamental Rights.”)

copyright law. These include five new exceptions, two of which – cross-border teaching activities and preservation of cultural heritage – constitute, in effect, a revision of exceptions previously regulated by the Information Society Directive.⁷⁷ However, their implementation is now mandatory and no longer left to the discretion of Member States. More importantly, the availability of these exceptions, as well as of the brand-new exception for text and data mining for scientific purposes,⁷⁸ cannot be restricted by contract in the sense that contractual terms which aim to prevent the activities covered by these three exceptions “shall be unenforceable”.⁷⁹

Taken together, these provisions have the potential to promote a paradigm shift towards the recognition of fully-fledged users’ rights, at least in relation to certain permitted activities. The extent of this shift will depend on national transposition and, perhaps more importantly, on judicial interpretation by the CJEU. With a view to address the conditions for an interpretation which is consistent with a users’ rights approach, the discussion here focuses on two of the key provisions of the DSM Copyright Directive. These are the already mentioned “umbrella provision” on the prohibition of contractual override and the new provision on the use of out-of-commerce works by cultural heritage institutions.

The prohibition of contractual override and the exception for text and data mining

The scope of the “umbrella provision” on contractual override can only be determined on a case-by-case basis which takes into consideration the specific conditions for the application of each exception. For example, while rightsholders cannot contractually exclude scientific text and data mining on their works and databases, they are still allowed to apply proportionate measures “to ensure the security and integrity of the networks and databases where the works or other subject matter are hosted”.⁸⁰ At the same time, though, rightsholders “must ensure that the use of technological measures does not prevent the enjoyment of the exceptions and limitations provided for in this Directive”.⁸¹ Moreover, rightsholders also have some freedom to decide contractually what the contour of “lawful access” is, thereby determining *ex ante* who can benefit from the exception in the first place.⁸² However, despite these potential limitations to its scope, the umbrella provision on contractual override represents a strong statement in favour of construing exceptions as users’ rights, which shall orient the future jurisprudence on exceptions and limitations.

Prior to the entry into force of the DSM Copyright Directive, the only subject matter to which a similar prohibition applied were computer programs and databases.⁸³ The existing CJEU on these points, albeit limited to ancillary issues, is indicative of a cautious attitude towards restrictions on rightsholder’s contractual freedom. As far as computer programs are concerned, the fact that back-up copying cannot be excluded by contract did not preclude a narrow interpretation of the

⁷⁷ Directive 2019/790 on Copyright in the Digital Single Market, Art. 5 (expanding on Art. 5(3)(a) of Directive 2001/29/EC) and Art. 6.

⁷⁸ *Ibid.*, Art. 3.

⁷⁹ *Ibid.*, Art. 7(1).

⁸⁰ *Ibid.*, Art. 3(3) and Rec. 16.

⁸¹ *Ibid.*, Rec. 7.

⁸² On the notion of “lawful user” see T. Synodinou “Lawfulness for Users in European Copyright Law: Acquis and Perspectives”, *Journal of Intellectual Property, Information Technology and E-Commerce Law*, 10 (2019) 1.

⁸³ Directive 2009/24/EC on the legal protection of computer programs (codified version), Art. 8(2) (declaring null and void any contractual provisions contrary to the exceptions for back-up copying, “observing, studying and testing” and decompilation) and Directive 96/9/EC on the legal protection of databases, Art. 15 (declaring null and void contractual restrictions to acts necessary to ensure access to the database by its “lawful user”).

exception, which left unaffected the rightsholder's right to control the resale of those copies.⁸⁴ Similarly, the provision against contractual override did not play any apparent role in the Court's construal of the exception for "observing, studying and testing the functioning of the programme".⁸⁵ More to the point, in *Ryanair v PR Aviation* the Court ruled that the provision that declares null and void contractual restrictions to the rights of lawful user of a database⁸⁶ does not apply when the database in question is protected by neither copyright nor the *sui generis* database right.⁸⁷ While the decision appears technically correct on a literal reading of the Database Directive, it raises a number of questions as to the actual effectiveness of norms that outlaw contractual restrictions to users' rights.⁸⁸

For example, would the provision of the DSM Copyright Directive cease to apply when works or other subject matter fail to meet the requirements for copyright protection, or even when copyright expires? To be sure, any use of unprotected subject-matter does not require authorization in the first place.⁸⁹ However, in practice, the uses covered by the new exceptions, in particular reproduction for text and data mining,⁹⁰ require access to large and complex datasets where it may not always be easy to single-out copyright protected content. The subject in control of such dataset may claim that no copyright or related rights subsist in order to be at liberty to impose contractual restrictions to third parties' text and data mining. Admittedly, under the *Ryanair v PR Aviation* decision, those restrictions would escape the provision of the DSM Copyright Directive (although they may be null and void under the contract law of Member States).⁹¹

A more sensible approach would be to give a strict interpretation to *Ryanair v PR Aviation*. Accordingly, the provision of the DSM Copyright Directive that outlaws contractual restrictions to certain activities covered by exceptions should be inapplicable only when the content is clearly *something else* than a copyright work or other subject matter. Therefore, for example, when a work is eligible for copyright protection but the terms of protection have expired, the person in control of such work or other subject matter (including database) should be equally subject to the provision, even though they have no actionable rights under copyright law. For example, a company in possession and control of a dataset of digitized books in the public domain should not be able to rely on contract or technological measures to restrict text and data mining for research purposes.⁹² The same should apply in the case of datasets containing works excluded from copyright protection by operation of law, such as (in certain jurisdictions) case law or acts of public sector bodies.⁹³

⁸⁴ *Ranks and Vasiļevičs*, Case C-166/15.

⁸⁵ *SAS Institute v World Programming*, Case C-406/10.

⁸⁶ Directive 96/9/EC on the legal protection of databases, Art. 8 ("Rights and obligations of the lawful user").

⁸⁷ *Ryanair v PR Aviation*, Case C-30/14 (2015).

⁸⁸ It should be borne in mind that Art. 8 of the Database Directive gives to lawful users a fully-fledged "right" to access the database's content (i.e. not just an exception to this effect). See M. Borghi & S. Karapapa "Contractual restrictions on lawful use of information: sole-source databases protected by the back door?" *European Intellectual Property Review*, 37(8), 2015, 505.

⁸⁹ Directive 2019/790 on Copyright in the Digital Single Market, Rec. 9.

⁹⁰ *Ibid.*, Art. 3.

⁹¹ See the case law discussed in M. Borghi & S. Karapapa "Contractual restrictions on lawful use of information: sole-source databases protected by the back door?", p. 512-513.

⁹² For an examination of contractual restrictions to access to Google Books see M. Borghi & S. Karapapa *Copyright and Mass Digitization* (Oxford University Press: 2012), p. 105-110.

⁹³ For instance in Italy (Copyright Law 1941/633, Art. 5). See also Directive (EU) 2019/1024 of the European Parliament and of the Council of 20 June 2019 on open data and the re-use of public sector information, OJ L 172, 26.6.2019.

A strict interpretation of the decision in *Ryanair v PR Aviation* would facilitate the construal of reproduction for text and data mining as an autonomous users' right, the exercise of which should prevail, in principle, over unilateral restrictions of all kinds. This would ensure that the provision achieves its intended effect to "benefit the research community and, in so doing, support innovation".⁹⁴

New copyright exceptions: the case of out-of-commerce works

Article 8 on the use of out-of-commerce works by cultural heritage institutions represents probably one of the broadest derogations to author's exclusive rights ever introduced by the EU legislator. The norm is a two-tier provision. First, where certain conditions are met, collective management organizations of Member States may license the use of out-of-commerce works on the basis of an extended collective licensing system.⁹⁵ Where no collective management organization fulfils the conditions to offer a licence for a certain category of works, cultural heritage institutions may avail of an exception to make out-of-commerce works available for non-commercial purposes.⁹⁶ This is, so to speak, a "backstop" exception which is only activated in the absence of a licensing mechanism.

Taken as a whole, the two-tier provision represents a major development in copyright law, both doctrinally and practically. From a practical perspective, it enables cultural institutions to engage in digitization projects on a much larger scale than before and in relation to all categories of works and other subject matter.⁹⁷ Doctrinally, it introduces, for the first time, a principle whereby the exercise of exclusive rights can be restricted on the grounds of "non-use", namely when the copyright owner does not (or no longer does) actively use her rights to commercially exploit her work. To paraphrase a famous quote, this is probably an obvious step for mankind, but it is a giant leap for copyright doctrine.⁹⁸

In the context of this paper, the question to be considered is whether the norm can be construed as a users' right, or whether its scope is severely limited by Article 17(2). The question is not only speculative, since the CJEU has already ruled against a similar law applied by a Member State in 2016.⁹⁹ The main reason for rejection was because the national law introduced an exception not provided for in Article 5 of the Information Society Directive, which, despite its optional character, is to be understood as an *exhaustive* catalogue of exceptions allowed to Member States. This reason for rejection is now overtaken by the entry into force of the new EU legislation. However, the Court's ruling and the AG's opinion were also based on other considerations concerning the essence of the exclusive right of the author. In particular, it was found that the law in question, by replacing the author's explicit consent with a kind of "presumption of consent", deprived authors of an

⁹⁴ Directive 2019/790 on Copyright in the Digital Single Market, Rec. 8.

⁹⁵ *Ibid.*, Art. 8(1)

⁹⁶ *Ibid.*, Art. 8(2) and (3). For a discussion of the provision see M. Brown "Exploring Article 8 of the Copyright Directive: Hope for Cultural Heritage" *AIDA (Annali Italiani del Diritto d'Autore)*, 2020.

⁹⁷ Directive 2019/790 on Copyright in the Digital Single Market, Rec. 37. For a contextual discussion see M. Borghi & S. Karapapa *Copyright and Mass Digitization*.

⁹⁸ *Ibid.*, p. 1-5 ("Turning copyright on its head").

⁹⁹ *Soulier and Doke v Premier Ministre*, Case C-301/15 [2016]. See French Decree 2013-182 on the digital exploitation of out-of-print 20th century books.

essential element of their intellectual property rights.¹⁰⁰ The rights of authors are in fact “preventive in nature”, while the law turned the exclusive right into a *de facto* mere right of remuneration.¹⁰¹

These considerations are still valid and in principle applicable to Article 8 of the DSM Copyright Directive in both its two components, namely the collective extended licence mechanism and the backstop exception. Indeed, there is no doubt that, in principle, Article 8 can constitute, if not an “expropriation”, at least a severe restriction on the use of intellectual property. I say “in principle” because, in point of fact, an author who is not active in the commercial exploitation of their work has demonstrably no concrete interests to protect. Moreover, the extinction of property rights for non-use in favour of third parties who make socially useful use of it is a principle recognized in traditional property law. In the field of intellectual property, non-use of a trade mark is a cause for revocation of rights.¹⁰² While rules of this kind are alien to traditional copyright law, their adoption must be justified by overarching principles, such as the need to promote education and access to culture and information.

Accordingly, an assessment of Article 8’s conformity with EU fundamental rights requires a careful application of the principle of proportionality. It may be reasonable to conclude that the impairment suffered by copyright owners’ property rights in works that are no longer commercially exploited by effect of the use made by cultural institutions be *proportionally lower* than the impairment suffered by the users’ right of access to culture by effect of the preventive nature of rights in those works. Such an assessment would validate the intended purpose of Article 8 to provide cultural institutions with “a clear framework for the digitisation and dissemination of out-of-print works”,¹⁰³ in order to foster their public interest mission.

6. Conclusion

This paper has addressed some issues of analysis and interpretation of copyright exceptions as users’ rights within the EU legal framework. It has shown how the CJEU has moved away from a strict interpretation of exceptions as “derogations” to general principles of copyright protection, recognising their autonomous legal status. The twofold nature of copyright exceptions, as internal scope limitations and expressions of external juridical interests, is reflected in the way the Court has interpreted statutory exceptions, namely as independent sources of rights *and* as statements of fundamental rights recognized in the EU Charter. These include, most notably, freedom of expression and information. While the approach has the potential to lead to a full recognition of users’ rights, EU law finds a significant constraint in the fact that intellectual property is defined as a fundamental right too. However, in this respect, the Court has cautioned against an “absolutist” approach to protection of intellectual property. Accordingly, exceptions should be better understood as justified “control” of the use of property, rather than forms of “dispossession” in the public interest. Against this background, the paper has finally examined two central provisions of the DSM Copyright Directive with the aim to clarify the conditions upon which they can achieve their intended effect of promoting certain free uses of copyright works.

Copyright exceptions have transformed from an ancillary subject at the periphery of the EU harmonization agenda into one that is central to the copyright system. Their full recognition as

¹⁰⁰ Ibid., par. 33 and Opinion of Advocate General Wathelet, par. AG38-39.

¹⁰¹ Ibid., par. 50.

¹⁰² Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark, OJ L 154, 16.6.2017, p. 1–99.

, Art. 18.

¹⁰³ Directive 2019/790 on Copyright in the Digital Single Market, Rec. 30.

users' rights, equally constitutive to copyright law as authors' rights, require further engagement with the legal nature, purpose, and scope of copyright. A task which, inevitably, will have to be taken on by the CJEU in the years to come.

References

Bibliography

Borghi, M. & S. Karapapa (2012) *Copyright and Mass Digitization*, Oxford University Press

Borghi, M. & S. Karapapa (2015) "Contractual restrictions on lawful use of information: sole-source databases protected by the back door?" *European Intellectual Property Review*, 37(8) 505

Breakey, H. (2010) "User's rights and the public domain", *Intellectual Property Quarterly*, 3, 312

Brown, M. (2020) "Exploring Article 8 of the Copyright Directive: Hope for Cultural Heritage" *AIDA (Annali Italiani del Diritto d'Autore)*

Burrell, R. & A. Coleman (2005) *Copyright Exceptions: The Digital Impact*, Cambridge University Press

Drassinower, A. (2005) "Taking User Rights Seriously" in M. Geist (ed.) *In the Public Interest: the Future of Canadian Copyright Law*, Irwin Law, 462

Drassinower, A. (2010) "Exceptions Properly So-Called", in Y. Gendreau & A. Drassinower (eds.) *Langues et Droit d'Auteur / Language and copyright* (Bruylant/Carswell: 2005), 205

Elkin-Koren, N. (2017) "Copyright in the Digital Ecosystem, A User Rights Approach" in R. Okediji (ed.) *Copyright Law in an Age of Limitations and Exceptions*, Cambridge University Press

Geiger, C. & E. Izyumenko (2020) "The constitutionalisation of intellectual property law in the EU and the *Funko Medien*, *Pelham* and *Spiegel Online* decisions of the CJEU: progress, but still some way to go!" *International Review of Intellectual Property and Competition Law (IIC)*, 51(3), 282

Geiger, C. (2008) "The Constitutional Dimension of Intellectual Property", in P. Torremans (ed.) *Intellectual Property and Human Rights*, Kluwer Law

Geiger, C. (2009) "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* 115

Geist, M. (2017) "The Canadian Copyright Story: How Canada Improbably Became the World Leader on Users' Rights in Copyright Law", in R. Okediji, *Copyright Law in an Age of Exceptions and Limitations*, Cambridge University Press

Ghidini, G. (2018) *Rethinking Intellectual Property: Balancing Conflicts of Interest in the Constitutional Paradigm*, Edward Elgar

Ginsburg, J. (1997) "Authors and Users in Copyright", 45 *J. Copyright Soc'y U.S.A.*, 1

- Griffith J. & L. McDonagh (2012) “Fundamental Rights and European IP Law – the case of Art 17(2) of the EU Charter”, in C. Geiger (ed.) *Constructing European IP: Achievements and New Perspectives*, Edward Elgar
- Karapapa, S. (2011) “*Padawan v SGAE*: a right to private copy?” *European Intellectual Property Review*, 33(4), 252.
- Karapapa, S. (2013) “A copyright exception for private copying in the United Kingdom”, *European Intellectual Property Review*, 35(3)
- Karapapa, S. (2020) *Defences to Copyright Infringement*, Oxford University Press
- Mezei, P. (2018) *Copyright Exhaustion. Law and Policy in the United States and the European Union*, Cambridge University Press
- Mysoor, P. (2018) “Exhaustion, non-exhaustion and implied licence” *International Review of Intellectual Property and Competition Law (IIC)*, 49(6), 663
- Patterson, L.R. & S.W. Lindberg (1991) *The Nature of Copyright: A Law of Users’ Rights*, University of Georgia Press
- Pessach, G. (2011) “Reverse Exclusion in Copyright Law – Reconfiguring Users’ Rights”, Available at SSRN: <https://ssrn.com/abstract=1813082> (last accessed 28 July 2020)
- Pila, J. & P. Torremans (2016) *European Intellectual Property Law*, Oxford University Press
- Ricolfi, M. (2015) “Trademarks and Human Rights”, in P. Torremans (ed.) *Intellectual Property Law and Human Rights*, 4th ed., Kluwer Law
- Ricolfi, M. (2017) “Commento all’ Art. 17 – La protezione della proprietà intellettuale”, in R. Mastroianni *et al* (eds.) *Carta dei diritti fondamentali dell’Unione Europea*, Giuffrè
- Ricolfi, M. (2019) “La proprietà intellettuale e le libertà antagoniste” in F. Caggia & G. Resta *I diritti fondamentali e il diritto privato*, Roma Tre
- Rosati, E. (2019) *Copyright and the Court of Justice of the European Union*, Oxford University Press
- Schauer, F. (1991) “Exceptions”, *University of Chicago Law Review* 58, no. 3, 871
- Sganga, C. (2019) “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*”, *European Intellectual Property Review*, 41(11)
- Synodinou, T. (2019) “Lawfulness for Users in European Copyright Law: Acquis and Perspectives”, *Journal of Intellectual Property, Information Technology and E-Commerce Law*, 10
- Torremans, P/ (2018) “Copyright (and Other Intellectual Property Rights) as Human Right”, in P. Torremans (ed.) *Intellectual Property and Human Rights*, Kluwer Law

Yu, P.K. (2018) “Challenge to the Development of a Human Rights Framework for Intellectual Property”, in P. Torremans (ed.) *Intellectual Property and Human Rights*, Kluwer Law

Case law

ACI Adam BV and Others v Stichting de ThuisKopie and Stichting Onderhandeligen ThuisKopie vergoeding, Case C-435/12, 10 April 2014, ECLI:EU:C:2014:254

Bastei Lübbe GmbH v Strotzer, Case C-149/17, 18 October 2018, ECLI:EU:C:2018:841

Booker Aquaculture Limited (trading as Marine Harvest McConnell) v The Scottish Ministers Joined Cases C-20/00 and C-64/00, 10 July 2003, ECLI:EU:C:2003:397

CCH Canadian Ltd. v. Law Society of Upper Canada [2004] SCC 13

Cofemel – Sociedade de Vestuário SA v G-Star Raw CV, Case C-683/17, 12 September 2019, ECLI:EU:C:2019:721

Deckmyn and Vrijheidsfonds VZW v Helena Vandersteen and Others, Case C-201/13, 3 September 2014, ECLI:EU:C:2014:2132

Entidad de Gestión de Derechos de los Productores Audiovisuales (EGEDA) and Others v Administración del Estado, Case C-470/14, 9 June 2016, ECLI:EU:C:2016:418

Funke Medien NRW GmbH and Others v Bundesrepublik Deutschland, Case C-469/17, 29 July 2019, ECLI:EU:C:2019:623

Infopaq International A/S v Danske Dagblades Forening, Case C-5/08, 16 July 2009, ECLI:EU:C:2009:465

Land Nordrhein-Westfalen v Renckhoff, Case C-161/17, 7 August 2018, ECLI:EU:C:2018:634

Luksan v Petrus van der Let, Case C-277/10, 9 February 2012, ECLI:EU:C:2012:65

Painer v Standard Verlags GmbH, Case C-145/10, 7 March 2013, ECLI:EU:C:2013:138

Pari Pharma GmbH v European Medicines Agency (EMA), T-235/15, ECLI:EU:T:2018:65

Pelham GmbH v Ralf Hütter, Case C-476/17, 29 July 2019, ECLI:EU:C:2019:624

R. (British Academy of Songwriters, Composers and Authors and others) v Secretary of State for Business, Innovation and Skills [2015] Bus. L.R. 1435

Ranks and Vasiļevičs v Finanšu un ekonomisko noziegumu izmeklēšanas prokuratūra, Case C-166/15, 12 October 2016, ECLI:EU:C:2016:762

Ryanair Ltd v PR Aviation BV, 15 January 2015, Case C-30/14, ECLI:EU:C:2015:10

SABAM v Netlog, Case C-360/10, 16 February 2012, ECLI:EU:C:2012:85

SAS Institute Inc. v World Programming Ltd, Case C-406/10, 2 May 2012, ECLI:EU:C:2012:259

Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM), Case C-70/10, 24 November 2011, ECLI:EU:C:2011:771

Soulier and Dore v Premier ministre, Ministre de la Culture et de la Communication, Case C-301/15, 16 November 2016, ECLI:EU:C:2016:878

Spiegel Online GmbH v Volker Beck, Case C-516/17, 29 July 2019, ECLI:EU:C:2019:625

Stichting de Thuisakopie v Opus Supplies Deutschland GmbH and others, Case C-462/09, 16 June 2011, ECLI:EU:C:2011:397

Technische Universität Darmstadt v Eugen Ulmer KG, Case C-117/13, 11 September 2014, ECLI:EU:C:2014:2196

UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH, Case C-314/12, 27 March 2014, ECLI:EU:C:2014:192

VCAST Limited v RTI SpA, Case C-265/16, 29 November 2017, ECLI:EU:C:2017:913

VG Wort v Kyocera, Joined Cases C-457/11 and C-460/11, 27 June 2013, ECLI:EU:C:2013:426