

# Three Types of Balancing in EU Copyright Law: the (mis)uses of the concept of “fair balance”

Daniel Jongsma\*

## 1. Introduction

Over the past decade, the role of fundamental rights balancing in the adjudication of copyright disputes in the EU has increased in importance. The CJEU has played a leading role in this development. Starting with its ruling in *Promusicae*, the Court has emphasized in a number of different contexts that the interpretation, implementation and application of EU copyright norms must preserve a “fair balance of rights and interests”. This balancing approach has not been without its detractors. Some have more specifically questioned the specific use made by the CJEU’s of the concept of “fair balance” in the context of copyright. Others have rejected this balancing approach in a more general manner as altogether inappropriate.

It must be admitted that the CJEU’s use of balancing often leaves a lot to be desired. In general, the structure of the balancing analysis is not clearly articulated. As a consequence, it is also often unclear to what extent the particular application of this concept of fair balance can really justify the outcome in specific cases. This undermines the rational character of the CJEU’s judgements, the coherency and transparency of its decision-making, and may ultimately affect the extent to which people are willing to accept its decisions as legitimate.

This paper focuses on this use of balancing by the CJEU in copyright cases, specifically the balancing of fundamental rights. It aims to explore how the CJEU uses three different types of balancing, obscured behind the unitary terminology of the concept of fair balance, to outline (i) the competences of the EU legislature, (ii) those of the Member States, and (iii) the scope of protection of EU copyright law. It is in particular this varying character of the Court’s use of balancing that has until now not been sufficiently acknowledged.

This paper will follow the following structure. Section 2 gives a brief overview of the genesis of the ‘age of balancing’ in EU copyright law, as well as of the criticism thereof. Section 3 explores the use of balancing to determine the optimal relationship between competing normative arguments, including fundamental rights. It aims at setting out a theoretical frame of reference for the evaluation of the approach by the CJEU, against the background of a model of proportionality analysis and balancing as developed in legal and constitutional theory. Section 4, then, takes a normative turn. It re-evaluates the case law of the CJEU through the theoretical lens of Section 3. This paper ends with some concluding observations in Section 5.

## 2. The CJEU, copyright, striking a “fair balance”, and the critics

### 2.1 A brief historical overview

The interface between (EU) copyright and fundamental rights has been a hot topic for years. This was the case even before the CJEU started to refer to fundamental rights on a more consistent basis

---

\* Postdoctoral researcher at Hanken School of Economics (Helsinki, Finland). The theme at the centre of this paper is also addressed in my doctoral dissertation, defended in January of 2020, and available online at <<https://helda.helsinki.fi/dhanken/handle/10227/294110>>.

after its *Promusicae* ruling in 2008.<sup>1</sup> Unsurprisingly, the subsequent increased use of fundamental rights balancing by the CJEU in copyright cases has been the focus of extensive analysis. Often the Court's use of balancing is discussed generally, without making a clear distinction between the different contexts in which that use occurs.<sup>2</sup> Some have in this regard distinguished between different eras of use of balancing methodology, suggesting that the CJEU's approach has matured over the years.<sup>3</sup> Others have instead focused on the use of fundamental rights balancing in a particular context. Particularly popular topic of discussion in this regard has been its use in enforcement proceedings against intermediaries.<sup>4</sup> It is in this context where the use of fundamental rights balancing first started to proliferate. These cases can be divided in two groups: proceedings to obtain the identity of infringers and proceedings aimed at preventing further infringements. In *Promusicae*, belonging to the first group, the CJEU merely gave a statement of principle: Member States must "rely on an interpretation of the directives which allows a fair balance to be struck between the various fundamental rights protected by the Community legal order".<sup>5</sup> Judgements in this group also include *LSG*,<sup>6</sup> *Bonnier Audio*,<sup>7</sup> *Coty Germany*,<sup>8</sup> and *Bastei Lübbe*.<sup>9</sup> Decisions concerning proceedings against intermediaries aimed at preventing further infringements include *Scarlet Extended v SABAM*,<sup>10</sup> *SABAM v Netlog*,<sup>11</sup> *Telekabel*,<sup>12</sup> and *McFadden*.<sup>13</sup> These cases often

---

<sup>1</sup> The contributions are too numerous to cite here. Notable early contributions in the European context include Christophe Geiger, *Droit d'auteur et droit du public à l'information* (Litec 2004), Jonathan Griffiths & Uma Suthersanen (Eds), *Copyright and Free Speech. Comparative and International Analysis* (Oxford University Press 2005), Alain Strowel & François Tulken (Eds), *Droit d'auteur et liberté d'expression. Regards francophones, d'Europe et d'ailleurs* (Larcier 2006) and Paul Torremans (Ed), *Copyright and Human Rights. Freedom of Expression, Intellectual Property, Privacy* (Kluwer Law International 2004).

<sup>2</sup> See, e.g., Bernd Justin Jütte, 'The beginning of a (happy?) relationship: copyright and freedom of expression in Europe' (2016) 38(1) *European Intellectual Property Review* 11 and Tuomas Mylly, 'Proportionality in the CJEU's Internet Copyright Case Law: Invasive or Resilient?' in U. Bernitz *et al.* (Eds), *General Principles of EU Law and the EU Digital Order* (Kluwer Law International 2019), p. 257-285.

<sup>3</sup> See, e.g., Tuomas Mylly, 'The constitutionalization of the European legal order: Impact of human rights on intellectual property in the EU' in Chr. Geiger (Ed), *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar 2015) and Caterina 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*' (2019) 41(11) *European Intellectual Property Review* 683.

<sup>4</sup> See, e.g., Christina Angelopoulos & Stijn Smet, 'Notice-and-fair-balance: how to reach a compromise between fundamental rights in European intermediary liability' (2016) 8(2) *Journal of Media Law* 266, Orit Fischman Afori, 'Proportionality: a new mega standard in European copyright law' (2014) 45(8) *International Review of Intellectual Property and Competition Law* 889, Christophe Geiger & Elena Izyumenko, 'The Role of Human Rights in Copyright Enforcement Online: Elaborating a Legal Framework for Website Blocking' (2016) 32(1) *American University International Law Review* 43, Elena Izyumenko, 'The Freedom of Expression Contours of Copyright in the Digital Era: A European Perspective' (2016) 19(3-4) *The Journal of World Intellectual Property* 115 2016 and Peter Teunissen, 'The balance puzzle: the ECJ's method of proportionality review in EU copyright law' (2018) 40(9) *European Intellectual Property Review* 579.

<sup>5</sup> Case C-275/06 *Promusicae* ECLI:EU:C:2008:54, para 68.

<sup>6</sup> Case C-557/07 *LSG-Gesellschaft zur Wahrnehmung von Leistungsschutzrechten* ECLI:EU:C:2009:107, para 28.

<sup>7</sup> Case C-461/10 *Bonnier Audio and Others* ECLI:EU:C:2012:219, para 56ff.

<sup>8</sup> Case C-580/13 *Coty Germany* ECLI:EU:C:2015:485, para 28ff. The case strictly speaking concerned a trademark infringement, but the judgement was phrased with regard to the enforcement of intellectual property in general.

<sup>9</sup> Case C-147/17 *Bastei Lübbe* ECLI:EU:C:2018:841, para 42ff.

<sup>10</sup> Case C-70/10 *Scarlet Extended v SABAM* ECLI:EU:C:2011:771, para 41ff.

<sup>11</sup> Case C-360/10 *SABAM v Netlog* ECLI:EU:C:2012:85, para 39ff.

<sup>12</sup> Case C-314/12 *UPC Telekabel Wien* ECLI:EU:C:2014:192, para 45ff.

<sup>13</sup> Case C-484/14 *McFadden* ECLI:EU:C:2016:689, para 80ff.

revolve around the question whether EU law either precludes a certain norm of national law or a particular injunction against an intermediary.

Fundamental rights arguments and balancing have also seen increasing use in a second context:<sup>14</sup> when determining the scope of exclusive rights and of limitations and exceptions, notably those in the InfoSoc Directive<sup>15</sup>, whose general purpose is to safeguard a fair balance of rights and interest.<sup>16</sup> Like it had done in the first context, the CJEU has defined a general interpretative principle. Member States must ensure, “in transposing the exceptions and limitations referred to Article 5(2) and (3) of [the InfoSoc Directive], ... that they rely on an interpretation of the directive which allows a fair balance to be struck between the various fundamental rights protected by the European Union legal order”.<sup>17</sup> The CJEU has shown that it also considers itself bound to that duty. In three cases, *GS Media*,<sup>18</sup> *Renckhoff*,<sup>19</sup> and *Moses Pelham (Metall auf Metall)*,<sup>20</sup> the CJEU referred to the “fair balance of rights and interests” when interpreting the scope of exclusive rights. In a number of other cases the “fair balance” and the use of fundamental rights balancing was when determining the scope of limitations and exceptions. To this group belong *Painer*,<sup>21</sup> *DR and TV2 Danmark*,<sup>22</sup> *Deckmyn*,<sup>23</sup> *Ulmer*,<sup>24</sup> *Funke Medien NRW (Afghanistan Papers)*,<sup>25</sup> and *Spiegel Online*.<sup>26</sup> In contrast to the use of ‘balancing’ in decisions involving intermediaries, the pertinent question in these cases is often not whether EU law precludes a certain state of affairs, but simply how a certain norm of EU law must be interpreted.

Finally, note should also be made of *Metronome* and *Laserdisken*, two decisions predating the one in *Promusicae* and which concerned the validity in light of fundamental rights of, respectively, the EU-wide introduction of the exclusive rental right and the prohibition for EU Member States to maintain a system of international exhaustion.<sup>27</sup>

An extensive overview and discussion of these decisions can be found in the contributions cited in this section. To the extent relevant to the topic of discussion here, some of these decisions will be more closely analyzed in Section 4.

---

<sup>14</sup> Cf. also Case C-277/10 *Luksan* ECLI:EU:C:2012:65, paras 68-70, which did not concern scope of protection, but a question of competence.

<sup>15</sup> Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society, OJ L 167, 22 June 2001, p. 10–19.

<sup>16</sup> The CJEU has emphasized this on numerous occasions. See Case C-160/15 *GS Media* ECLI:EU:C:2016:644, para 31; Case C-469/17 *Funke Medien NRW (Afghanistan Papers)* ECLI:EU:C:2019:623, para 57; Case C-476/17 *Pelham and Others (Metall auf Metall)* ECLI:EU:C:2019:624, para 32 and Case C-516/17 *Spiegel Online* ECLI:EU:C:2019:625, para 42. Cf. also Case C-161/17 *Renckhoff* ECLI:EU:C:2018:634, para 41. See also Joined Cases C-403/08 and C-429/08 *Football Association Premier League and Others* ECLI:EU:C:2011:631, para 164; Case C-360/13 *Public Relations Consultants Association (PRCA)* ECLI:EU:C:2014:1195, para 24 and Case C-145/10 *Painer* ECLI:EU:C:2011:798, para 132, in which the CJEU considered similarly in respect of specific provisions rather than generally.

<sup>17</sup> *Funke Medien NRW (Afghanistan Papers)* (*supra* note 16), para 53; and *Spiegel Online* (*supra* note 16), para 38.

<sup>18</sup> *GS Media* (*supra* note 16), paras 31 & 44-46.

<sup>19</sup> *Renckhoff* (*supra* note 16), paras 40-43

<sup>20</sup> *Pelham and Others (Metall auf Metall)* (*supra* note 16), paras 34-38.

<sup>21</sup> *Painer* (*supra* note 16), paras 134-137.

<sup>22</sup> Case C-510/10 *DR and TV2 Danmark* ECLI:EU:C:2012:244, para 57.

<sup>23</sup> Case C-201/13 *Deckmyn and Vrijheidsfonds* ECLI:EU:C:2014:2132, para 25ff.

<sup>24</sup> Case C-117/13 *TU Darmstadt v Eugen Ulmer* ECLI:EU:C:2014:2196, para 31.

<sup>25</sup> *Funke Medien NRW (Afghanistan Papers)* (*supra* note 16), para 70ff.

<sup>26</sup> *Spiegel Online* (*supra* note 16), paras 72 & 82.

<sup>27</sup> Case C-200/96 *Metronome Musik v Music Point Hokamp* ECLI:EU:C:1998:172 and Case C-479/04 *Laserdisken* ECLI:EU:C:2006:549.

## 2.2 The critique so far

The CJEU's has faced plenty of criticism for its use of fundamental rights arguments in its copyright decisions. Predominantly, these decisions have been criticized for their inadequate argumentation and the overall lack of a conceptual framework within which fundamental rights balancing occurs. The concept of 'fair balance' has been described as "vacuous and unhelpful"<sup>28</sup> and as "an empty slogan merely giving fundamental rights gloss to the CJEU case law"<sup>29</sup>. Often the Court just declares that something does or does not violate the "fair balance" that must be safeguarded, without giving full reasons why.<sup>30</sup> Sometimes, any real reasons supporting that conclusion are altogether absent. Most other occasions, the Court's assessment is one-sided, focused solely on establishing the (degree of) interference with a particular right, without real regard for other rights concerned.<sup>31</sup>

The lack of any real argumentation has invited the suggestion that the CJEU merely uses fundamental rights arguments to fortify its interpretation of secondary EU law. Jonathan Griffiths, for instance, has suggested that the repeated reference by the CJEU to the concept of 'fair balance' serves the purpose of lending "rhetorical coherence to a partially harmonised copyright regime" and promoting the Court's "harmonising agenda".<sup>32</sup> On the other hand, the arguably selective references to fundamental rights provide fuel for the suggestion that the CJEU proceeds from a certain bias as regards the result to be obtained.<sup>33</sup>

Importantly, the use of fundamental rights to bolster the interpretation of secondary law has also been criticized for creating a risk of "petrification" or "lock-in" of those interpretations. That is to say, it is suggested that where the Court concludes that a particular outcome is not only demanded by secondary legislation but also by primary legislation such as the EU Charter, the EU legislature will not be able to overturn the interpretation of the Court.<sup>34</sup> As suggested in Section 4, the risk of lock-in depends on the character of the CJEU's use of balancing.

Criticism of the use of fundamental rights balancing has also been of a more fundamental nature. For instance, in a recent contribution Tuomas Mylly has described the use of fundamental rights proportionality in the CJEU's copyright case law as a "a significant epistemological bottleneck for integrating multiple applicable rights, legislative aims and infrastructure effects in decision-making", suggesting it relies on an inappropriate comparison between incommensurable values, leads to an

---

<sup>28</sup> Jonathan Griffiths, 'Constitutionalising or harmonising? The Court of Justice, the right to property and European copyright law' (2013) 38 *European Law Review* 65, p. 74

<sup>29</sup> Mylly 2015 (*supra* note 3), p. 130

<sup>30</sup> Or, as it did in *McFadden* (*supra* note 13), it avoids establishing a 'fair balance' altogether and devolves the responsibility of striking this fair balance onto a private undertaking. On the potential resulting risk of private censorship, see e.g. Christina Angelopoulos, 'Are blocking injunctions against ISPs allowed in Europe? Copyright enforcement in the post-Telekabel EU legal landscape' (2014) 9(10) *Journal of Intellectual Property Law & Practice* 812, p. 818.

<sup>31</sup> Cf. Mylly 2015 (*supra* note 3), p. 16 (regarding the *Sabam* cases cited in notes 10 and 11), Teunissen 2018 (*supra* note 4), p. 592 (regarding *McFadden* (*supra* note 13)), and Petar Radosavljev, 'For whom the copyright scale tips: has the CJEU established a proper balance of rights with its GS media case judgement?' (2017) 8(3) *European Journal of Law and Technology*, p. 7ff, retrieved from < <http://ejlt.org/article/view/601> > accessed on 3 January 2020 and Bianca Hanuz, 'Linking to unauthorized content after the CJEU GS Media decision' (2016) 11(12) *Journal of Intellectual Property Law & Practice* 879, p. 881 (regarding *GS Media* (*supra* note 16)).

<sup>32</sup> Griffiths 2013 (*supra* note 28), p. 71. Cf. also Mylly 2015 (*supra* note 3), p. 119 and Martin Husovec, 'Intellectual Property Rights and Integration by Conflict: The Past, Present and Future' (2016) 18 *Cambridge Yearbook of European Legal Studies* 239, p. 261ff, who sees in *Coty Germany* a recognition by the CJEU of positive obligations for the Member States based directly on article 17(2) of the EU Charter.

<sup>33</sup> Cf. Mylly 2019 (*supra* note 2), p. 276.

<sup>34</sup> Cf. Husovec 2016 (*supra* note 32), p. 268 and Mylly 2015 (*supra* note 3), p. 127-128.

increase of perceived conflicts between rights to the detriment of consideration for the objective of applicable norms and “collateral damage on a diversity of social and public goods related to the Internet”, due to this focus on individual rights of the parties involved to the exclusion of other rights and interests.<sup>35</sup> The balancing paradigm has also been rejected for lacking “normative criteria [according to which] a conflict between fundamental rights is to be resolved”<sup>36</sup> and obscuring “how weight is to be attributed to differing interests or even as to which interests are to enjoy a place on the scales”<sup>37</sup>. In other words, the use of fundamental rights balancing to resolve copyright conflicts is best abandoned altogether.

### 3. Modalities of balancing: a theoretical perspective

The central aims of this paper is to explore the different ways fundamental rights balancing is used in the CJEU’s copyright decisions. This allows us to place the criticism of the CJEU’s approach in perspective. A central role in the Court’s decisions is played by the concept of ‘fair balance’. This concept, which finds its origin in the case law of the ECtHR,<sup>38</sup> was adopted by the CJEU into its own fundamental rights case law when itself applying ECHR rights. It merged this concept with its pre-existing proportionality analysis of fundamental rights limitations as developed in seminal cases such as *Nold*<sup>39</sup> and *Hauer*<sup>40</sup>. The concept of fair balance is thus, in the first place, connected to proportionality analysis. This Section focuses on the use of proportionality analysis (PA) to review certain norms and its use in horizontal conflicts, i.e. between private parties, in order to illustrate different modalities of balancing in EU copyright law.

#### 3.1 Proportionality analysis, the nature of balancing and (intensity of) review

PA is a widespread mechanism used to review legislative decision-making in light of a state’s fundamental rights commitments. PA looks to determine whether a certain measure (i) pursues a legitimate aim, (ii) is suitable to attain that aim, (iii) does not go beyond what is necessary to achieve it, and (iv) whether the degree to which the measure contributes to the fulfilments of the aim is commensurate with the degree of harm inflicted on the right in question. The use of this kind of PA by the CJEU has a long history.<sup>41</sup> The last step of the enquiry, known as proportionality in the narrow sense or ‘balancing’, is most controversial, because it appears to require precisely the kind of quantitative cost-benefit analysis of incommensurable values without clear normative guidance for which the use of balancing in copyright cases has been criticized.<sup>42</sup> Indeed, one could understand some leading proponents of PA, such as Robert Alexy and Aharon Barak, as suggesting that precisely

---

<sup>35</sup> Mylly 2019 (*supra* note 2), p. 272ff.

<sup>36</sup> Alexander Peukert, 'The fundamental right to (intellectual) property and the discretion of the legislature' in Chr. Geiger (ed), *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar 2015), p. 135.

<sup>37</sup> Robert Burrell & Allison Coleman, *Copyright Exceptions. The Digital Impact* (Cambridge University Press 2005), p. 190.

<sup>38</sup> Decision of the European Court of Human Rights (Plenary), in the case “*Relating to certain aspects of the laws on the use of languages in education in Belgium*” v. *Belgium (Merits)* (generally known as the “Belgian Linguistics” case), Appl. No. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63 and 2126/64, of 23 July 1968, para I.B.5.

<sup>39</sup> Case 4/73 *Nold KG v Commission* ECLI:EU:C:1974:51.

<sup>40</sup> Case 44/79 *Hauer v Land Rheinland-Pfalz* ECLI:EU:C:1979:290.

<sup>41</sup> For an early analysis, see, e.g., Gráinne De Búrca, ‘The Principle of Proportionality and its Application in EC Law’ (1993) 13(1) *Yearbook of European Law* 105.

<sup>42</sup> This criticism of balancing is not specific to (EU) copyright law. See for an overview of the purported weaknesses, e.g., Aharon Barak, *Proportionality. Constitutional Rights and their Limitations* (Cambridge University Press 2012), Ch. 18 and Matthias Jestaedt, ‘The Doctrine of Balancing—its Strengths and Weaknesses’ in: M. Klatt (Ed), *Institutionalized Reason: The Jurisprudence of Robert Alexy* (Oxford University Press 2012), p. 152-172.

such as cost-benefit analysis is required.<sup>43</sup> Accordingly, their ‘brand’ of balancing has been referred to as “interest balancing”<sup>44</sup> or as a “maximisation account of proportionality”<sup>45</sup>. This approach is contrasted with “balancing as reasoning”, which instead views balancing as a process of moral reasoning to determine the priority between competing values.<sup>46</sup> However, one should be careful to construe any account of PA as requiring a simple cost-benefit analysis. Also for commentators such as Alexy and Barak, who talk about comparison of “intensity of interference” and “importance of satisfaction” (Alexy) and “harm” and “benefit” (Barak), balancing is an evaluative exercise in justification and moral reasoning.<sup>47</sup> For Barak, balancing is a “value-laden” enquiry into whether the incursion into a right can be morally justified.<sup>48</sup> Also for Alexy, who is famous for suggesting that the “intensity of interference” with the right and “importance of satisfaction” of the purpose can be both qualified as either light, moderate and serious and then compared, any such qualification depends on moral argumentation.<sup>49</sup>

While balancing can thus be said to formally concern a comparison (and ordinal ranking)<sup>50</sup> of the degree of fulfilment of a particular aim and the degree of interference caused with a certain right relative to each other, materially it will often require moral determinations.<sup>51</sup> This does imply a certain measure of discretion for courts, but it hardly means that “normative criteria” are absent. Court’s must rule within the framework provided by the law, specifically the constitution (in the case of the CJEU, the Treaties and the EU Charter).<sup>52</sup> This framework is of course not fully determinative, but in this regard balancing judgements are not very different from normal legal argumentation and interpretation of ambiguous norms, which also bestow upon courts a certain – sometimes large – degree of discretion.<sup>53</sup> The open nature of balancing is both its strength and its weakness. On the one hand it forces judges to justify why they decide a certain way, to explain why the balance ‘tips’ one way or the other. On the other hand, it is of supreme importance that they do exactly that: identify which values or ‘principles’ are at stake and provide reasons for their

---

<sup>43</sup> Cf., e.g., Robert Alexy, *A theory of constitutional rights* (J. Rivers Trans.; Oxford University Press 2002), Section 3.2 in the Postscript and Barak 2012 (*supra* note 42), Ch. 12

<sup>44</sup> Kai Möller, ‘Proportionality: Challenging the critics’ (2012) 10(3) *International Journal of Constitutional Law* 709, p. 715.

<sup>45</sup> Francisco Urbina, *A Critique of Proportionality and Balancing* (Cambridge University Press 2017), Ch. 2.

<sup>46</sup> Cf., generally, Möller 2012 (*supra* note 44). See also, e.g., Mattias Kumm, ‘The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review’ (2010) 4 *Law & Ethics of Human Rights* 140, p. 168-169 and Richard Stacey, ‘The Magnetism of Moral Reasoning and the Principle of Proportionality in Comparative Constitutional Adjudication’ (2019) 67 *The American Journal of Comparative Law* 435.

<sup>47</sup> Similarly, Richard Stacey, ‘The Rule of Law Sold Short’ (2018) 33(1) *Constitutional Commentary* 129, p. 132.

<sup>48</sup> Cf. Barak 2012 (*supra* note 42), p. 342.

<sup>49</sup> Cf. Robert Alexy, ‘Constitutional Rights and Proportionality’ (2014) 22 *Revus: Journal for Constitutional Theory and Philosophy of Law* 51, p. 58-59.

<sup>50</sup> On balancing as an ordinal rather than cardinal ranking of values, see, e.g. Martin Borowski, ‘On Apples and Oranges. Comment on Niels Petersen’ (2013) 14(8) *German Law Journal* 1409, p. 1413, Virgílio Afonso da Silva, ‘Comparing the Incommensurable: Constitutional Principles, Balancing and Rational Decision’ (2011) 31(2) *Oxford Journal of Legal Studies* 273, p. 283 and Stacey 2019 (*supra* note 46), p. 464ff.

<sup>51</sup> Cf. also Stacey 2019 (*supra* note 46), p. 449ff, who argues that even courts which purport to limit themselves to factual analyses to determine whether fundamental rights limitations are ‘necessary’ cannot avoid the moral reasoning associated with balancing.

<sup>52</sup> Cf. Robert Alexy, ‘On Balancing and Subsumption. A Structural Comparison’ (2003) 16(4) *Ratio Juris* 433, p. 442, Barak 2012, p. 349, and Stacey 2019 (*supra* note 46), p. 466.

<sup>53</sup> Cf., arguing similarly, Alexy 2002 (*supra* note 43), p. 106 and Borowski 2013 (*supra* note 50), p. 1411. On ambiguity of norms in general and the need to “balance”, see, famously, H.L.A. Hart, *The Concept of Law* (Oxford University Press 2012, 3rd ed.), p. 135.

relative weight. Without this, judgements may come across as arbitrary and fall prey to the accusation of irrationality that haunts PA.

Provided that a measure is suitable and necessary, the essential question is thus whether the (legitimate) reasons in favour of the measure are not outweighed by those against it deriving from the fundamental right in question. In cases of review, it is important to recognise that courts ought not seek to take the place of policy-makers. Appropriately, courts exercise deference and restraint in their review. The degree of deference and restraint is variable. As a rule, the more important a particular right, and the greater the degree of interference with that right, the less courts should exercise deference and restraint in accepting the assessments and assumptions made by decision-makers as correct.<sup>54</sup> Where courts do not strictly scrutinize those assessments and assumptions decision-makers enjoy discretion. Robert Alexy has in this regard made a useful distinction between empirical and normative epistemic discretion.<sup>55</sup> In particular the second form of discretion is of interest here. It arises where courts recognise that it is normatively uncertain how the degree of fulfilment or interference with a right or interest must be qualified. It may lead a court to accept the conclusion of a primary decision-maker that a particular state of affairs is 'balanced'. Such discretion may be in particular appropriate where the moral argument involved is especially contentious. This helps explain why supranational courts such as the ECtHR, take account of cultural diversity and a varying hierarchy of values among different states,<sup>56</sup> (in)famously leading it to grant states a larger margin of appreciation in cases involving morals.<sup>57</sup>

The latter point, finally, brings us back to the CJEU and its use of proportionality to review decision-making and the intensity of that review. If it is accepted that value pluralism should play a role in determining the intensity of review, it warrants the conclusion that sometimes the intensity of review of Member State measures should be less where Member State values might diverge, which notably may be the case where fundamental rights are concerned. The CJEU has done exactly this with regard to restrictions on the free movement of goods and services.<sup>58</sup> Similarly, where Member States have discretion in terms of implementation of EU law and accordingly may apply national standards of fundamental rights protection without endangering the "primacy, unity and effectiveness of EU law",<sup>59</sup> it is appropriate for the CJEU to take a more deferential approach. This explains why the CJEU might apply different standards of fundamental rights review where it is purely concerned with EU action than in cases in which Member State action is involved. In the

---

<sup>54</sup> For an elaborate analysis, see, e.g., Julian Rivers, 'Proportionality and variable intensity of review' (2006) 65(1) *Cambridge Law Journal* 174.

<sup>55</sup> Alexy 2002 (*supra* note 43), p. 414ff.

<sup>56</sup> On this form of discretion, which he has called "cultural discretion", see Julian Rivers, 'Proportionality, Discretion and the Second Law of Balancing' in G. Pavlakos (Ed), *Law, Rights and Discourse: The Legal Philosophy of Robert Alexy* (Hart Publishing 2007), p. 178-180.

<sup>57</sup> See, e.g., E.g, Decision of the European Court of Human Rights (Plenary), in the case of *Handyside v. United Kingdom*, Appl. No. 5493/72 of 7 December 1976, para 48 and Decision of the European Court of Human Rights (Plenary), in the case of *Rees v. The United Kingdom*, Appl. No. 9532/81, of 17 October 1986, para 37 *et seq.*

<sup>58</sup> See for instance, the less intense standard of review applied in cases such as Case C-36/02 *Omega* ECLI:EU:C:2004:614, Case C-368/95 *Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v Bauer Verlag* ECLI:EU:C:1997:325 and C-112/00 *Schmidberger* ECLI:EU:C:2003:333. Cf., however, Julian Rivers, 'Proportionality and discretion in international and European law' in N. Tsagourias (Ed), *Transnational constitutionalism: international and European models* (Cambridge University Press 2007), p. 126-127 who notes that over time the CJEU has tended to reduce the scope of "cultural discretion", which he explains by reference to the understandable desire "to conceive of the European Union (EU) as a single political Community".

<sup>59</sup> The CJEU laid down this standard for cumulative application of (higher) national standards of fundamental rights protection with the protection offered by Charter rights in Case C-399/11 *Melloni* ECLI:EU:C:2013:107, para 60.

former it acts as a constitutional court. In the latter it operates closer to a supra-national court, taking account of national competencies and associated discretion in its determination of the intensity of review.

On the matter of supranational courts and fundamental rights review it must be acknowledged that they can leave greater leeway than would be appropriate for courts of a single political community.<sup>60</sup> The latter courts grant discretion to the legislature to respect the separation of powers, while the discretion granted by supranational courts to national courts (and states as such) “is derived from the special relationship of international law treaties ... to the national law”.<sup>61</sup> This realization is important for another, (for present purposes) unrelated, reason: it explains why the CJEU and national courts should not merely attempt to satisfy the criteria laid down by the ECtHR if they intend to offer fundamental rights the greatest possible protection.

The foregoing illustrated two things. First, balancing involving fundamental rights is first and foremost a process of (moral) argumentation and justification. Second, due to the different relation between the CJEU and, on the one hand, the EU legislature and, on the other hand, Member State authorities and courts, the CJEU can be expected to apply a different intensity of fundamental rights review in both scenarios. In other words, it may draw the boundaries of what can be considered a ‘fair balance’ differently depending on whose exercise of competence is being reviewed.

### 3.2 Horizontal effect of fundamental rights and balancing

One could question whether PA has a role to play in the resolution of conflicts between private individuals, i.e. in horizontal relations. In this regard a distinction must be made between direct and indirect horizontal effect. In the event of the former a private person can directly rely on a fundamental right versus another private person. This form of horizontal effect is not addressed here, as it has (so far) not played a role in EU copyright adjudication. Fundamental rights can be said to have indirect horizontal effect when norms intended to safeguard them are applicable in horizontal relations or when norms of private law are interpreted in light of fundamental rights. Stephen Gardbaum submits that courts are hesitant to use PA in horizontal relations and instead tend to resort to a more general weighing or balancing of two independent duties to determine which one is weightier in the circumstances of the case.<sup>62</sup> This, he suggests, is “more helpful and systematically coherent than utilizing a limitation of constitutional rights analysis”, which includes a balancing analysis that is instead aimed at determining whether there exists a disproportionate *relation* between the benefits of the measure and the harm to the right.<sup>63</sup> He is right there is a distinction between two types of balancing in this regard, but the assertion that the use of one is more helpful or systematically coherent than the other in horizontal conflicts may not be entirely accurate. Instead, both the use of PA and a more general balancing may be appropriate in horizontal conflicts. They merely perform different functions. PA can be used as a tool to exclude a particular interpretation of a norm. In that case, the interpretation of a norm of private law focuses on the following hypothetical: Had the legislature intended the proposed interpretation of the norm in question, would it have created a disproportionate interference with a fundamental right, taking

---

<sup>60</sup> Cf. *Rivers* 2006 (*supra* note 54), p. 175.

<sup>61</sup> *Barak* 2012 (*supra* note 42), p. 420.

<sup>62</sup> Stephen Gardbaum, ‘Positive and Horizontal Rights: Proportionality’s Next Frontier or a Bridge Too Far?’ in V. Jackson & M. Tushnet (Eds), *Proportionality: New Frontiers, New Challenges* (Cambridge University Press 2017), p. 239-241.

<sup>63</sup> *Ibid.*, p. 246.



account of the legislature's discretion?<sup>64</sup> Such use of PA in the course of interpretation thus has the character of review. By contrast, courts may also pursue an interpretation of ambiguous norms which does most justice to the fundamental right(s) involved. In this case, a court will not review (hypothetical) decision-making by the legislature, but itself concretize the ambiguous norm. The distinction is important, because the latter use of fundamental rights arguments does not "lock in" or "petrify" the Court's interpretation, meaning the legislature is free to overturn it. In this regard fundamental rights arguments are simply interpretative arguments, and the balancing is first and foremost between different such arguments, such as textual, systemic and teleological arguments, although where those arguments are ambiguous the balancing may indeed one between independent 'duties', as suggested by Gardbaum – or, more accurately, between different (constitutional) values. Illustrative in this regard is the position of the German Federal Constitutional Court that "[i]f several interpretations are possible in the court's interpretation and application of provisions of the non-constitutional law, the court must give preference to an interpretation that corresponds to the values enshrined in the constitution".<sup>65</sup>

#### 4. Copyright and balancing: a (re-)evaluation

The previous section discussed the concept of 'fair balance' as, principally, a form of proportionality analysis used to review decision-making. Insofar as this analysis requires balancing between different values, it was argued that it forces judges to explicitly acknowledge those values and justify why they decide one way or another, while respecting the primacy of the primary decision-maker. The margin of discretion of this primary decision-maker depends on its relationship to the reviewing court. Courts can also themselves be primary decision-makers, typically when formulating or concretizing a norm in the course of interpretation. One could call one review balancing and the other interpretative balancing or optimization balancing, since the court must itself determine what it considers the 'optimal' balance of the rights and interests in question.

In the case of the CJEU and its copyright case law this leads to the recognition of three modalities of balancing. One, review of EU action. Two, review of Member State action. Three, the independent use of balancing to determine the scope of norms, notable those in EU directives. It is important to note that the CJEU itself does not explicitly make this distinction, despite its arguable important practical implications in particular in respect of "lock-in" or "petrification". Nevertheless, one can recognize these modalities in the Court's case law, although an exact qualification is often difficult to make. In this regard two particular difficulties arise: first, where the use of balancing by the CJEU is a matter of review the nature of this review is often obscure. Second, sometimes it is unclear whether the courts uses fundamental rights balancing as a means to give further meaning to a particular norms of EU law (e.g. in a directive), or in order to define the boundaries set by the Charter to legislative and Member State action, i.e. whether it conducts optimization or review balancing.

##### 4.1 The nature of review: the questionable role of the concept of essence

PA is often accompanied by a preliminary test whether the 'essence' or 'core' of a right has been violated. In the case of the EU, this test is laid down in article 52(1) of the EU Charter, which requires

---

<sup>64</sup> Where two (or more) fundamental rights are concerned a "double test of proportionality" may be appropriate. In this sense, see, e.g., Hugh Collins, 'On the (in)compatibility of Human Rights Discourse and Private Law' in H.-W. Micklitz (Ed), *Constitutionalization of European Private Law* (Oxford University Press 2014), p. 49-51, although arguably mixing the distinction between the different forms of balancing made here.

<sup>65</sup> E.g., in the copyright context, German Federal Constitutional Court (First Senate), 19 July 2011, 1 BvR 1916/09 – *Le Corbusier-Möbel*, para 86 and German Federal Constitutional Court (First Senate), 31 May 2016, 1 BvR 1585/13 – *Metall auf Metall*, English translation published in the *IIC* 48(3) (2017), p. 343, para 82.

not only that interferences with rights are proportionate but also that they respect “the essence of those rights”. The theoretical nature of the concept of essence is contested,<sup>66</sup> as is its practical use.<sup>67</sup> The concept of essence arguably is best conceptualized as prohibiting those interferences with rights that are so serious that it is as good as impossible to conceive of reasons that will ever justify it.<sup>68</sup> As such, it merely guarantees a minimum level of protection.<sup>69</sup> By itself, it does not prohibit very serious interferences (that fall short of a violation of the essence) that only marginally contribute to the fulfilment of other rights and interests.

The concept of essence takes centre stage in the Court’s decisions on the availability of certain remedies versus intermediaries. In *Telekabel* the CJEU faced the question whether the fundamental rights guaranteed by the EU legal order precluded an injunction requiring an Internet service provider (ISP) to prevent access by its customers to infringing websites without that injunction specifying the precise measures the ISP must take (a so-called outcome prohibition). The CJEU considered that such an injunction does not infringe the “very substance”<sup>70</sup> of the right to conduct a business, since it leaves the ISP the freedom to determine the specific measures to adopt and since that ISP can avoid liability by proving it has taken all “reasonable measures”.<sup>71</sup> As far as the freedom to conduct a business was concerned, it left it at that, and moved on to potential threats to the right to freedom of information, ultimately concluding that outcome prohibitions are not inherently precluded by EU law.

The CJEU followed the same approach in *McFadden*. The Court essentially had to grapple with the question whether EU law precludes an injunction requiring the provider of a public Wi-Fi network to password protect that network in order to prevent that users use that network for illegal filesharing purposes.<sup>72</sup> The Court, again, noted first and without elaboration that such an injunction does not infringe either the essence of the freedom to conduct a business or of the right to freedom of information.<sup>73</sup> The Court concluded that because password protection may seriously discourage users from using the Wi-Fi network for illegal purposes and because it was the only available measure, a lack of such a measure would “deprive the fundamental right to intellectual property of

---

<sup>66</sup> Disagreement concerns in particular the answer to the question whether the ‘essence’ of a right can be defined independently (the ‘absolute’ theory) or only in relation to other rights and interests, that is in terms of proportionality (the ‘relative’ theory). On the distinction, see the references cited in the following two footnotes.

<sup>67</sup> See, e.g., Rivers 2006 (*supra* note 54), p. 187 (“The concept of ‘very essence’ is practically useless.) and Takis Tridimas & Giulia Gentile, ‘The Essence of Rights: An Unreliable Boundary?’ (2019) 20(6) *German Law Journal* 794, p. 804 (“The case law suggests that [distinguishing the essence of a right from its periphery] is a near impossible task.”).

<sup>68</sup> Cf. Alexy 2002 (*supra* note 43), p. 192-196, Barak 2012 (*supra* note 42), p. 497-498, Maja Brkan, ‘The Concept of Essence of Fundamental Rights in the EU Legal Order: Peeling the Onion to its Core’ (2018) 14 *European Constitutional Law Review* 332, p. 363, Tuomas Ojanen, ‘Making the Essence of Fundamental Rights Real: The Court of Justice of the European Union Clarifies the Structure of Fundamental Rights under the Charter’ (2016) 12(2) *European Constitutional Law Review* 318, p. 322, Rivers 2006 (*supra* note 54), p. 184-187, Gerhard van der Schyff, ‘Cutting to the core of conflicting rights: The question of inalienable cores in comparative perspective’ in E. Brems (Ed), *Conflicts Between Fundamental Rights* (Intersentia 2008), p. 133 *et seq.*

<sup>69</sup> Cf. Tridimas & Gentile 2019 (*supra* note 67), p. 815.

<sup>70</sup> Cf. Tridimas & Gentile 2019 (*supra* note 67), p. 802, who note that “[t]he terms ‘substance’ and ‘essence’ are interchangeable”.

<sup>71</sup> *UPC Telekabel Wien* (*supra* note 12), paras 51-53.

<sup>72</sup> *McFadden* (*supra* note 13). Specifically, the Court was asked whether EU law precluded an outcome prohibition requiring the owner of a public Wi-Fi network to prevent copyright infringements by its users if the only reasonable measures they could take would be (i) terminating the Wi-fi network altogether, (ii) filtering all communications, or (iii) password protecting the network. The first two options were quickly rejected, the first option specifically for causing a serious infringement of the freedom to conduct a business (see paras 87-88).

<sup>73</sup> *Ibid.*, paras 91-92.

any protection, which would be contrary to the idea of a fair balance”.<sup>74</sup> Consequently, it is not precluded by EU law.

*Telekabel* and *McFadden* imply that injunctions granted by Member State Courts will abide by the EU Charter as long as they respect the essence of rights. This use of the concept of essence is problematic, beyond the theoretical and practical defects of that concept touched on above. Limiting the PA to a check whether the essence of a right has been violated, treats that rights as a mere minimum norm, instead of a human rights value that deserves the greatest possible respect.<sup>75</sup> As pointed out, it permits serious interferences without proper justification. This is not to say the CJEU should prescribe a certain outcome. It is understandable that it wants to leave some room for Member States to apply its own standard of fundamental rights protection. Limiting the analysis to an essence test, however, appears inappropriate. Instead, the CJEU must consider the seriousness of the interference with the right in question, and consider whether that interference can be justified by reasons relating to the fulfilment of other rights or (legitimate) interests. In this assessment it can leave a certain margin of discretion for Member States, for instance by considering that a certain state of affairs (national norm, injunction etc.) is (not) manifestly disproportionate.<sup>76</sup> The approach of the Court in *Telekabel* and *McFadden* can be contrasted with those of its AGs. In his Opinion in *Telekabel*, AG Cruz Villalón had considered that the legal uncertainty for ISPs created by outcome prohibitions results in a disproportionate interference with their freedom to conduct a business.<sup>77</sup> In *McFadden*, AG Szpunar had concluded that the measure in question would not be consistent with the requirement that a fair balance be struck, notably because it would impose “clearly disproportionate” “administrative constraints” on the provider that offers access to a Wi-Fi network merely as an auxiliary service, and because the measure “would not in itself be effective” and “does not necessarily prevent infringements of protected works”.<sup>78</sup> Admittedly, these were largely one-sided determinations of (dis)proportionality, but they at least started from the right point: a consideration of the seriousness of the interference with the rights concerned.

The problematic character of the essence test is further illustrated by a second set of decisions concerning enforcement against intermediaries. In those decisions the CJEU has laid down the standard that the requirement that a fair balance be struck is not respected if a measure results in a serious infringement of a Charter right. Theoretically, the CJEU conflates proportionality and essence.<sup>79</sup> In practice, it uses the “serious infringement” test the same as the essence test, as it considers it a limitation that can never be justified. Accordingly, in *Scarlet Extended v SABAM* and *SABAM v Netlog* the CJEU held that an injunction which would have required the intermediaries in question to, at their own expense and for an unlimited time, filter all communications passing through their networks, would result in a serious infringement of the freedom to conduct a business, without considering the importance of that injunction to the right to intellectual property.<sup>80</sup> Conversely, in *Coty Germany* and in *Bastei Lübbe*, it held that EU law precluded certain provisions of national law because they resulted in a serious infringement of both the right to intellectual

---

<sup>74</sup> *Ibid.*, paras 95-98.

<sup>75</sup> Cf. Alexy 2014 (*supra* note 49), p. 22.

<sup>76</sup> The CJEU has applied this standard in the context of review of EU action involving political, economic and social choices. See, e.g., Case C-547/14 *Philip Morris Brands and Others* ECLI:EU:C:2016:325, para 164ff.

<sup>77</sup> Opinion of AG Cruz Villalón in Case C-314/12 *UPC Telekabel Wien* ECLI:EU:C:2013:781, paras 83-90.

<sup>78</sup> Opinion of AG Szpunar in Case C-484/14 *McFadden* ECLI:EU:C:2016:170, paras 137-147.

<sup>79</sup> Cf. Tridimas & Gentile 2019 (*supra* note 67), p.808.

<sup>80</sup> *Scarlet Extended v SABAM* (*supra* note 10), para 41 *et seq.* and *SABAM v Netlog* (*supra* note 11), para 39 *et seq.*

property and the right to an effective remedy. In *Coty*,<sup>81</sup> the CJEU considered that EU law precluded a provision of national law that unconditionally permits banks to invoke banking secrecy to refuse the provision of the name and address of its clients accused of infringement to right holders. The Court considered that “in the context of article 8 [of the Enforcement Directive<sup>82</sup>]”, the “effective exercise of the fundamental right to intellectual property” was “seriously impaired” because courts were prevented altogether from ordering – under any circumstances – the divulgence of the name and addresses of account holders even though article 8(1) requires Member States to provide for such a possibility, meaning the national provision was “such as to seriously infringe the fundamental right to an effective remedy and, ultimately, the fundamental right to intellectual property”.<sup>83</sup> In *Bastei Lübbe*, the CJEU similarly ruled that EU law precluded a German rule, as constructed by the German Federal Supreme Court, that permitted the owner of an Internet connection to escape liability for copyright infringement by alleging other family members had access to that connection without specifying the how and the when of that access. The Court held that because “proving the alleged infringement of copyright and who was responsible for that infringement are rendered impossible the fundamental rights to an effective remedy and to intellectual property ... are seriously infringed”.<sup>84</sup> Accordingly, “an almost absolute protection for the family members of the owner of an internet connection ... cannot ... be considered to be sufficiently effective and capable of ultimately leading to effective and dissuasive sanctions” within the meaning of article 8(1) of the InfoSoc Directive.<sup>85</sup>

In other words, if in certain concrete circumstances a particular remedy is necessary to permit a right holder to enforce their rights it may not be withheld.<sup>86</sup> What if this remedy at the same time creates a serious infringement with, for instance, the right to privacy? In *Bastei* the CJEU overtly avoided the issue: Member States are permitted to prevent “what was regarded as an intolerable interference with family life”, but only if right holders have another effective remedy at their disposal.<sup>87</sup> This shows one of the limitations of the use of the concept of essence: it is unable to explain how to proceed when two essences meet.<sup>88</sup>

The concept of essence is best abandoned in this context, or at least no longer applied as a single standard to determine whether a certain remedy is proportionate. It induces courts to only give cursory (at best) attention to other rights and impoverishes legal reasoning, as illustrated by the CJEU’s wanting reasoning in the decisions discussed here.<sup>89</sup> is best reserved for those instances in which there can be no reasonable disagreement about the outcome. This arguably has not been the case in any of the decisions discussed here.

---

<sup>81</sup> The case strictly speaking concerned a trademark infringement, but the judgement was phrased with regard to enforcement of intellectual property in general.

<sup>82</sup> Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (OJ L 157, 30 April 2004), corrigendum published in OJ L 195, 2 June 2004, p. 16–25.

<sup>83</sup> *Coty Germany* (*supra* note 8), paras 36–41.

<sup>84</sup> *Bastei Lübbe* (*supra* note 9), para 51.

<sup>85</sup> *Ibid*, para 52.

<sup>86</sup> Cf. in this respect also the conclusion in *McFadden* quoted, *supra*, at note 74 and accompanying text.

<sup>87</sup> *Bastei Lübbe* (*supra* note 9), para 53.

<sup>88</sup> Cf. van der Schyff 2008 (*supra* note 68), p. 136.

<sup>89</sup> Cf., in respect of the lack of a clear definition of the essence of rights, also Mylly 2019 (*supra* note 2), p. 274 and Sganga 2019 (*supra* note 3), p. 688.

## 4.2 The question of optimization and the CJEU's embryonic approach to balancing

Not only is the nature of its review often unclear, it is often obscure whether the CJEU engages in fundamental rights review in the first place. For instance, in *Coty Germany* and *Bastei Lübbe* the CJEU explicitly framed its conclusion that the rights to intellectual property and an effective legal remedy were seriously infringed “in the context of” the Enforcement and InfoSoc Directives, respectively. This may suggest that its conclusion ultimately was a matter of EU secondary law, not primary law. This is important, as in the former case the EU legislature would be able to overturn the outcome, whereas in the latter case it would be bound to the Court's interpretation of the Charter.<sup>90</sup> Ultimately, it is difficult to maintain that the CJEU's rulings merely constituted an interpretation of secondary law in light of the Charter if one understands the ‘serious infringement’ standard an incarnation of the essence test. Indeed, logically the CJEU presents those infringements as ones that can never be justified, meaning neither Member States nor the EU legislature can diverge from the CJEU's judgement.

The CJEU's use of the concept of fair balance and fundamental rights arguments is also unclear in cases in which the CJEU interprets provisions of substantive copyright law. The most ‘controversial’ example in this respect is likely the *Deckmyn* decision. The CJEU, having given a uniform interpretation to the concept of ‘parody’, held that national courts must ensure that the application of the parody exception preserve a fair balance in the concrete circumstances of the case.<sup>91</sup> Numerous commentators have suggested that this may imply the parody exception laid down in article 5(3)(k) of the InfoSoc Directive is no longer optional if Member States are to respect the fundamental right to freedom of expression.<sup>92</sup> This is not necessarily the right conclusion. The duty to ‘balance’ imposed on national courts concerned specifically the need to ensure that the ‘interest’ of right holders not to be associated with a discriminatory parody did not outweigh the right to freedom of expression of the parodist. The question was thus whether the parody exception ought *not* be applied, despite the reproduction fulfilling all the characteristics of the concept of parody.<sup>93</sup> Arguably, this is an optimisation issue, simply because this ‘interest’ is not a fundamental right.<sup>94</sup> Accordingly, the balancing exercise could not have concerned a question of fundamental rights review.

The CJEU has recently attempted to redefine the role of national courts in striking a balance in the concrete circumstances of a case. In *Funke Medien* and *Spiegel Online* the Court held that national courts “in striking the balance which is incumbent on [them] between [exclusive rights] on the one

---

<sup>90</sup> The relevance can be illustrated by the debate surrounding the original proposal for art. 17 of the DSM Directive, whose conformity with the CJEU's rulings in *Scarlet Extended v SABAM* and *SABAM v Netlog* was contentious. See for a discussion, e.g., Christina Angelopoulos, ‘On Online Platforms and the Commission's New Proposal for a Directive on Copyright in the Digital Single Market’ (January 2017), retrieved from <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2947800](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2947800)> accessed on 16 February 2020, p. 38-40.

<sup>91</sup> *Deckmyn and Vrijheidsfonds* (*supra* note 23), para 32.

<sup>92</sup> Cf. Jonathan Griffiths, ‘Taking power tools to the *acquis* - The Court of Justice, the Charter of Fundamental Rights and European Union Copyright Law’ (Queen Mary University of London, School of Law. Legal Studies Research Paper No.266/2017), retrieved from <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3084060](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3084060)> accessed on 16 February 2020, p. 13-14, Husovec 2016 (*supra* note 32), p. 260-261, Sganga 2019 (*supra* note 3), p. 688 and Dirk Voorhoof, ‘Freedom of expression and the right to information: Implications for copyright’ in Chr. Geiger (Ed), *Research Handbook on Human Rights and Intellectual Property* (Elward Elgar 2015), p. 351, n 76.

<sup>93</sup> Cf. in this sense the Opinion of AG Szpunar in Case C-469/17 *Funke Medien NRW (Afghanistan Papers)* ECLI:EU:C:2018:870, para 69.

<sup>94</sup> See, on the content of this balancing exercise, e.g., Daniël Jongmsma, ‘Parody After *Deckmyn* – A Comparative Overview of the Approach to Parody Under Copyright Law in Belgium, France, Germany and The Netherlands’ (2017) 48(6) *International Review of Intellectual Property and Competition Law* 652, p. 673ff.

hand, and, on the other, the rights of the users of protected subject matter referred to in [limitations and exceptions], ... having regard to all the circumstances of the case before it, rely on an interpretation of those provisions which, whilst consistent with their wording and safeguarding their effectiveness, fully adheres to the fundamental rights enshrined in the Charter". This is a convoluted and enigmatic statement. That they must "fully adhere to fundamental rights" seems trite; what it means in practice unclear. How national courts can balance exclusive rights and limitations and exceptions as such is also debatable. Robert Alexy and Ronald Dworkin would likely maintain that these cannot be balanced due to their rule-like character.<sup>95</sup> Indeed, it is arguably more proper to balance the rights and interests that justify those norms. It is not surprising, perhaps, that it is exactly in this regard that the CJEU's use of fundamental rights balancing when itself acting as a norm-maker, falls short. In particular as far as the rights and interests of right holders are concerned, it has so far not yet clearly identified their content. In the past it has also referred to exclusive rights as such,<sup>96</sup> to the "substance of copyright",<sup>97</sup> or even to the interests of right holders in the protection of their intellectual property guaranteed by article 17(2),<sup>98</sup> without ever clearly specifying what this demands as a matter of principle.

The purposes underlying protection are often all but ignored when the concept of fair balance is concerned. This was different, however, in the Court's recent *Moses Pelham* decision. One of the questions the CJEU had to settle was whether the use of a two-second sample from a phonogram in a new musical creation constitutes a reproduction 'in part' of that phonogram. The Court held that, as a general rule, even copying the shortest of samples constitutes such a reproduction. However, at the same time the Court considered that taking a short sample is not always a 'reproduction' in this sense where the freedom of art is concerned. Emphasizing that a fair balance must be struck, the court considered that to permit a phonogram producer to prohibit such use of samples in new works "in a modified form unrecognisable to the ear" would limit the freedom of the arts while permitting that use "would not interfere with the opportunity which the producer has of realising satisfactory returns on his or her investment", the purpose underlying the exclusive right in question.<sup>99</sup> Consequently, reproducing parts of a phonogram is permitted in new works of art, as long as the phonogram is no longer "recognizable". Although superficially a balancing judgement it does not stand up to methodological scrutiny. First of all, from the point of view of both the freedom of art and the fulfilment of the purpose of guaranteeing a return on investment, it is unclear why a distinction needs to be made between recognizable and unrecognizable samples. In this regard it would have made more sense if the Court had held that the reproduction right does not apply to the taking of small samples if they do not hurt the ability to obtain a return on investment *tout court*. Second, allowing right holders to control a licensing market over even very small parts arguably *does* increase their ability to obtain a return on investment, even if only to a limited extent. This means that the court should have at least considered the importance to the freedom of arts of permitting such uses on the one hand, and the importance of subjecting them

---

<sup>95</sup> Cf. Alexy 2002 (*supra* note 43), p. 57ff and Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1977), p. 22ff.

<sup>96</sup> *Painer* (*supra* note 16), para 134.

<sup>97</sup> *DR and TV2 Danmark* (*supra* note 22), para 57.

<sup>98</sup> *GS Media*, para 31; *Renckhoff*, para 41; *Funke Medien NRW (Afghanistan Papers)*, para 57; *Pelham and Others (Metall auf Metall)*, para 32; and *Spiegel Online*, para 42 (all *supra* note 16).

<sup>99</sup> *Pelham and Others (Metall auf Metall)* (*supra* note 16), paras 34-38.

the right holder control in light of the purpose to enable them to obtain a return on investment on the other.<sup>100</sup> This analysis was altogether missing.

If the CJEU wishes to improve the rationality, coherency and transparency of its use of the concept of fair balance, it ought to more consistently focus on the purposes underlying copyright and explain what scope of protection they justify in light of conflicting fundamental rights demands. The justificatory use of balancing ought to be comprehensive and not merely rhetorical, or else balancing indeed remains an “empty slogan”.

## 5. Conclusion

This paper intended to highlight three modalities of fundamental rights balancing that play a role in the CJEU’s copyright decisions, and why it is important to distinguish between them. The first modality is the review of EU action. The second is to review Member State action. Third, fundamental rights balancing is used by the CJEU when it itself creates a norm in light of fundamental rights.

The first modality was not extensively discussed in this paper. It appears most clearly in those cases in which the validity of a particular norm of EU law is challenged on fundamental rights grounds. As for review of Member State action in cases concerning enforcement actions directed at intermediaries, the CJEU appears satisfied as long as the remedy in question does not violate the essence of any right. One may wonder whether the CJEU would apply the same standard when considering whether the implementation of copyright proper by the Member States violates a Charter right. If so, this would even further undermine the argument made that any of the optional limitations and exceptions are *de facto* mandatory in order to safeguard a particular fundamental right. Regardless, the essence standard is inadequate in that it guarantees only a minimum level of protection. Finally, as for the use of fundamental rights balancing in the concretization of substantive copyright norms, the Court’s methodology equally still leaves a lot to be desired. The strength of an explicit balancing approach that it is geared towards justification appears for now lost on the Court, even if its approach in *Moses Pelham* was a step in the right direction.

On a final note, one can ask whether a fourth modality of balancing in EU copyright may yet emerge: the use of fundamental rights as external restraints on copyright in the form of direct horizontal effect of fundamental rights. The CJEU may have given a deathblow to this doctrine in *Funke Medien* and *Spiegel Online*, where it held that since the InfoSoc Directive contains the “mechanisms allowing those different rights and interests to be balanced”, the (more extensive) protection of fundamental rights cannot justify the introduction by Member States of limitations or exceptions to the rights of authors not found in that directive.<sup>101</sup> This has been lamented as a “quite radical move to categorically exclude any external [freedom of expression] review of copyright norms”<sup>102</sup> and as placing national courts “at the crossroads, as they have to abide by both the standards of the ECHR

---

<sup>100</sup> Cf. In this regard the judgement in the same case of the German Federal Constitutional Court (First Senate), 31 May 2016, 1 BvR 1585/13 – *Metall auf Metall*, English translation published in *IIC* 48(3) (2017), p. 343.

<sup>101</sup> *Funke Medien NRW (Afghanistan Papers)* (*supra* note 16), paras 55-64; and *Spiegel Online* (*supra* note 16), paras 40-49.

<sup>102</sup> Christophe Geiger & 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!’ (Center for International Intellectual Property Studies Research Paper No. 2019-09), retrieved from <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3472852](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3472852)> accessed on 16 February 2020, p. 29.

and the Copyright Directive”.<sup>103</sup> Strictly speaking, however, the Court merely held Member States may not introduce new limitations and exceptions as such, not whether users can directly rely on their fundamental rights against specific right holders. What is more, in one of the two cases, *Funke Medien*, the right holder is the German State. One would certainly expect private individuals to be permitted to directly invoke their fundamental rights in such a situation. The fact that the CJEU paid no attention whatsoever to the ‘vertical’ nature of the conflict and ruled as it did, may indicate there still is a chance it will add another modality of balancing to its impressive repertoire.

---

<sup>103</sup> Thom Snijders & 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’ (2019) 50(9) *International Review of Intellectual Property and Competition Law* 1176, p. 1189.