CASE LAW SECTION

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CJEU, Grand chamber, 29 July 2019, case C-469/17, *Funke Medien*, case C-476/17, *Pelham*, case C-516/17, *Spiegel Online*:

Exceptions (in general and in particular), rights, freedom of expression...: 'je t'aime, moi non plus...'

The CJEU handed down three landmark rulings in the quiet of summer 2019.[1] These rulings saw the Court edging things a little closer to European

1. CJEU, Grand chamber, 29 July 2019, case C-469/17, *Funke Medien*, case C-476/17, *Pelham*, case C-516/17, *Spiegel Online*; Dalloz IP/IT Sep. 2019, Au fil du mois, p. 464, 465; D. 2019, 1742, "Sampler n'est pas jouer", G. Querzola, note on case C-476/17, *Pelham*; Légipresse Oct. 2019, p. 541, note V. Varet; Légipresse Jan. 2020, Panorama Propriété littéraire et artistique, p. 69, obs. C. Alleaume; Comm. com. électr., Dec. 2019, comm. 75, obs. C. Caron (case C-476/17); Jan. 2020, comm. 1, obs. C. Caron (case C-469/17); Feb. 2020, comm. 11, obs. C. Caron (case C-516/17); RTD eur. 2019, p. 927, obs. E. Treppoz; PI

harmonisation, in its explanation of how the exceptions to monopoly and fundamental rights – specifically freedom of expression – are articulated.

The two corpora, exceptions and fundamental rights, may have seemed contradictory. How in fact could the application of copyright be neutralised by an external corrective without upsetting the internal balance intended by legislators? How to preserve the primacy of political choice in a system where only the courts have the final say on the law? Some have nevertheless called for the wider application, the opening up, of exceptions.[2] The court's ruling ultimately came down somewhere in the middle and is undoubtedly reasonable in terms of copyright law.[3] *In medio stat virtus*. While fundamental rights cannot entail a derogation from exclusive rights outside the list of exceptions drawn up, some exceptions, in both their existence and interpretation, can also be based on fundamental rights. Similarly, the contours of rights can sometimes be influenced by fundamental rights.

The CJEU thus gives fundamental rights a unique role in these three rulings handed down by the grand chamber, underlining their importance.

Oct. 2019, p. 29, obs. A. Lucas (on *Funke Medien*) and p. 32, obs. J.-M. Bruguière (on *Spiegel Online)*; J.-M. Bruguière, "L'équilibre des droits en matière de droit d'auteur selon la Cour de justice : toutes les exceptions, rien que les exceptions, pas que les exceptions", JCP G 2019, 992; V. Varet, "Droit d'auteur et liberté d'expression : état des lieux après les arrêts du 29 juillet 2019", Propr. intell. Apr. 2020, p. 68.

2. L. Bently, S. Dusollier, C. Geiger, J. Griffiths, A. Metzger, A. Peukert and M. Senftleben, "Sound Sampling, a Permitted Use Under EU Copyright Law? Opinion of the European Copyright Society in Relation to the Pending Reference before the CJEU in Case C-476/17, *Pelham GmbH v Hütter*", IIC – International Review of Intellectual Property and Competition Law, May 2019, vol. 50, no. p. 467.

3. On this idea, see in particular A. Bensamoun, *Essai sur le dialogue entre le législateur et le juge en droit d'auteur*, PUAM, 2008. – See also J.-M. Bruguière, "Reception of British 'fair dealing' in the French closed system of exceptions. A plea in favour of 'fair dealing' à la française using revivification of copyright standards (and the revelation of the philosophy of the 'reasonable')", RIDA 3/2018, no. 257, p. 5.

They are given a sort of illusory autonomy, where concepts cancel each other out but are also incorporated into each other and feed off each other. Rather than ending the debate between the interplay of exceptions and fundamental rights, the '*je t'aime, moi non plus*' push-me pull-me nature of these decisions has, on the contrary, revived it; because fundamental rights can now be used to interpret exceptions and even prerogatives.

The underlying facts were diverse and we will discuss them briefly. It should be noted that all these cases contribute to the interaction between the fundamental rights of users and exceptions to holders' rights as well as to the scope of exceptions in general. The defendants claimed freedom of expression – and, in its wake, freedom of information and creative freedom – to justify the unauthorised use of a work or protected subject matter, in full or in part, in an attempt to evade the charge of copyright infringement.

The *Pelham* case related more specifically to the related rights of phonogram producers. It raised the question of sampling, which consists of re-using short sound clips from a pre-existing work in a new work (in this case incorporated in a phonogram). In the case in hand, the composers of the song '*Nur Mir*' used a two-second sample of the song '*Metall auf Metall*' by the band Kraftwerk.

The *Funke Medien* case concerned the unauthorised publication by a newspaper website of military documents relating to operations in Afghanistan, documents 'classified for restricted access' by the German government.

Lastly, in the *Spiegel Online* case, a German politician sought to distance himself from an early work, arguing that the publisher had made changes to it that he had not agreed to. To prove that the changes had not altered the meaning of the original text in any way, a newspaper decided to provide a hypertext link to both the original version and the allegedly distorted version.

The contemporaneousness of these three decisions made sense. Because the facts and the arguments were different in each case, the CJEU clarified the issues relating to each dispute (III). However, the methodological contribution is most noteworthy: in these rulings, the Court laid down a robust principle on how exceptions and fundamental rights are articulated (I) and described the freedom of Member States as regards the scope of exceptions in general (II).

I. THE PRINCIPLE OF INTERPLAY BETWEEN EXCEPTIONS AND FUNDAMENTAL RIGHTS

While the principle of interplay between exceptions to exclusive rights and fundamental rights ultimately excludes using the latter to autonomously open up the former (A), the justification provided is not wholly convincing (B).

A. Rejection of the use of fundamental rights to open up exceptions

Fundamental rights have sometimes served as an external corrective to copyright law. French case law in particular has determined that freedom of expression could constitute a limitation on the application of rights, a sort of

'meta-exception'. In the *Klasen* case,[4] the lower courts set aside the exceptions of parody and short quotation, holding that the conditions for these had not been met. Rejecting this reasoning, the Court of Cassation allowed for a derogation other than the exceptions provided for in Article 5 of Directive 2001/29, stating that the appeal court should have "explained in concrete terms how the aim of striking a fair balance between the rights at play had led to the judgment handed down". Thus, freedom of creation could, on a case-by-case basis, pose an exception to exclusive rights.

This reasoning was criticised by the CJEU, even though it raises the question of whether this European solution would spill over into the arena of moral rights. In fact, in France, the same balancing act was performed in the same area.[5] As moral rights are not harmonised, this facet of French case law cannot be deemed irrelevant.

But if this were the case, it would mean that the two facets of protection could be treated differently, that fundamental rights on their own could pose an exception to moral rights, but that economic rights could only be limited by exceptions. Intellectually, it is difficult to conceive of this scenario.

4. Cass. 1st civil chamber, 15 May 2015, appeal no. 13-28116, Comm. com. électr. 2015, comm. 55, note C. Caron; JCP G 2015, 967, note C. Geiger; Légipresse 2015, p. 474, note V. Varet; Propr. intell. 2015, p. 281, obs. A. Lucas and p. 285, obs. J.-M. Bruguière; RTD com. 2015, p. 515, obs. F. Pollaud-Dulian; A. Bensamoun and P. Sirinelli, "Droit d'auteur *vs* liberté d'expression : suite et pas fin… ", D. 2015, p. 1672.

5. Cass. 1st Civ., 22 June 2017, appeal no. 16-11759, *Dialogue des carmélites*, Comm. com. électr., Sep. 2017, comm. 69, obs. C. Caron; JCP G 2017, 438, note X. Daverat; RTD com. 2017, p. 891, obs. F. Pollaud-Dulian; Dalloz IP/IT 2017, p. 1955, note P. Malaurie; Propr. intell. Oct. 2017, p. 60, obs. A. Lucas; L'essentiel Droit de la propriété intellectuelle, Oct. 2017, no. 9, p. 3, obs. A. Lucas.

The European court rejected this external reasoning, which ultimately involves redesigning the contours of the monopoly by opening up an autonomous route: derogation. Fundamental rights can no longer be apprehended as an open hypothesis to exception in law. The balance is internal to the subject matter: the Spiegel Online ruling states that the "mechanisms allowing those different rights and interests to be balanced are contained in Directive 2001/29 itself", thanks to the granting of exclusive rights counterbalanced by exceptions.[6] This state of affairs allows various rights and interests at play to be taken into account.

Thus, the CJEU holds that freedom of expression – like its corollaries, freedom of information and creative freedom – as enshrined in Article 11 of the Charter of Fundamental Rights of the European Union, apart from the exceptions and limitations laid down in Article 5(2) and (3) of Directive 2001/29, cannot justify a derogation to the exclusive rights laid down in Article 2 and 3 of the same directive – either in terms of copyright law or in terms of the law applicable to phonogram producers. Fundamental rights do not provide an opportunity for opening up and cannot therefore be used to stall the 'normal' application of copyright law. Opt-out arrangements are anticipated. Thus, although the list in Article 5 is in fact exhaustive, as already stated by the Court,[7] it must now be supplemented by the exceptions laid down in Directive 2019/790 on copyright and related rights in the digital single market.

6. *Spiegel Online*, par. 43; *Pelham*, par. 60.

7. CJEU, 16 Nov. 2016, case C-301/15, *Soulier and Doke*, par. 34; 7 August 2018, case C-161/17, *Renckhoff*, par. 16.

B. Justification of the solution

The Court justified its approach by observing that a different solution "would endanger the effectiveness of the harmonisation of copyright and related rights effected by that directive, as well as the objective of legal certainty pursued by it".[8]

Although the solution may be welcome, the assertion is unconvincing. Note that the effectiveness of harmonisation is threatened just as much by the optional character of the exceptions as by the rejected hypothesis. Article 5 of Directive 2001/29 lists 21 exceptions, 20 of which are optional. Only the exception of technical copying is mandatory. It can readily be asserted that the legal objective of harmonisation has not been achieved.

The objective of legal certainty for its part is only partially maintained. True, acceptance of fundamental rights as an instance of opening up would, in addition to upsetting the internal balance, lead to lack of predictability. Freedom of expression is a malleable concept, the contents of which are changeable, as arbitrated by the courts. But fundamental rights are not completely excluded either from the topic of exceptions or that of rights. And it is not clear whether this position actually reduces the power of the courts.[9]

In the first instance, the rule on interaction laid down by the CJEU may seem rigorous and favourable to the upholding of literary and artistic

8. *Pelham*, par. 63; *Spiegel Online*, par. 47.
9. See II-B and III-B in this section.

property rights, marking out the boundaries more clearly and the balances more predictably. But appearances can be deceptive because when it came to clarifying the scope of the exceptions, the Court reintroduced elements of variability in its reasoning.

As we have already seen, before upsetting the internal balances specifically designed by legislators, it is advisable to start by exploiting the few freedoms left by the law.

II. THE SCOPE OF EXCEPTIONS IN GENERAL

The CJEU reiterates that Member States retain room for manoeuvre as regards the scope of the exceptions to rights (A). But this assertion is immediately qualified by adjustments that mean their freedom is restricted (B).

A. The freedom of Member States

The principle of interplay laid down does not cancel out the room for manoeuvre left to states insofar as, as the Court has stated, the exceptions mentioned do not constitute full harmonisation provisions. In particular, in the *Spiegel Online* ruling, the Court clearly stated that Articles 5(3)(c) and (3)(d) of Directive 2001/29 (the exception of news reporting and the exception of quotation) "must be interpreted as not constituting measures of full harmonisation of the scope of the exceptions or limitations which they contain".[10] This positioning allows states to retain a measure of discretion, and

10. *Spiegel Online*, par. 39. See also *Funke Medien*, par. 54.

in particular allows Germany to uphold its constitutional tradition during the transposition phase. In fact, when the subject matter does not entirely depend on EU law, states retain the freedom to apply national standards for protecting fundamental rights as long as this does not challenge the level of protection afforded by the Charter of Fundamental Rights of the European Union. Similarly, the vocabulary and techniques used – flexible concepts, the technique of example, etc. – leave a measure of freedom to legislators in terms of transposition and to the courts in terms of interpretation. The scope of the exceptions is thus not set in stone by the European text.

However, this freedom of Member States to determine the scope of exceptions is a restricted freedom. National legislators and courts are bound to respect certain principles.

B. The restricted freedom of Member States

Firstly, Member States must respect the general principles of EU law, particularly the principle of proportionality,[11] which implies that use of a work must not exceed the bounds of what is necessary to reach the objective pursued by the exception. It is a sort of minimisation principle, familiar in personal data law.

Next, states must ensure that exceptions retain their effectiveness and respect their purpose "in order to safeguard a fair balance of rights and interests between the different categories of rightholders, as well as between the different

11. *Funke Medien*, par. 49; *Spiegel Online*, par. 68; *Pelham*, par. 69.

categories of rightholders and users of protected subject matter".[12] Even if exceptions are strictly interpreted – which precludes reasoning by analogy in this area[13] – states must apply them in such a way that the limitation retains some advantage for rightholders. In France, this idea was upheld in an old ruling, a little differently to be sure but with the same aim, holding that the application of an exemption (in this case Article L. 214-1 of the Intellectual Property Code on statutory licensing, limiting the rights of producers of phonograms and performers) "does not exclude it from being applied to the full extent of the rationale behind this provision".[14]

States must also submit exceptions to the additional filter of the three-step test.[15] As we know, the three-step test is not an instance of opening up, as some would have it,[16] once use has no negative effect on rightholders. It is a key for interpreting the existing system. All it does is qualify the application of exceptions: it clarifies but does not broaden the scope of the exceptions listed.[17]

12. *Funke Medien*, par. 51; *Spiegel Online*, par. 72.

13. CJEU, 27 Feb. 2014, case C351/12, *OSA*.

14. Cass. 1st civil chamber, 14 June 2005, JCP G 2005, IV, 2746; Propr. intell. 2005, p. 438, 2nd ruling, obs. A. Lucas.

15. *Funke Medien*, par. 52; *Spiegel Online*, par. 37.

16. Particularly in the Netherlands, B. Hugenholtz and M. Sentfleben, *Fair Use in Europe: In Search of Flexibilities*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1959554; M. Senftleben, *Copyright, Limitations and the Three-Step Test - An Analysis of the Three-Step Test in International and EC Copyright Law*, Kluwer Law International, 2004. – See also the draft academic European Copyright Code, accessible at the following address: www.copyrightcode.eu; D. Gervais, "Towards a new core international copyright norm: The reverse three step test", *Market Intellectual Property Law Review*, Vol. 9, 2005, p. 1, esp. p. 29 et seq. – See also *Les exceptions au droit d'auteur - Etats des lieux et perspectives dans l'Union européenne*, eds. A. Lucas, P. Sirinelli and A. Bensamoun, Dalloz, coll. Thèmes et commentaires, 2012 (esp. p. 55 et seq.).

17. *OSA*, par. 40; CJEU, 10 April 2014, case C435/12, *ACI Adam*, par. 26.

Lastly, Member States must interpret exceptions in such a way as to ensure a fair balance between the different fundamental rights.[18] This means that there is an interplay between fundamental rights and exceptions. The reasoning must be *incorporated* internally. This assertion seems all the more logical given that certain exceptions are based precisely on fundamental freedoms, particularly on freedom of expression (for example the exceptions of short quotation, news reporting or parody). It thus seems natural that an exception founded on respect for a fundamental freedom should include, at the application stage, this freedom as an "adjustment variable". Furthermore, this approach could be facilitated by the presence of flexible concepts within exceptions, enabling a reasonable interpretation of the law that incorporates respect for fundamental rights. As has been stated many times, internal resources should be applied before distorting the law externally.

In including fundamental rights in this way, the CJEU is reiterating the need stated in Article 52.3 of the Charter of Fundamental Rights of the European Union to ensure coherence with corresponding provisions in the European Convention on Human Rights. As seen in the ECHR ruling in the *Ashby Donald* case, freedom of expression should take priority when relied on "in political discourse and discourse concerning matters of the public interest".[19]

18. *Funke Medien*, par. 53; *Spiegel Online*, par. 38.

19. ECHR 10 Jan. 2013, no. 36769/08, *Ashby Donald v France*, par. 73-74, RIDA 3/2013, no. 237 p. 323, and p. 237, obs. P. Sirinelli; Comm. com. électr. 2013, comm. 39, note C. Caron; RTD com. 2013, p. 274, obs. F. Pollaud-Dulian; D. 2013, p. 2487, obs. J. Larrieu, C. Le Stanc and P. Tréfigny; D. 2013, p. 172, obs. C. Manara.

Rather than ending the debate, relying on fundamental rights when each exception is assessed internally would enhance the powers of the courts and undoubtedly those of the CJEU, which is highly likely to be asked for a preliminary ruling on how to interpret exceptions in line with the balance to be achieved. Thus, alongside the multiple harmonisation methods available to the CJEU[20] – principles, autonomous concepts, etc. – fundamental rights open up a new route to the unification of law via the CJEU.

III. OTHER CLARIFICATIONS PROVIDED BY RULINGS

Beyond questions of principle common to decisions the CJEU has, through its rulings, provided notable clarifications on the concept of a work (A) and on the contours of protection, both positively through infringement of monopoly (B), and negatively via exceptions (C).

A. The concept of a work

The *Funke Medien* case is highly instructive as regards the concept of intellectual work. Instead of taking criminal proceedings in a case involving the uploading of military documentation concerning army movements in Afghanistan (obtained by the press group by unknown means), the German government claimed copyright infringement and brought action for an injunction against Funke Medien. Advocate General Szpunar suggested that

20. V.-L. Benabou, "Retour sur dix ans de jurisprudence de la Cour de justice de l'Union européenne en matière de propriété littéraire et artistique : les méthodes", Propr. intell. Apr. 2012, p. 140; A. Bensamoun, "Réflexions sur la jurisprudence de la CJUE : du discours à la méthode", Propr. intell. Apr. 2015, p. 139.

the Court rule that the questions referred were inadmissible. In doing so, he was raising doubts as to the classification as works of "purely informative documents, drafted in absolutely neutral and standardised terms, providing an accurate report of events or stating that no events of interest have occurred".[21] The Court rejected this suggestion, choosing instead to deliberate on the substance, starting with the concept of a work. Referring to the *Levola* ruling,[22] it restated that two conditions must be satisfied cumulatively for subject matter to be classified as a work. First, "the subject matter must be original in the sense that it is its author's own intellectual creation", i.e. it must be a creation that "must reflect the author's personality, which is the case if the author was able to express his creative abilities in the production of the work by making free and creative choices". Second, "only something which is the expression of the author's own intellectual creation may be classified as a 'work' within the meaning of Directive 2001/29".[23] It is therefore for the national courts to verify whether the author of the military reports was able to make creative choices "capable of conveying to the reader the originality of the subject matter at issue".[24] But it is not difficult to see that the CJEU has some doubts, as expressed indirectly in its watered-down explanations as to why copyright protection is not afforded when form is subordinate to function: "If military status reports, such as those at issue in the main proceedings, constitute purely informative documents, the content of which is essentially determined by the

21. Opinion 25 Oct. 2018/14.

22. CJEU, 13 Nov. 2018, case C-310/17, RIDA 1/2019, no. 259 p. 139, obs. P. Sirinelli and A. Bensamoun; Comm. com. électr. 2019, comm. 1, obs. C. Caron; Propr. intell. 2019, no. 70, p. 18, obs. J.-M. Bruguière and no. 71, p. 116, obs. M. Vivant; RTD eur. 2019 p. 930, obs. E. Treppoz; F. Pollaud-Dulian, "Saveur ou fragrance d'un produit et droit d'auteur : le goût du "Heksenkaas" n'ensorcelle pas la Cour de justice", D. 2018, p. 2464.

23. Par. 19 and 20.

24. Par. 23.

information which they contain, so that such information and the expression of those reports become indissociable and that those reports are thus entirely characterised by their technical function, precluding all originality, it should be considered, as the Advocate General stated in point 19 of his Opinion, that, in drafting those reports, it was impossible for the author to express his or her creativity in an original manner and to achieve a result which is that author's own intellectual creation."[25]

As we know, the concept of a work has been harmonised by the CJEU, which has determined that it is an autonomous concept under EU law,[26] even though states did not wish to conceptualise the concept, perhaps to preserve different traditions. The Funke Medien ruling is in the same vein. The criteria laid down by the Court are exhaustive[27] and cumulative: there needs to be a form that can be identified with sufficient precision and objectivity; to characterise originality, there also needs to be creative activity reflecting the author's personality.

B. The positive contours of rights

The *Pelham* ruling answers two questions of varying importance on whether infringement of monopoly has occurred. The question in essence

25. Par. 24.

26. See in particular V.-L. Benabou, "La qualification de l'œuvre de l'esprit à l'épreuve de la jurisprudence européenne : une notion harmonisée ?", in *L'œuvre de l'esprit en question(s), Un exercice de qualification*, eds. A. Bensamoun, F. Labarthe and A. Tricoire, Mare & Martin, 2015, p. 225.

27. The CJEU rejected the criterion of aesthetic impact, clarifying the interaction with design law: CJEU, 12 Sep. 2019, case C-683/17, *Cofemel v G-Star Raw*, Opinion of M. Szpunar; D. 2019. 1759; RTD eur. 2019. 930, obs. E. Treppoz; CCE 2019, no. 65, obs. C. Caron; RTD com. 2020 p.54, obs. F. Pollaud-Dulian.

was whether using, in unrecognisable form, a two-second-long rhythmical sequence from a pre-existing phonogram without permission in a new phonogram constituted copyright infringement.

Firstly, does the use of very short extracts, modified to make them unidentifiable, constitute a copy within the meaning of distribution rights? Article 9(1)(b) of Directive 2006/115 of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property recognises that producers of phonograms have a right of distribution or a right to make 'copies' available to the public. The important thing here was to determine whether a phonogram that incorporated musical sampling constituted a 'copy'. The CJEU ruled that "Article 9(1)(b) of Directive 2006/115 – "must be interpreted as meaning that a phonogram which contains sound samples transferred from another phonogram constitutes a 'copy', within the meaning of that provision, of that phonogram".[28] To reach this conclusion, the Court held that a duplicate must be able to replace the original, which is not the case here. It based its reasoning on the Geneva Convention of 29 October 1971, Article 1(c) of which defines a 'duplicate' as an article which "embodies all or a substantial part of the sounds fixed in that phonogram". This could seem surprising given that the Convention has not been ratified by the European Union or by all of its Member States. Arguably, the Convention may merely have influenced the decision, given that it is not mandatory – as opposed to the Berne Convention, which has entered Union

28. Par. 55.

law since being incorporated in the 1996 WIPO Treaty, to which the EU is a signatory.[29]

Next and most importantly, the Court had to rule on whether sampling involved the reproduction rights of producers of phonograms enshrined in Article 2(c) of Directive 2001/29, which is considered in the ruling as constituting full harmonisation.[30] It started by restating that a reproduction can relate to even a very small part of a phonogram and that such reproduction therefore falls within a producer's exclusive rights. But to establish 'reproduction', the Court refers to everyday language, which implies that the elements in question must be recognisable. It could quite simply have deduced that reproduction was not established because the extract was not identifiable. However, it continued its reasoning by stating the need to establish a balance between competing interests inherent to the definition of the rights. Was this necessary? The answer has to be no. But the contribution is important. The Court stated that in interpreting the contours of the law, it was important to seek to achieve "a fair balance between, on the one hand, the interest of the holders of copyright and related rights in the protection of their intellectual property rights now guaranteed by Article 17(2) of the Charter and, on the other hand, the protection of the interests and fundamental rights of users of protected subject matter as well as of the public interest".[31] If intellectual property rights, recognised as fundamental rights, are neither absolute nor

29. On this, see CJEU 9 Feb. 2012, case C-277/10, *Martin Luksan*; D. 2012. 2836, obs. P. Sirinelli; Légipresse 2012. 283 and obs; RTD com. 2012. 318, obs. F. Pollaud-Dulian; RTD eur. 2012. 964, obs. E. Treppoz.

30. Regarding Article 2(a), and Article 3(1) of Directive 2001/29, see also *Funke Medien*, par. 38.

31. Par. 32.

inviolable, a balance must be struck between them and other fundamental rights, "including freedom of the arts, enshrined in Article 13 of the Charter, which, in so far as it falls within the scope of freedom of expression, enshrined in Article 11 of the Charter and in Article 10(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950, affords the opportunity to take part in the public exchange of cultural, political and social information and ideas of all kinds".[32] However, sampling "constitutes a form of artistic expression which is covered by freedom of the arts".[33] And, as if to push its point home – unnecessarily, let it be said – the Court stated that "such sampling would not interfere with the opportunity which the producer has of realising satisfactory returns on his or her investment"[34] an assertion that summons the three-step test and interference with normal exploitation.

This reasoning is baffling, to say the least. If there is no reproduction, there is no possible infringement of a fundamental right and therefore no 'fair balance' to be found, no 'balancing' to be effected, and no three-step test to be applied. How therefore can this approach be explained? The principle of *de minimis non curat praetor* could quite easily have obviated the need for such analysis[35] but this was not the route taken. Some commentators have suggested informing the decision by taking account of the purposes of authors' rights,[36] arguing that because exploitation of these rights is not threatened in

32. Par. 34.
33. Par. 35.
34. Par. 38.
35. To this effect, see C. Caron, Comm. com. électr., op cit.
36. To this effect, see J.-M. Bruguière, JCP G, op cit.

practice, it can be assumed that no monopoly is at play. The solution could also be explained by taking account of the specific subject matter of the right: "in the circumstances described, the specific subject matter of the exclusive right of producers does not justify subjecting such an extract to this right".[37]

It is difficult at this stage to reach any definitive conclusion. The question remains as to who stands to win the battle – between intellectual property and freedom of creation – if reproduction is in fact established because it fixes identifiable protected elements.

C. The negative contours of rights

Finally, these decisions have contributed to the designing of the contours of some exceptions.

In the case of the quotation exception, the *Pelham* and *Spiegel Online* rulings provide interesting clarifications, even though this exception had already been ruled on by the CJEU.[38] In the *Pelham* case, the question was whether the exception could be relied on even though the protected subject matter was not identifiable. In its response, the Court again referred to everyday language, stating that "the essential characteristics of a quotation are the use, by a user other than the copyright holder, of a work or, more generally, of an extract from a work for the purposes of illustrating an assertion,

37. V. Varet, op cit., Propr. intell. Apr. 2020, esp. p. 77.

38. CJEU, 1 Dec. 2011, case C-145/10, *Eva-Maria Painer*, Comm. com. électr. 2012, comm. 26, note C. Caron; D. 2012, p. 471, note N. Martial-Braz; Légipresse 2012, p. 161, note J. Antippas; Propr. intell. 2012, p. 30, obs. A. Lucas; Europe 2012, comm. 97, obs. L. Idot; RTD com. 2012, p. 109, obs. F. Pollaud-Dulian.

of defending an opinion or of allowing an intellectual comparison between that work and the assertions of that user, since the user of a protected work wishing to rely on the quotation exception must therefore have the intention of entering into 'dialogue' with that work".[39] Therefore, no dialogue, whether material or intellectual, can take place unless the element used is identifiable. This clarification seems obvious and it is hard to see how mentioning source and author can be required for an unrecognisable quotation. Moreover, as the Court says, there is no reproduction for the same reason, there is not even any room for investigating beforehand the possibility of an exception because there is no monopoly at play. But the fact remains that the clarification is useful for defining the contours of the quotation exception.

Furthermore, as well as picking up on certain points in the *Pelham* decision, the *Spiegel Online* ruling stipulates that a quotation can take the form of a hypertext link:[40] "neither the wording of Article 5(3)(d) of Directive 2001/29 nor the concept of 'quotation', as described in paragraphs 78 and 79 above, require that the quoted work be inextricably integrated, by way of insertions or reproductions in footnotes for example, into the subject matter citing it, so that a quotation may thus be made by including a hyperlink to the quoted work.[41] It is difficult to see how it could be otherwise, given that the exception in question is in a text that is supposed to regulate the

39. Par. 71.

40. A politician who authored a manuscript on criminal policy relating to sexual offences committed against minors and published under a pseudonym in an article to a book felt that the message of his manuscript had been altered by the publisher of the book. As proof of this, he published his original manuscript and the article published on his website. The operator of an online information portal published an article showing that in fact the meaning of the message was identical in both texts. To establish this, it made both texts available via hypertext links that readers could download.

41. Par. 80.

'information society'. What's more, the favourable reception given by the CJEU to hypertext links is well-known, given its justification of solutions specific to the right of communication to the public under copyright law.[42] Lastly, in this ruling, the Court clarifies the meaning of the requirement that a work be "lawfully made available to the public" in order to be able to benefit from the exception. Thus, the condition imposed in Article 5(3)(d) of the directive is met "if [the work] has been made available to the public with the authorisation of the copyright holder or in accordance with a non-contractual licence or a statutory authorisation".[43] An exception can therefore be legalised via the rightholder's consent or the order of law.

The *Spiegel Online* case also dealt with the exception of news reporting. Article 5(3)(c) of Directive 2001/29 authorises Member States to provide for exceptions to the rights in the "use of works or other subject-matter in connection with the reporting of current events, to the extent justified by the informatory purpose and as long as the source, including the author's name, is indicated, unless this turns out to be impossible". The beneficiary here is the press, for whom the exception applies as regards the "dissemination of information by news agencies for the purposes of satisfying the informatory interest of the public in respect of current events". The Court then goes on to say that 'reporting' does not require reader analysis. It merely entails "providing information on a current event" i.e. "is of informatory interest to the public". The Court next provides an answer to the referral for preliminary

42. See in particular CJEU 2nd chamber, 8 Sep. 2016, case C-160/15, *GS Media*, Comm. com. électr. 2016, comm. 78, note C. Caron; JCP G 2016, 1222, obs. L. Marino; Dalloz IP/IT 2016, p. 543, obs. P. Sirinelli; D. 2016, p. 1905, note F. Pollaud-Dulian.

43. Par. 89.

ruling, stating that the benefit of the exception cannot be made conditional on obtaining the author's prior consent, "which would be likely to make it excessively difficult for relevant information to be provided to the public in a timely fashion".[44] Most importantly, the Court asserts that "the terms of a provision of EU law which, as is the case of Article 5(3) of Directive 2001/29, makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an independent and uniform interpretation throughout the European Union".[45] Does this mean that it is an autonomous concept under EU law like the parody exception,[46] and that therefore it must be interpreted uniformly within the EU? If this is the case, one could legitimately query whether Article L. 122-5-9 of the French Intellectual Property Code complies with EU law. This provision authorises only "reproduction or representation, in full or in part, of a graphic, plastic or architectural work via the print or broadcast media or online, with the exclusive aim of providing immediate information directly related to it, provided that the name of the author is clearly stated". Evidently, the German hypothesis would not have been covered by the French exception.

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Minor facts, multiple contributions, but undeniably major rulings! In these three rulings of 29 July 2019, the CJEU has added a further building

44. Par. 71.

45. Par. 62.

46. CJEU, 3 Sep. 2014, case C201/13, *Johan Deckmyn*, D. 2014. 2097, note B. Galopin; Légipresse 2014. 457 and obs; *ibid.* 604, comm. N. Blanc; JAC 2014, no. 17, p. 10, obs. E. Scaramozzino; RTD com. 2014. 815, obs. F. Pollaud-Dulian; RTD eur. 2016. 358, obs. F. Benoît-Rohmer.

block to the construction of European copyright law. By dismissing a strand of case law that sought to invoke fundamental rights to justify a new exception to the application of copyright law, it has also provided a veritable method for reading exceptions, a method that notably includes fundamental rights. In so doing, the Court has put renewed and valuable emphasis on freedom of expression. True, freedom of expression cannot in itself constitute an exception, but it has become a key for interpreting rights and exceptions alike. Far from being marginalised, it has been embedded and now fully incorporates the 'normal' interplay of copyright law.

No doubt a few more case referrals, a few more rulings and many more comments are needed to fully grasp all the implications of these new rules.

COURT OF JUSTICE OF THE EUROPEAN UNION

Case C-469/17

Grand Chamber

29 July 2019

Funke Medien NRW GmbH v. Bundesrepublik Deutschland

Request for a preliminary ruling from the Bundesgerichtshof

REFERENCE FOR A PRELIMINARY RULING – Copyright and related rights – Directive 2001/29/EC – Information Society – Harmonisation of certain aspects of copyright and related rights – Art. 2(a) – Reproduction right – Art. 3(1) – Communication to the public – Art. 5(2) and (3) – Exceptions and limitations – Scope – Charter of Fundamental Rights of the European Union

COURT OF JUSTICE OF THE EUROPEAN UNION

Case C-476/17

Grand Chamber

29 July 2019

Pelham GmbH e.a. v. Ralf Hütter et Florian Schneider-Esleben

Request for a preliminary ruling from the Bundesgerichtshof

REFERENCE FOR A PRELIMINARY RULING – Copyright and related rights – Directive 2001/29/EC – Information Society – Harmonisation of certain aspects of copyright and related rights – Sampling – Art. 2(c) – Phonogram producer – Reproduction right – Reproduction 'in part' – Art. 5(2) and (3) – Exceptions and limitations – Scope – Art. 5(3)(d) – Quotations – Directive 2006/115/EC – Art. 9(1)(b) – Distribution right – Fundamental rights – Charter of Fundamental Rights of the European Union – Art. 13 – Freedom of the arts

COURT OF JUSTICE OF THE EUROPEAN UNION

Case C-516/17

Grand Chamber

29 July 2019

Spiegel Online GmbH v. Volker Beck

Request for a preliminary ruling from the Bundesgerichtshof

REFERENCE FOR A PRELIMINARY RULING – Copyright and related rights – Directive 2001/29/EC – Information Society – Harmonisation of certain aspects of copyright and related rights – Art. 5(3) – Exceptions and limitations – Scope – Art. 5(3)(c) and (d) – Reporting of current events – Quotations – Use of hyperlinks – Lawfully making available to the public – Charter of Fundamental Rights of the European Union – Art.11 – Freedom of expression and of information

The decision is available on the CJEU website in the following electronic address:

https://curia.europa.eu