Quotation as an Autonomous Concept of EU Copyright Law and Its Compatibility with Online Content-Sharing Services

University of Lapland

Faculty of Law

Master's Thesis

Intellectual Property

Samuli Havela (0427405)

Spring 2021

Table of Contents

1. INTRODUCTION 1

1.1 General 1
1.2 Research Questions 2
1.3 Methods 3
1.4 Limitations 6
1.5 Structure 7

2. THE FOUNDATIONS OF EUROPEAN COPYRIGHT 10

2.1 Droit D'Auteur – the Roots of European Copyright Tradition 10
2.2 Internationalization of Copyright 11
2.2.1 Berne Convention 11
2.2.2 TRIPS Agreement 13
2.2.3 WIPO Copyright Treaty 13
2.2.4 The Three-Step-Test 14
2.3 The Green Papers – First EU Copyright Initiatives 15
2.4 Information Society Directive 18
2.4.1 Introduction 18
2.4.2 Exceptions and Limitations – The Quotation Exception 19
2.5 The CJEU as the Interpreter of EU Law 21
2.6 Exceptions and Limitations in EU Copyright Law – Safeguarding Fundamental Rights 23
2.6.1 Autonomous Concepts of the EU 23
2.6.2 Deckmyn – Exceptions and Limitations Receive Uniform Interpretation 25
2.6.3 An Exhaustive (and a Mandatory?) Set of Exceptions and Limitations 27

3. THE QUOTATION EXCEPTION 31

3.1 Introduction 31
3.2 The Quotation Exception in the InfoSoc. Directive 31
3.3 The Meaning of Quotation 34
3.3.1 The Definition of Quotation 34
3.3.2 *Use of a Work* 35
3.3.3 In Whole or in Part 38
3.4 The Dialogue Requirement 39
3.4.1 A Dialogue between the Quoting Work and the Quoted Work 39
3.4.2 Unaltered and Distinguishable 40
3.5 Lawfully Made Available to the Public 41
3.6 Indicating the Source 41
3.7 National Discretion 43
3.7.1 Exceptions and Limitations 43
3.7.2 The Quotation Exception 45
3.7.3 The Boundaries of Discretion 46
3.7.4 Fundamental Rights as Interpretive Boundaries 48

4. DSM DIRECTIVE AND ONLINE CONTENT-SHARING SERVICES 50

4.1 Introduction **50**
4.2 The Reception – Calls for a *New* Quotation Exception **53**
4.3 Online Content-Sharing Services **54**
4.4 The Adopted Text – DSM Directive Finalized **55**
4.4.1 The Telos of the DSM Directive 55
4.4.2 Article 17(7) 57
4.4.3 The Quotation Exception in the DSM Directive 58

5. THE QUOTATION EXCEPTION – A FUTURE-PROOF PROVISION? 61

5.1 DSM Directive and Quotation – in Search for a Fair Balance in Modern Copyright Environment **61**
5.2 The Dynamic Quotation Exception **63**
5.3 Quotation and Freedom of Expression – Trouble in the Horizon? **64**
5.3.1 Dialogue and Unalteration 64
5.3.2 Indicating the Author – Hinderance to Creativity? 67

6. CONCLUSION 69

6.1 Quotation – an Autonomous Concept of EU Law **69**
6.2 Compatibility with Online Content-Sharing Services **71**

Abbreviations

AG	Advocate General
Berne Convention	Berne Convention for the Protection of Literary and Artistic Works, 9th of September 1886, in force 4th of December 1887, latest amendment 28th of September 1979, in force 19th of November 1984
CJEU	Court of Justice of the European Union
CFR	The Charter of Fundamental Rights of the European Union (OJ C 326, 26.10.2012, p. 391-407)
DSM Directive	Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC
ECS	European Copyright Society
ECtHR	European Court of Human Rights
ECHR	The Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4th of November 1950
EU	European Union
EUT	The Treaty on European Union (consolidated version) (OJ C 202, 7.6.2016, p. 13)
InfoSoc. Directive	Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the Information Society
IP	Intellectual Property
IPR	Intellectual Property Rights
PECL	The Principles of European Contract Law 2002, (Parts I, II r evised 1998, part III 2002), European Union

Statute of Queen Anne	An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Author's or Purchasers of Such Copies, during the Times therein mentioned, Great Britain, Public General Acts 1709-1710, 8 & 9 Anne, c. 19
TFEU	The Treaty on the Functioning of the European Union (consolidated version) (OJ C 202, 7.6.2016, p. 47)
TRIPS Agreement	The Agreement on Trade-Related Aspects of Intellectual Property Rights, Marrakesh, Morocco, 15th of April 1994, latest amendment 23rd of January 2017
U.S. Code	The Code of Law of the United States of America
VCLT	Vienna Convention on the Law of Treaties (with annex), 23rd of May 1969, in force 27th of January 1980
WIPO	World Intellectual Property Organization

References

Literature

Bently, Lionel – Aplin, Tanya: Whatever Became of Global Mandatory Fair Use? A Case Study in Dysfunctional Pluralism. University of Cambridge Faculty of Law. Legal Studies Research Paper Series No. 34 2018.

Bently, Lionel – Geiger, Christophe – Griffiths, Jonathan – Metzger, Axel – Peukert, Alexander – Senftleben, Martin: 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*. European Copyright Society 2019. (*Bently & others* 2019)

Bobek, Michal: Legal Reasoning of the Court of Justice of the EU. 39 European Law Review 418 (2014). Forthcoming.

De Cock, Caroline: Open Letter in Light of the Competitiveness Council on 30 November 2017 (on behalf of over 80 signatories). Copyright for Creativity. Brussels 2017.

European Copyright Society (multiple signatories): Limitations and Exceptions as Key Elements of the Legal Framework for Copyright in the European Union. Opinion on the Judgment of the CJEU in Case C-201/13 *Deckmyn*. European Copyright Society 2014.

Geiger, Christophe – Gervais, Daniel – Senftleben, Martin: Understanding the 'three-step-test'. ResearchGate 2015 p. 167-189.

Ginsburg, Jane C.: A Tale of Two Copyrights. Literary Property in Revolutionary France and America. Tulane Law Review Vol. 64 No. 5 1990 p. 991-1031.

Goldstein, Paul – Hugenholtz, Bernt: International Copyright. Oxford University Press Inc. 2010.

Graig, Paul P.: *Pringle* and the Nature of Legal Reasoning. Maastricht Journal of European and Comparative Law No. 53 2013 p. 205-220.

Haarmann, Harald: Early Civilization and Literacy in Europe. An Inquiry into Cultural Continuity in the Mediterranean World. Mouton de Groyter Berlin – New York 1996.

Haarmann, Pirkko-Liisa: Immateriaalioikeus. Alma Talent Oy 2014.

Haarmann, Pirkko-Liisa: Tekijänoikeus ja lähioikeudet. Talentum 2005.

Juncker, Jean-Claude: A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change. Political Guidelines for the Next European Commission. Opening Statement in the European Parliament Plenary Session. Strasbourg 2014.

Jongsma, Daniël: AG Szpunar on Copyright's Relation to Fundamental Rights: One Step Forward and Two Steps Back? IPR-Info No. 1 2019.

Jongsma, Daniël: Creating EU Copyright Law: Striking a Fair Balance. Hansaprint Oy 2019.

Jongsma, Daniël: Parody After *Deckmyn*. A Comparative Overview of the Approach to Parody Under Copyright Law in Belgium, France, Germany and The Netherlands. International Review of Intellectual Property and Competition Law Vol. 48 No. 6 2017 p. 652-682.

Maduro, Miquel Poiares: Interpreting European Law. Judicial Adjudication in a Context of Constitutional Pluralism. European Journal of Legal Studies Vol. 1 No. 2 2007 p. 137-152.

Metzger, Axel – Senftleben, Martin: Comment of the European Copyright Society on Selected Aspects of Implementing Article 17 of the Directive on Copyright on the Digital Single Market into National Law. European Copyright Society 2020.

Nicola, Fernanda G.: National Legal Traditions at Work in the Jurisprudence of the Court of Justice of the European Union. The American Journal of Comparative Law Vol. LXIV No. 4 2016 p. 865-890.

Odermatt, Jed: The International Court of Justice and the Court of Justice of the European Union: Between Fragmentation and Universality of International Law. iCourts Working Paper Series No. 158 2019.

Polish Digital Rights Organizations (multiple signatories): Open Letter to Members of the European Parliament by Polish Digital Rights Organizations. Warsaw 2017.

Otten, Adrian – Wager, Hannu: Compliance with TRIPS. The Emerging World View. Vanderbildt Journal of Transnational Law Vol. 29 No. 3 1996 p. 391-414.

Raitio, Juha: Euroopan unionin oikeus. Alma Talent Oy 2016.

Rosati, Eleonora: Originality in EU Copyright. Full Harmonization through Case Law. Edward Elgar Publishing Limited 2013.

Senftleben, *Martin*: Bridging the Differences Between Copyright's Legal Traditions. The Emerging EC Fair Use Doctrine. Journal of the Copyright Society of the U.S.A. Vol. 57 No. 3 2010 p. 521-552.

Seville, Catherine: The Space Needed for Parody withing Copyright Law: Reflections Following Deckmyn. National Law School of India Review 27 No. 1 2015 p. 1-16.

Smits, Jan M.: What is Legal Doctrine? On the Aims and Methods of Legal-Dogmatic Research. Maastricht European Private Law Institute Working Paper No. 6 2015.

Talus, Kim – Penttinen, Sirja-Leena: Eurooppaoikeudelliset oikeuslähteet ja niiden tulkinta oikeustieteellistä opinnäytettä kirjoittaessa. In *Miettinen, Tarmo,* Oikeustieteellinen opinnäyte. Artikkeleita oikeustieteellisten opinnäytteiden vaatimuksista, metodista ja arvostelusta. Edita Publishing Oy 2016.

Van Eechoud, Mireille – Hugenholtz, P. Bernt – Van Gompel, Stef – Guibault, Lucie – Helberger, Natali: Harmonizing European Copyright Law: The Challenges of Better Lawmaking. Amsterdam Law School Research Paper No. 7 2012. (*Van Eechoud* & *others* 2012)

Wiesbrock, Anja: The Implications of Mangold for Domestic Legal Systems. The *Honeywell* Case. Maastricht Journal of European and Comparative Law Vol. 18 No. 1-2 2011 p. 201-218.

Internet-Sources

Council of Europe: Human Rights – Definitions – Some Definitions. Updated 4.11.2020. https://www.coe.int/en/web/echr-toolkit/definitions (4.11.2020)

European Commission: Migration and Home Affairs – What we do – Networks – Fundamental Rights. Updated 4.11.2020. https://ec.europa.eu/home-affairs/what-we-do/networks/european_migration_network/glossary_search/fundamental-rights_en (4.11.2020)

European Union: Court of Justice of the European Union (CJEU). Updated 26.3.2020. https://europa.eu/european-union/about-eu/institutions-bodies/court-justice_en#what-does-the-cjeu-do? (26.9.2020)

Liberties: Article 13 Open Letter – Monitoring and Filtering of Internet Content is Unacceptable. Updated 16.10.2017. https://www.liberties.eu/en/news/delete-article-thirteen-open-letter/13194 (18.11.2020)

The Open Letter of the Scholarly Publishing and Academic Resources Coalition (SPARC) to the Members of the Legal Affairs Committee in the European Parliament. 29.9.2017. https://sparceurope.org/copyrightreform/ (18.4.2020)

Reda, Julia: EU Copyright Reform/Expansion: https://juliareda.eu/eu-copyright-reform/ (20.4.2020) (*Reda* 2020 a)

Reda, Julia: EU Copyright Reform: Our Fight Was Not in Vain. Updated 18.4.2019. https://juliareda.eu/2019/04/not-in-vain/ (21.11.2020)

Reda, Julia: Upload Filters: https://juliareda.eu/eu-copyright-reform/censorship-machines/ (18.11.2020) (*Reda* 2020 b)

Stim, Richard: The 'Fair Use' Rule: When Use of Copyrighted Material Is Acceptable. Updated 5.12.2020. https://www.nolo.com/legal-encyclopedia/fair-use-rule-copyright-material-30100.html (5.12.2020)

Bently, L. – Kretschmer, M. – Johannes of Speyer's Printing Monopoly, Venice (1469). http://www.copyrighthistory.org/cam/tools/request/showRecord.php?id=record_i_1469 (23.6.2020)

World Intellectual Property Organization: Summary of the Berne Convention for the Protection of Literary and Artistic Works (1886). https://www.wipo.int/treaties/en/ip/berne/summary_berne.html (5.7.2020)

World Intellectual Property Organization: Summary of the WIPO Copyright Treaty (WCT) (1996). https://www.wipo.int/treaties/en/ip/wct/summary_wct.html (22.12.2020)

Official Sources

A (2018) 0245. Report on the proposal for a directive of the European Parliament and of the Council on copyright in the Digital Single Market (COM(2016)0593 – C8-0383/2016 – 2016/0280(COD))

A4 (1999) 26. Report on the proposal for a European Parliament and Council Directive on the harmonization of certain aspects of copyright and related rights in the Information Society. Committee on Legal Affairs and Citizens' Rights

AD (2017) 595591. Opinion of the Committee on Culture and Education for the Committee on Legal Affairs on the proposal for a directive of the European Parliament and of the Council on copyright in the Digital Single Market (COM(2016)0593 - C8-0383/2016 - 2016/0280(COD))

AD (2017) 599682. Opinion of the Committee on the Internal Market and Consumer Protection for the Committee on Legal Affairs on the proposal for a directive of the European Parliament and of the Council on copyright in the Digital Single Market (COM(2016)0593 - C8-0383/2016 - 2016/0280(COD))

COM (1988) 172, final. Communication from the Commission. Green Paper on Copyright and the Challenge of Technology – Copyright Issues Requiring Immediate Action

COM (1993) 700, final. Growth, Competitiveness, Employment. The Challenges and Ways Forward into the 21st Century. White Paper

COM (1994) 347, final. Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions. Europe's way to the Information Society. An action plan

COM (1994) supplement 2/94 – Bull. EU. Growth, Competitiveness and Employment. White Paper follow-up. Europe and the Global Information Society. Recommendations of the High-Level Group on the Information Society to the Corfu European Council (Bangemann Group)

COM (1995) 382, final. Green Paper – Copyright and Related Rights in the Information Society

COM (1996) 568, final. Communication from the commission. Follow-up to the Green Paper on Copyright and Related Rights in the Information Society

COM (1997) 628, final. Proposal for a European Parliament and Council Directive on the harmonization of certain aspects of copyright and related rights in the Information Society

COM (2015) 192, final. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – A Digital Single Market Strategy for Europe

COM (2016) 593, final. Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market

TA (2019) 0231. European Parliament legislative resolution of 26 March 2019 on the proposal for a directive of the European Parliament and of the Council on copyright in the Digital Single Market (COM(2016)0593 – C8-0383/2016 – 2016/0280(COD))

SEC (2011) 567, final. Commission Staff Working Paper. Operational Guidance on taking account of Fundamental Rights in Commission Impact Assessments

Legislation & Treaties

An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Author's or Purchasers of Such Copies, during the Times therein mentioned, Great Britain, Public General Acts 1709–1710, 8 & 9 Anne, c. 19

Agreement on Trade-Related Aspects of Intellectual Property Rights, Marrakesh, Morocco, 15th of April 1994, latest amendment 23rd of January 2017

Berne Convention for the Protection of Literary and Artistic Works, 9th of September 1886, in force 4th of December 1887, latest amendment 28th of September 1979, in force 19th of November 1984

Charter of Fundamental Rights of the European Union (OJ C 326, 26.10.2012, p. 391-407)

Code of Law of the United States of America (U.S. Code)

Constitution of the United States, Philadelphia, 17th of September 1787, ratified 21st of June 1788

Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4th of November 1950

Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC

Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the Information Society

Principles of European Contract Law 2002, (Parts I, II revised 1998, part III 2002), European Union

Treaty on European Union (consolidated version) (OJ C 202, 7.6.2016, p. 13)

Treaty on the Functioning of the European Union (consolidated version) (OJ C 202, 7.6.2016, p. 47)

Vienna Convention on the Law of Treaties (with annex), 23rd of May 1969, in force 27th of January 1980

WIPO Copyright Treaty, Geneva, Switzerland, 20th of December 1996, in force 6th of March 2002

Court of Justice of the European Union

C-26/62 NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration ECLI:EU:C:1963:1

C-6/64 Flaminio Costa v E.N.E.L. ECLI:EU:C:1964:66

C-22/70 Commission of the European Communities v Council of the European Communities (*ERTA*) ECLI:EU:C:1971:32

C-78/70 Deutsche Grammophon Gesellschaft mbH v Metro-SB-Großmärkte GmbH & Co. KG. ECLI:EU:C:1971:59

C-62/79 SA Compagnie générale pour la diffusion de la télévision, Coditel, and others v Ciné Vog Films and others ECLI:EU:C:1980:84

C-327/82 Ekro BV Vee- en Vleeshandel v Produktschap voor Vee en Vlees ECLI:EU:C:1984:11

C-287/98 Grand Duchy of Luxemburg v Berthe Linster, Aloyse Linster and Yvonne Linster ECLI:EU:C:2000:468

C-144/04 Werner Mangold v Rüdiger Helm ECLI:EU:C:2005:709

C-479/04 Laserdisken ApS v Kulturministeriet ECLI:EU:C:2006:549

C-275/06 Productores de Música de España (Promusicae) v Telefónica de España SAU ECLI:EU:C:2008:54

Joined cases C-402/07 and C-432/07 Christopher Sturgeon, Gabriel Sturgeon and Alana Sturgeon v Condor Flugdienst GmbH (C-402/07) and Stefan Böck and Cornelia Lepuschitz v Air France SA (C-432/07) ECLI:EU:C:2009:716

C-05/08 Infopaq International A/S v Danske Dagblades Forening ECLI:EU:C:2009:465

Joined cases C-403/08 and C-429/08 Football Association Premier League Ltd and Others v QC Leisure and Others (C-403/08) and Karen Murphy v Media Protection Services Ltd (C-429/08) ECLI:EU:C:2011:631

C-467/08 Padawan SL v Sociedad General de Autores y Editores de España (SGAE) ECLI:EU:C:2010:620

C-145/10 Eva-Maria Painer v Standard VerlagsGmbH and Others ECLI:EU:C:2011:798

C-510/10 DR and TV2 Danmark A/S v NCB – Nordisk Copyright Bureau ECLI:EU:C:2012:244

C-399/11 Stefano Melloni v Ministerio Fiscal ECLI:EU:C:2013:107

C-314/12 UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft mbH Request for a preliminary ruling from the Oberster Gerichtshof ECLI:EU:C:2014:192

C-370/12 Thomas Pringle v Government of Ireland and Others ECLI:EU:C:2012:756

C-435/12 ACI Adam BV and Others v Stichting de Thuiskopie and Stichting Onderhandelingen Thuiskopie vergoeding ECLI:EU:C:2014:254

C-466/12 Nils Svensson and Others v Retriever Sverige AB ECLI:EU:C:2014:76

C-201/13 Johan Deckmyn and Vrijheidsfonds VZW v Helena Vandersteen and Others ECLI:EU:C:2014:2132

C-160/15 GS Media BV v Sanoma Media Netherlands BV and Others ECLI:EU:C:2016:644

C-149/17 Bastei Lübbe GmbH & Co. KG v Michael Strotzer ECLI:EU:C:2018:841

C-161/17 Land Nordrhein-Westfalen v Dirk Renckhoff ECLI:EU:C:2018:634

C-469/17 Funke Medien NRW GmbH v Bundesrepublik Deutschland *(Afghanistan Papers)* ECLI:EU:C:2019:623

C-476/17 Pelham GmbH and Others v Ralf Hütter and Florian Schneider-Esleben (*Metall Auf Metall*) ECLI:EU:C:2019:624

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

C-401/19 Poland v Parliament and Council [case in progress]

European Court of Human Rights

Decision of the European Court of Human Rights (Fifth Section), in the case of Ashby Donald and Others v. France, Appl. No. 36769/08, of 10th of January 2013

Opinions

Opinion of Advocate General *Sharpston* delivered on 2nd July 2009 on joined cases C-402/07 and C-432/07 *Sturgeon and Others* ECLI:EU:C:2009:416 (AG *Sharpston* on *Sturgeon & Others*)

Opinion of Advocate General *Trstenjak* delivered on 12th of April 2011 on C-145/10 *Painer* ECLI:EU:C:2011:239 (AG *Trstenjak* on *Painer*)

Opinion of Advocate General *Cruz Villalón* delivered on 22nd of May 2014 on C-201/13 *Deckmyn* ECLI:EU:C:2014:458 (AG *Cruz Villalón* on *Deckmyn*)

Opinion of Advocate General *Szpunar* delivered on 12th of December 2018 on C-476/17 *Pelham and Others (Metall Auf Metall)* ECLI:EU:C:2018:1002 (AG *Szpunar* on *Metall Auf Metall*)

Opinion of Advocate General *Szpunar* Delivered on 10th of January 2019 on C-516/17 *Spiegel Online* ECLI:EU:C:2019:16 (AG *Szpunar* on *Spiegel Online*)

1. INTRODUCTION

1.1 General

As of writing this thesis, the copyright regulations of the European Union are going through a change. The new Digital Single Market directive[1] (the DSM Directive, EU 2019/790) is in force and is awaiting national implementation. With the DSM Directive, EU attempts to bring its copyright regulations up to date with modern technological advancements.[2] This directive adds to the existing EU copyright framework as well as slightly amends the 19-year-old Information Society Directive[3] (the InfoSoc. Directive, 2001/29/EC). The controversial DSM Directive has had many experts worried about the future of EU copyright law and the problems that the implementation of this directive may produce.[4] At the center of the criticism have often been concerns around freedom of information, freedom of expression, preimposed censorship and possible damage to European economy[5].

One major criticism that has been voiced against the DSM Directive is the possible inability to rely on copyright exceptions in the future.[6] The same copyright exceptions and limitations introduced in the InfoSoc. Directive apply to the DSM Directive, due to the latter directive being an extension to the EU copyright framework. However, new technological development has given birth to new ways of creation and exploitation of copyright-protected content not previously known when the InfoSoc. Directive was crafted. One example of this is the emergence of online content-sharing services and the plurality of user-generated content that they store, referred to in article 17 as well as recital 61 of the DSM Directive. These kinds of new phenomena do then raise the question whether the existing exceptions and limitations are properly suited for the digital age.

According to the DSM Directive's article 17(7)(a), quotation is one of the purposes under which users must be allowed to create, upload and make available content that contain copyright-protected content, authorized by the author or not. The quotation exception, like many other concepts of EU copyright law, has been a subject of development by the Court

[1] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC
[2] See *Juncker* 2014, section 2. A Connected Digital Single Market
[3] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society
[4] See f.ex. *SPARC Europe* 2017, section The Open Letter – EU copyright reform threatens Open Access and Open Science & *De Cock*, 2017
[5] See *Reda* 2020 a, section EU copyright reform/expansion
[6] See f.ex. the Open Letter to Members of the European Parliament by Polish Digital Rights Organisations of 10 July 2017

of Justice of the European Union (CJEU) over the years. Cases like *Painer*[7], *Metall Auf Metall*[8] and *Spiegel Online*[9] have brought clarity and expanded on the concept of the quotation exception well beyond what is apparent from the wording of the provision it was introduced in, article 5(3)(d) of the InfoSoc. Directive. As a result, it is also evident that ''quotation'' has become an autonomous concept of EU law, much in the same way as ''parody'' in article 5(3)(k) of the InfoSoc. Directive (see *Deckmyn*[10]).

As EU copyright law is experiencing winds of change, many of the existing concepts therein call for re-examination. With new technology come new ways to innovate and create. These new ways had not necessarily been considered when the existing rules on EU copyright were crafted. In relation to the quotation exception, it is then relevant to ask whether it is equipped to handle the challenges of the digital age – namely, the ones identified in the DSM Directive. This calls for an in-depth analysis of both the quotation exception as well as the DSM Directive's purpose, goals and relevant provisions.

1.2 Research Questions

These topics shall be addressed and answered with the following two research questions. The first question is as follows: what is *quotation* as an autonomous concept of EU copyright law? Answering this question is crucial for understanding the quotation exception. As already mentioned, CJEU rulings, such as *Metall Auf Metall* and *Spiegel Online*, give the impression that the quotation copyright exception is an autonomous concept of the EU.[11] This would also be consistent with article 5(3) of the InfoSoc. Directive. Parody, article 5(3)(k), has already been established as an autonomous concept of EU law. Nothing in the wording suggests that parody is exceptional compared to other exceptions and limitations introduced therein, such as the quotation exception. The thesis, however, does not merely focus on the meaning of the term ''quotation'' in EU law. Rather, the ''autonomous concept'' in the research question is understood in a wider sense. In addition to the term ''quotation'', the thesis also examines the conditions, the terms and the expressions used in article 5(3)(d) of the InfoSoc. Directive. The purpose is to explain the meaning of all these subjects in article 5(3)(d) as they are understood in EU law. Thus, to understand quotation as an autonomous concept of EU law is to explore these sub-questions: How is ''quotation''

[7] C-145/10 *Painer* ECLI:EU:C:2011:798
[8] C-476/17 *Pelham and Others* ECLI:EU:C:2019:624 *(Metall Auf Metall)*
[9] C-516/17 *Spiegel Online* ECLI:EU:C:2019:625
[10] C-201/13 *Deckmyn* ECLI:EU:C:2014:2132
[11] *Jongsma* 2019, p. 24

defined in EU law? What are the quotation exception's scope and interpretive limits? How extensive is its level of harmonization and how much room is left for national discretion and interpretation? By exploring these themes, the concept of quotation as it is understood in EU law can be laid out to a satisfactory extent. Only through researching the concept of quotation can its potential be fully realized. This is an important first step that must be taken before the provision can be properly analyzed against challenges of the future.

The second question is as follows: is the quotation exception compatible with online content-sharing services? This question calls for further pretext. Article 17 of the DSM Directive lays out certain rules for online content-sharing service providers in relation to using copyright-protected content. According to article 17(4), the service providers have a duty to, through their best efforts, prevent unauthorized communications to the public of protected works on their services. Article 17(7), however, states that these efforts must not result in the unavailability of non-infringing works, including those covered by a copyright exception. Taking this as well as the concept of quotation into account, it is relevant to ask how well the quotation exception fits the digital age. This requires considering the scope of the quotation copyright exception against the nature of content typically encountered on online content-sharing services. One must also consider the history of CJEU case law, the goals of the DSM Directive, the weight of fundamental rights in EU copyright law and the existing EU copyright framework. In order to evaluate the quotation exception's compatibility with article 17, several factors must be explored. What kind of user-generated content the quotation exception covers? Does the exception have any clear blind spots in relation to this kind of content? Does the provision leave room for interpretation in the wake of the challenges brought by the digital age? Would it sufficiently secure the goals of the DSM Directive as well as the relevant fundamental rights? Once these themes have been researched, only then can it truly be determined whether the quotation exception is compatible with online content-sharing services.

1.3 Methods

This thesis uses the legal dogmatic method of research. Thus, the approach of the research takes an internal perspective in the EU legal system, which is not only the subject of the inquiry, but also the provider of the normative framework of the analysis. As a result, the law is intelligible in its own terms. In spirit of legal dogmatism, it is important to see the law as a system. The results of the research are produced through rigorous analysis of all the relevant elements in the system. The subject of interpretation and systemization is the present

law. It is also important to accommodate new developments and case law against the background of societal change.[12]

The aim of legal dogmatism is to describe the existing law in a certain field (in this case, EU copyright law) as it stands in the present day. A legal dogmatic research aspires to be as neutral and as consistent as possible in order to describe how the law reads. Legal doctrine grasps the normative complexity of the law in order to help the reader understand and solve practical problems. As a result, the law is rationalized and stabilized in order to keep it intelligible to the reader. On top of this descriptive function, legal dogmatism also has a prescriptive nature. Out of a set of complex norms for human behavior, which is, arguably, what the law essentially is, legal doctrine articulates what these norms are. Information produced through legal dogmatic research can act as the basis of future legislation, *lex ferenda*. As any systematization of law can have practical consequences, norms are, at least in continental European legal tradition, produced autonomously within the legal system itself. Lastly, legal dogmatism can be seen to serve as a justification for the existing law. In spirit of the internal perspective of legal dogmatic research, the law is presented as a self-contained system of mutual reference. The validity of norms therein can then be justified by reference to this system. To put it simply, if the rule doesn't fit into the system, it is not a law. This is due to legal system being already justified by its own coherence.[13]

Keeping all of this in mind, it is important to realize that EU law exists within the union's own unique legal system.[14] Indeed, EU legal system is often described as a *sui generis* -system, containing elements from national systems and international organizations.[15] Legal principles have always had a great significance in interpreting the law.[16] This is often considered one of the special features of EU legal system. A typical way to systemize EU legal sources is to make a distinction between primary sources and secondary sources. This distinction also determines the hierarchy relation between different norms. Primary sources consist of foundational treaties and treaties comparable to foundational treaties. These

[12] *Smits* M-EPLI 2015, p. 5-7
[13] *Smits* M-EPLI 2015, p. 8-12
[14] See C-26/62 *Van Gend en Loos* ECLI:EU:C:1963:1, p. 12. See also C-6/64 *Costa v. Enel* ECLI:EU:C:1964:66, p. 593, where the CJEU ruled that ''By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply.'' In this case, the CJEU also established the supremacy of EU law against national law.
[15] *Talus – Penttinen* 2016, p. 223
[16] *Raitio* 2016, p. 196

include EU's foundational values (the Treaty on European Union[17] aka. EUT article 2), general principles of EU law as well as basic & human rights, foundational treaties of the EU (EUT & the Treaty on the Functioning of the European Union[18] aka. TFEU along with their protocols), international agreements, EU secondary norms (regulations, directives & decisions), delegated regulatory acts, implementing acts, CJEU decisions, actions of the member states in implementing EU law and legally non-binding norms such as guidelines and statements. Although not exhaustive, this list contains the legal sources in the EU legal system in (roughly) hierarchical order.[19]

Interpreting EU law can be difficult due to its unique nature. EU law is expanding and changing all the time. EU also has over 20 official languages, which sometimes causes translative problems. The union also uses its own terminology that differs from that of the member states. Regulatory work in the EU is also often slow and foundational EU treaties do not give priority to any legal interpretive method. Nevertheless, EU law is, first and foremost, interpreted through literal interpretation. Although systematic and teleological ways of interpretation always have their place, their relevance is most profound when the wording of the regulation is unclear and vague. It is important to note that all the official languages of the union are equally probative, as laid out in EUT article 55, which may, at worst, only add to the complexity of the system. Certain judicial terms may also have different meanings on union level even if they have originally been imported from a member state's law.[20]

Systematic interpretation means that EU norms must be interpreted within their context and taking into account EU law as a whole. EU norms are to be interpreted as a part of the legal structure they belong to in order to maintain the coherence and efficiency of EU law.[21] Interpretation of EU law must not undermine its validity, but rather be in harmony with its surrounding legal structure. Secondary sources need to be interpreted in light of the primary sources. An individual article of a foundational treaty is to be analyzed as a part of a larger body of foundational treaties. Teleological approach, however, attempts to fulfill the purpose

[17] The Treaty on European Union (consolidated version) (OJ C 202, 7.6.2016, p. 13)
[18] The Treaty on the Functioning of the European Union (consolidated version) (OJ C 202, 7.6.2016, p. 47)
[19] *Talus – Penttinen* 2016, p. 225-234 and Raitio 2016, p. 198
[20] *Talus – Penttinen* 2016, p. 237-239
[21] See joined cases C-402/07 and C-432/07 *Sturgeon & others* ECLI:EU:C:2009:716, para 47, where the CJEU emphasized that ''…a Community act must be interpreted, as far as possible, in such a way as not to affect its validity…'' and ''…where a provision of Community law is open to several interpretations, preference must be given to that interpretation which ensures that the provision retains its effectiveness.''

of the law, its *effet utile*. The norm is approached through its purpose and objective, which is important in EU law. Teleological interpretation is appropriate in a dynamic legal environment that is always changing. If a literal interpretation would produce contradictory results to the norm's purpose and objective, teleological interpretation shall be utilized. Unlike it is often the case in national law, in EU law, a norm's purpose and objective isn't merely derived from its preparatory work and the ''will of the legislator'', but from the purpose and the objectives of the European Union in general. In teleological interpretation one must consider the entirety of EU's primary sources and legal principles. It is then important to consider not only these general objectives of the union, but also the time point of the interpretation (due to the dynamic nature of EU law).[22]

This thesis utilizes analytical legal dogmatism while considering the unique nature of the EU legal system. Although the primary form of interpretation shall be literal, it cannot ignore systematic and teleological points of view. Rather, a harmony among these three ways of interpretation is pursued. The terms and expressions used in legal norms are given the meaning they are generally understood to have in EU law. When the wording of a norm is vague or unclear, it is interpreted considering its context and the legal structure it inhabits in as a whole so that its validity isn't undermined and harmony within the surrounding legal structure is maintained. Furthermore, a norm is always interpreted in light of the purpose and objective of not only the norm itself, but the union in general. If a literal interpretation of a norm would lead to a result clearly contradictory to its purpose and objective, precedence must be given to a teleological approach.

1.4 Limitations

This thesis focuses on the quotation exception in EU copyright law and, more importantly, on ''quotation'' as an autonomous concept of EU law. This requires examining all of the requirements and expressions in article 5(3)(d) of the InfoSoc. Directive as well as the meanings attributed to the terms therein. As a result, the thesis also reveals what are the frames within which member states are expected to operate when transposing and interpreting the provision. This thesis does not focus on how different member states themselves have incorporated the quotation exception in their copyright law, unless it helps

---

[22] *Talus – Penttinen* 2016, p. 240-244. See also C-22/70 *ERTA* ECLI:EU:C:1971:32, paras 40-41, an example of teleological interpretation by the CJEU: ''The objective of this review is to ensure, as required by article 164, observance of the law in the interpretation and application of the Treaty. It would be inconsistent with this objective to interpret the conditions under which the action is admissible so restrictively as to limit the availability of this procedure merely to the categories of measures referred to by article 189.''

in getting a better understanding of the quotation exception in EU law. When it comes to the second research question, the thesis focuses mainly on article 17 of the DSM Directive and, in particular, its 7th paragraph. Article 17 deals with the use of protected content on online content-sharing services with its 7th paragraph focusing on the exceptions and limitations to the obligations laid out in the article. It is also necessary to research the purpose and objective of the article as well as the DSM Directive in general. Still, all of this will be done through the lens of the quotation exception and not so much through other exceptions and limitations, unless it provides information that better helps understand the relationship between the quotation exception and article 17 of the DSM Directive. Therefore, the quotation exception will be compared against article 17 of the DSM Directive, the relevant recitals of the directive as well as the directive's preparatory works to the extent that they provide nuance to the topic.

1.5 Structure

The thesis begins with a brief examination on how European copyright has evolved and what kind of features it is grounded upon. In order to get a satisfactory understanding of European copyright tradition, the time frame of this examination takes place from 1400s onwards. In order to not to diverge from the theme of the thesis, the focus on the development of European copyright prior to EU initiatives is kept brief and on a general level. This includes going through the emergence of copyright as a concept in Europe, what kind of events led up to it and what was the rationale behind it. The thesis will then focus on the international development of copyright. This is necessary because copyright law has, for a very long time, been international. Most existing copyright legal structures – including that of the EU's – is influenced by international copyright law. Thus, the thesis then examines the most significant international treaties on copyright with the main focus being on the provisions relevant to copyright exceptions and limitations – in particular, the quotation exception. The Berne Convention[23], the TRIPS Agreement[24] and the WIPO Copyright Treaty[25] are the three most important agreements in this regard.

The focus then shifts to the European Union's own copyright framework. At first, it is ideal to examine the union's first documented initiatives towards harmonizing copyright law and

[23] Berne Convention for the Protection of Literary and Artistic Works, 9th of September 1886, in force 4th of December 1887, latest amendment 28th of September 1979, in force 19th of November 1984
[24] The agreement on Trade-Related Aspects of Intellectual Property Rights, Marrakesh, Morocco, 15th of April 1994, latest amendment 23rd of January 2017
[25] WIPO Copyright Treaty, Geneva, Switzerland, 20th of December 1996, in force 6th of March 2002

the reasons behind them. This is done through researching the relevant preparatory works, the *travaux preparatoires* of EU copyright legislation with the emphasis being on those concerning the InfoSoc. Directive. This includes the relevant Green Papers as well as the official documents related to them. Afterwards, the thesis focuses on the InfoSoc. Directive itself. The examination begins with giving an overview of the directive as well as explaining its purpose and objectives, its *telos*. This is done by going through the relevant recitals concerning the overall telos of the directive as well as those concerning the exceptions and limitations. The purpose and objectives of the exceptions and limitations deserve to be researched intensively and in-depth as, what is true for exceptions and limitations in general is also true for the quotation exception. Lastly, before moving on to article 5(3)(d) of the InfoSoc. Directive itself, it is also ideal to briefly examine the rules and the customs for interpreting EU law. All this background work is important for answering the research questions because, due to the unique nature of EU legal system, the provisions therein must be interpreted in light of the legislative framework they inhabit.

Thereafter, the thesis focuses on article 5(3)(d) of the InfoSoc. Directive, the quotation exception. This section consists of going through the quotation exception in-depth. This includes analyzing the wording of the provision, examining the meaning of ’’quotation’’ in EU law, breaking down the provision to all its components and researching them condition by condition, expression by expression. This extensive analysis is heavy with case law as well as corresponding judicial literature. After this, the first research question – that is, what is quotation as an autonomous concept of EU law – can be confidently answered.

After that, the research focuses on the second research question. This will begin with an overview of the DSM Directive, its preparatory works as well as the official documents related to it. In particular, attention is given to the telos of the directive, article 17 as well as online content-sharing services as a concept recognized by the directive. These findings are then compared to the results of the research done on the quotation exception in the earlier sections. Based on what has been discovered through the legal text, case law as well as judicial literature, the thesis then evaluates the quotation exception’s compatibility with online content-sharing services described in article 17 of the DSM Directive. In particular, the thesis seeks to identify possible shortcomings that the quotation exception might have in this regard. In addition, the research makes an assessment whether these shortcomings can be overcome through softer means (legal interpretation, case-by-case analysis) or are more robust means required (crafting new legislation, annulling existing legislation). After this,

the second research question – whether the quotation exception is compatible with online content-sharing services described in article 17 of the DSM Directive – can also be sufficiently answered. Finally, the research will reach its conclusion section which consists of a summary of the answers to the two research questions.

2. The Foundations of European Copyright

2.1 Droit D'Auteur – the Roots of European Copyright Tradition

As explained in section 1.5, to fully understand the copyright framework of the European Union, one must first study European copyright tradition. Although copyright law is very much international, different copyright legal orders tend to have characteristics tied to the legal systems they inhabit. These characteristics are often rooted in regional history and their importance must not be underestimated. In order to understand the nature of copyright as well as that of the exceptions and limitations to author's rights in EU copyright law, it is necessary to first have an overview of European copyright history from its inception up until EU's own copyright initiatives.

Although artistic and literary works have existed since the very early times of human history (f.ex. art and symbolism in early history)[26], copyright law is, in comparison, a fairly new concept. It wasn't until the invention of printing that the first seeds of copyright law were planted in Europe, in the form of printing privileges.[27] Due to mankind being able to mass-produce books, printers and publishers required privileges for their respective undertakings so that third parties wouldn't also begin similar projects. These kinds of printing privileges slowly spread all over Europe. This system of privileges created the first means for authors to secure their economic interests during a time when the conception of art moved towards individualism, promoting the author's personality.[28] In England, out of this system of privileges came eventually the exclusive right to make copies of a work – in other words, *copyright*. The first known copyright law in history, the Statute of Queen Anne[29], was introduced in 1710. This statute gave the authors of books the exclusive right to print and sell their books for fourteen years from registration (and, if the author was still alive after these fourteen years, another fourteen years would be added to this duration).

Eventually, almost every country that had begun industrialization introduced protection for author's and inventors in the form of exclusive rights, following the example of England, France and the USA. It is important to note the difference between the Anglo-American and the continental European concept of copyright (the latter also known as *droit d'auteur*). The

---

[26] See f.ex. *Haarmann* 1996.
[27] *Bently – Kretschmer*, 2020, section Johannes of Speyer's Printing Monopoly, Venice (1469)
[28] *Haarmann* 2005, p. 1-4
[29] An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Author's or Purchasers of Such Copies, during the Times therein mentioned, Great Britain, Public General Acts 1709–1710, 8 & 9 Anne, c. 19

intent behind the Anglo-American copyright regulation (for example, as it is reflected in the US Constitution[30] Article I, Section 8, cl. 8[31]) is not only to reward the author for innovative work, but also to advance the society's interests. The Anglo-American approach to copyright is noticeably utilitarian. The continental European approach to the subject is very different. New works and inventions are worthy of protection merely because the authors and inventors had, according to European enlightenment philosophers, a natural ownership-like relation to their creations. In a way, these creations are an extension of their authors' personalities. This also explains why the protection of moral rights is stronger and more deeply rooted in civil law countries compared to common law countries. The continental European approach to copyright is very author centered. It should be pointed out, however, that European droit d'auteur and Anglo-American copyright have gotten closer over the last decades and aren't as incompatible to one another as they may have once been.[32]

Post French Revolution conception of copyright, droit d'auteur, was to be the early model for later continental European copyright law. All privileges were overturned in place of a copyright law that is said to enshrine the author. Exclusive rights belong to the author due to the property being a product of their own intellectual creation. In French tradition, one could describe it as there being a sacred bond between the author and his creation. This is a stark contrast to the US copyright clause that, reflecting the Statute of Queen Anne, gives to the public interest as much importance as to that of the author's, if not even more. This difference in philosophies between different copyright frameworks also explains why copyright legislation in author-centered continental European systems tend to be considerably more protective of author's rights than their Anglo-American counterparts.[33]

2.2 Internationalization of Copyright

2.2.1 Berne Convention

Although copyright law was at first strictly national (and in some ways still is), there were calls for universal copyright regulation as early as in the 19th century. The movement that began in an international Congress of Authors and Artists in Brussels in 1858 eventually concluded in 1883 in Berne, Switzerland. The conference, developed at the instigation of

[30] Constitution of the United States, 17th of September 1787, ratified 21st of June 1788
[31] US Constitution Article I, Section 8, cl. 8: ''(The Congress shall have Power) To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries'' (Underlines added).
[32] *Haarmann* 2014, p. 6-7. See also *Goldstein – Hugenholtz* 2010, p. 6-8 and 15-21.
[33] *Ginsburg* 1990, p. 991-996

Victor Hugo of the Association Littéraire et Artistique Internationale, produced a universal copyright treaty consisting of ten articles. The final draft of the Convention for the Protection of Literary and Artistic Works came into force on December 5th, 1887. Since then, the Convention has been amended numerous times with the last amendment being from 1979.[34]

The Berne Convention (later also ’’Berne’’ and ’’the Convention’’) is arguably the most important international copyright treaty in the world. It is governed by World Intellectual Property Organization (WIPO) and has been signed by 179 countries. It is aimed to protect literary and artistic works and the rights of their authors. The Convention’s most significant aspects are widely considered to be the three basic principles on which it is based on as well as the series of provisions determining the minimum protection to be granted. First, the *national treatment* principle in article 5(1) states that, when a work originates in one of the contracting states, it must be given the same level of protection in each of the contracting states that the latter grants its own nationals. Secondly, the *automatic protection* principle in article 5(2) prescribes that the enjoyment of the protection and the rights laid out in the Convention must not be conditional upon compliance of any formality. This principle applies to both the rights granted by the Convention as well as whatever rights the contracting states grant to their nationals currently or in the future. Finally, the principle of *independent protection* means that the protection of a work is independent of the existence of protection in the country of origin of the work. A contracting state can deny the protection of a work, however, if they provide a longer term of protection than the Convention requires and the protection in the country of origin has ceased.[35]

There are several minimum requirements in the Berne Convention. Article 2(1) describes ’’literary and artistic works’’ as every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression. In addition to containing certain exclusive rights to authors, Berne also introduces a set of provisions for exceptions and limitations. These include the quotation exception in article 10(1) as well as the three-step-test in article 9(2) – both of which are later analyzed further. On top of substantive rights, the Convention also provides for strong moral rights (article 6bis). The author has the right to object to any distortion, mutilation or other modification of, or other derogatory action in relation to the work, even after the transfer of economic rights to the work.

---

[34] *Goldstein – Hugenholtz* 2010, p. 33-34

[35] World Intellectual Property Organization (WIPO) 2020, section Summary of the Berne Convention for the Protection of Literary and Artistic Works (1886)

2.2.2 TRIPS Agreement

The Agreement on Trade-Related Aspects of Intellectual Property Rights – the TRIPS Agreement (later also ''TRIPS'') – was initiated due to a stalemate in efforts to increase the minimum standards of the Berne Convention and other intellectual property treaties, along with growing frustration over weak enforcement measures.[36] TRIPS solidified the importance of intellectual property as part of the multilateral trading system and was a result of intellectual property's growing trade political significance[37]. The treaty adheres to the national treatment principle (article 3) as well as the *most-favored-nation* principle (article 4), latter of which states that any advantage, favor, privilege or immunity granted by a member state to nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other member states.

According to article 9(1) of TRIPS, members must comply with articles 1-21 of the Berne Convention (Paris Act 1971). These articles encompass very significant provisions, such as the automatic protection principle, the three-step-test and the quotation copyright exception. It is through article 9(1) of TRIPS that the EU is obligated to follow these provisions of the Berne Convention as the EU is a member of the former, but not the latter. It is noteworthy that, according to the very same article 9(1) of TRIPS, members do not have rights or obligations in relation to the rights conferred under article 6bis of Berne or the rights derived therefrom – in other words, the provision concerning moral rights.

2.2.3 WIPO Copyright Treaty

Lastly, it is worthwhile to briefly visit the WIPO Copyright Treaty. This treaty is a special agreement under the Berne Convention that deals with the protection of works and the rights of their authors in the digital environment. Any contracting party must comply with the substantive portion of Berne 1971 Act – including EU. The treaty introduces two new subject-matters to be protected by copyright; computer programs and databases. In addition to the rights granted by the Berne Convention, the treaty also grants the right of distribution, the right of rental and a broader right of communication to the public. However, most interestingly – at least, in regard to the topic of this thesis – the treaty develops the three-step-test provision from Berne further. This shall be explained shortly.[38]

[36] *Goldstein – Hugenholtz* 2010, p. 73
[37] *Otten – Wager* 1996, p. 393
[38] World Intellectual Property Organization 2020, section Summary of the WIPO Copyright Treaty (WCT) (1996)

2.2.4 The Three-Step-Test

The three-step-test is a general clause regulating exceptions and limitations. Due to its significance to the topic of this research, it is advisable to examine it more closely under a separate heading. As the name of the doctrine suggests, it consists of three identifiable steps that have to be met for an exception or limitation, or the use of an exception or limitation, to be valid. The test was first introduced to international copyright regulation by the Berne Convention in the Stockholm Act (1967). Article 9(2) of Berne reads as follows:

> ''It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in (1) certain special cases, provided that such reproduction (2) does not conflict with a normal exploitation of the work and (3) does not unreasonably prejudice the legitimate interests of the author.'' (numbers added to indicate the ''steps'')

The provision refers to the kind of reproduction of works not authorized by the author – in other words, copyright exceptions and limitations. These kinds of acts must be limited to certain special cases where such reproduction does not conflict with a normal exploitation of the work. The reproduction must also not unreasonably prejudice the legitimate interests of the author. The three-step-test was adopted as a response to the recognition of the general right to reproduction. The test was a compromise solution in place of a finite list of specific exceptions. As such, the three steps in the article are open for interpretation and have been utilized differently in different countries. Some countries view the three-step-test as a rule that national exceptions and limitations must adhere to, while others have adopted the test as a whole in their own national legislation, creating a kind of ''fair dealing'' doctrine that allows certain acts of reproduction of works on case-by-case basis.[39]

Article 13 of the TRIPS Agreement reiterates the three-step-test introduced in Berne in article 9(2). It is also the only instance where TRIPS speaks of exceptions and limitations. Article 13 of the agreement, in its entirety, reads as follows:

> ''Members shall confine limitations or exceptions to exclusive rights to (1) certain special cases which (2) do not conflict with a normal exploitation of the work and (3) do not unreasonably prejudice the legitimate interests of the right holder.'' (numbers added)

The wording in Berne, however, focuses on authorization of reproduction of works whereas article 13 of TRIPS deals with exceptions and limitations as well as exclusive rights in general. Another interesting observation is the usage of the term ''right holder'' in place of Berne's ''author''. Nevertheless, members of the TRIPS Agreement are still obligated to

---

[39] See *Geiger – Gervais – Senftleben* 2015, p. 167-169 and 173-176

follow article 9(2) of Berne, as per article 9(1) of the agreement. It is then likely that article 13 of TRIPS merely reaffirms the three-step-test with terminology more suitable to the agreement rather than introduces a new version of it. Admittedly, the wording in TRIPS does extend the scope of the test further in comparison to that of Berne's.

The WIPO Copyright Treaty incorporates the three-step-test in article 10. Interestingly, the provision extends the test's application to all rights – not just to reproduction of works. Indeed, the provision speaks of ''rights granted to authors'' on a general level both when applying the treaty itself and when applying the Berne Convention. Furthermore, the Agreed Statement accompanying the treaty states that such exceptions and limitations, as established in national law in compliance with the Berne Convention, may be extended to the digital environment. Contracting states may even craft new exceptions and limitations appropriate to the digital environment. The extension or creation of new exception and limitations is allowed if the conditions of the three-step-test are met.[40]

2.3 The Green Papers – First EU Copyright Initiatives

Copyright initiatives as EU projects became more and more relevant towards the end of the 80s. The reason for this, as is widely believed, is the steady increase in significance of information as an economic commodity. Harmonizing copyright law between the member states was in the union's interest in order to guarantee the proper functioning of the internal market, which is one of the core objectives of the EU as per title IV of TFEU. To ensure the proper functioning of the single market, article 26 (1-2)[41] of TFEU almost called for action on a union level in the field of copyright.[42]

Article 114(1) of TFEU states that the parliament and the council shall adopt the measures for the approximation of the provisions which have as their object the establishment and functioning of the internal market. Furthermore, article 36 states that provisions relating to the free movement of goods shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of – among other things – the protection of industrial and commercial property. This is due to article 345 prohibiting treaties that would prejudice the rules in the member states concerning property ownership, although the

---

[40] World Intellectual Property Organization 2020, section Summary of the WIPO Copyright Treaty (WCT) (1996)

[41] TFEU article 26(1): ''The Union *shall* adopt measures with the aim of establishing or ensuring the functioning of the internal market, in accordance with the relevant provisions of the Treaties''. Article 26(2): ''The internal market *shall* comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties.'' (Italics added)

[42] See *Rosati* 2013, p. 10-12

relationship between the free movement provisions and intellectual property hasn't always been clear cut.[43] Regardless, it is the viewpoint of EU that too empowered IP rights on national level can be a hinderance to the proper functioning of the internal market in the form of arbitrary discrimination or disguised restriction on trade. The CJEU has ruled numerous times that the application of national measures that hamper the free movement of goods or services is allowed only to the extent that is necessary to protect the ''specific subject-matter'', which is understood as the essence of an intellectual property right.[44] The CJEU has used this kind of reasoning in cases such as *Deutsche Grammophon*[45] and *Coditel*[46].

After a series of similar cases[47], it was becoming obvious to the union that copyright would play an important role in a functioning internal market. The first seeds for copyright harmonization were sown by the commission in June 1988, in the form a document called ''Green Paper on Copyright and the Challenge of Technology: Copyright Issues Requiring Immediate Action''[48]. The first chapter of the Green Paper is dedicated to explaining the basis for the initiative. The commission highlighted the importance of clearly defining the relationship of copyright and the internal market (1.1.2). Many copyright-related concerns were identified, not least of them being the challenges introduced by recent technological developments of that time (1.1.3). Indeed, the issues that the Commission considered the most urgent, among other things, were piracy, home copying of sound & audio-visual material and the protection available to computer programs and databases (1.6.2).

The intention behind the initiative was to ensure the proper functioning of the internal market by eliminating obstacles and legal differences distorting these objectives. The intervention was deemed necessary in order to improve Europe's competitiveness in areas of potential growth, such as media and information. The report also raised concerns around third party misappropriation of creative efforts and substantial investments within the community,

[43] See *Rosati* 2013, p. 12-14
[44] *Van Eechoud* & *others* 2012, p. 3
[45] C-78/70 *Deutsche Grammophon* ECLI:EU:C:1971:59. See para 11: ''Although it permits prohibitions or restrictions on the free movement of products, which are justified for the purpose of protecting industrial and commercial property, Article 36 (of TFEU) only admits derogations from that freedom to the extent to which they are justified for the purpose of safeguarding rights which constitute the specific subject-matter of such property''
[46] C-62/79 *Coditel* ECLI:EU:C:1980:84. See p. 897: ''It (the Commission of the European Communities) considers that it is a matter of finding a way of reconciling the principle of freedom to provide services with the protection of the specific subject-matter of the copyright in question.''
[47] For more information, see *Van Eechoud* & *others* 2012, p. 3 and the cases mentioned therein
[48] COM (1988) 172, final

striking a fair balance between the interests of different stakeholders as well as the cross-border impact that new technology has had on dissemination and reproduction techniques.[49]

Harmonization efforts continued throughout the 90s. In 1994, the White Paper titled ''Growth, Competitiveness, Employment. The Challenges and Ways Forward into the 21st Century'' was published.[50] This document marks the first time the term ''information society'' is used. It is introduced in the section discussing the changing society and new technologies.[51] Information society is described as a society in which management, quality and speed of information are key factors to competitiveness. The report predicted the emerging technologies to dramatically change many aspects of economic and social life as well as to result in major gains in productivity and industry. In relation to intellectual property, the document deemed it necessary to extend intellectual property law to efficiently protect intellectual property[52]. The follow-up to the White Paper, The Bangemann report[53], placed high priority on intellectual property rights in the wake of the information society, calling for common rules to be established and enforced by the member states.[54] The follow-up report saw intellectual property rights as important factors in developing a competitive European industry in the area of information technology as well as across a wide variety of industrial and cultural sectors. The Bangemann report also stated that Europe has a vested interest in maintaining a high level of protection of intellectual property. It also recognized the cross-border nature of these new phenomena with calls for regular world-wide consultation with all interested parties.

This led to the commission's communication on Europe's way to the information society.[55] In it, the commission called for a review of IPR measures as well as an examination for the possible need for additional measures.[56] The commission also announced an upcoming Green Paper on IPRs in the information society. The subsequent Green Paper on Copyright and Related Rights in the Information Society was published on July 19th, 1995.[57] In it, the commission explains that the protection of copyright and related rights is vital to the internal

[49] Rosati 2013, p. 15-16
[50] COM (1993) 700, final
[51] COM (1993) 700, final, p. 107
[52] COM (1993) 700, final, p. 24 & 83
[53] COM (1994) supplement 2/94 Bull. EU (The Bangemann report), p. 5-40
[54] The Bangemann report, p. 21-22
[55] COM (1994) 347, final
[56] COM (1994) 347, final, p. 5-6
[57] COM (1995) 382, final

market and is closely tied to the free movement of goods and services.[58] It is important that the community is to be treated as one market in which to work. Therefore, rules concerning copyright and related rights should align from country to country. Otherwise, the internal market would become fragmented. According to the commission, the fact that in the information society works would increasingly more often be circulated in non-material form only further solidifies the insufficiency of national, territorial copyright solutions. Thus, the commission deemed it necessary to harmonize legislation on these matters on union level.

On November 20th, 1996, the commission issued its follow-up to the Green Paper.[59] In it, the commission reiterated the vitality of the single market for the development of the information society in Europe. Fragmented, inconsistent national responses to technological developments could have jeopardized its functioning. According to the commission, copyright and related rights play an important role in the information society, which called for legislative action in this field for the proper functioning of the single market. While Europe's traditionally high level of copyright protection were to be maintained, there was a need to bring about a favorable environment which protects and stimulates creativity and innovative activities. Additionally, a fair balance of rights and interests between different stakeholders had to be ensured.[60]

2.4 Information Society Directive

2.4.1 Introduction

EU copyright initiatives eventually culminated into the Directive on copyright and related rights in the Information Society – the Information Society Directive aka. the InfoSoc. Directive. The directive was considerably larger than the technological development required at the time, presumably as an attempt to make it future-proof.[61] Although the directive particularly harmonized basic economic rights, the largest part of the directive deals with copyright exceptions and limitations. This is despite the fact that exceptions and limitations received little attention in the Green Papers prior the directive.

As explained before, EU law exists within its own legal system outside of international law. One of the unique features of this legal system (and the interpretive methods it requires) is its cumulative reasoning in legal interpretation. Not only must focus be given to literal

[58] COM (1995) 382, final, p. 10
[59] COM (1996) 568, final
[60] COM (1996) 568, final, p. 2
[61] *Rosati* 2013, p. 18-20

interpretation, but the purpose and objectives of the legal framework in inhabits as well as the coherence of the entire legal system in general must be kept in mind. With that said, it is important to review the purpose and objectives of the InfoSoc. Directive concerning the directive as a whole as well as copyright exceptions and limitations – in particular, the quotation exception. This is done best by examining the appropriate recitals of the directive.

Recitals 1-6 of the Commission's proposal[62] for the InfoSoc. Directive highlight the importance of harmonizing laws on copyright and related rights to ensure the smooth functioning of the internal market, to foster the development of the Information Society in Europe, to reduce legal uncertainty and fragmentation between member states and to respond to the economic realities associated with new technological development. This coincides with what was discussed in section 2.3 – the growing economic significance of copyright required union-level initiatives to ensure the functioning of the single market. In continental European tradition, the commission insists that the harmonization efforts must be based on a high level of protection to cultivate intellectual creation (recital 8). It was in their report concerning the proposal that the Committee on Legal Affairs and Citizens' Rights suggested an amendment underlining compliance with the fundamental principles of law, such as freedom of expression and the public interest.[63] All of these recitals – in some form or another – made their way to the final draft of the directive and can be seen as constructing the foundational basis of the directive out of which its purpose and objectives are to be derived from.

2.4.2 Exceptions and Limitations – The Quotation Exception

The recitals concerning exceptions and limitations in particular are recitals 14 and 31-45 of the directive. Many of these recitals are rather specific and restricted to certain situations. For the purposes of this thesis, it is reasonable only to focus on a certain amount of them. Recital 31 begins with demanding that a fair balance of rights and interests between the different categories of rightholders and users of protected subject-matter must be safeguarded – a statement that can be viewed as forming the nucleus of the telos of exceptions and limitations. It is indeed through this balancing exercise that the CJEU often interprets and defines the scope of limitations and exceptions, sometimes even resulting in creating legal norms.[64] This is discussed further in sections 2.5-2.6. Furthermore, recital 31

---

[62] COM (1997) 628, final
[63] A4 (1999) 26, p. 4
[64] *Jongsma* 2019, p. 15-16

calls for reassessment of the existing limitations and exceptions in the ''new electronic environment'' and highlights the problematic nature of differences in the exceptions and limitations to certain restricted acts for a functioning single market. The recital closes with stating that both the justification and the degree of harmonization of exceptions and limitations should be based on their impact on the smooth functioning of the internal market. That last line is especially interesting as it is the first hint towards the extent that the EU is willing to harmonize provisions on copyright exceptions and limitations.

In recital 32, it is explained that the list of exceptions and limitations to the reproduction right and the right of communication to the public provided by the directive is exhaustive. This implies that the member states aren't allowed to introduce exceptions and limitations to these exclusive rights beyond the ones provided by the directive – an issue that is discussed further in section 2.6.3. Recital 32 ensures, however, that the list provided takes into account different legal traditions within the union while also aiming to ensure a functioning single market. Still, the tension between harmonization and respecting legal traditions of the member states is obvious and can also partly explain the different viewpoints that European legal scholars have of the legal reasoning of the CJEU[65]. A type of a list concerning exceptions and limitations is provided in recital 34, although it doesn't appear to be the finite list recital 32 was referring to. Rather, it gives the impression of a guideline provision for a set of exceptions and limitations that the member states should be given the option of providing for. It still warrants a mention as it is the only recital that mentions the quotation exception – as one of the items on the list. However, the quotation exception isn't elaborated on beyond mentioning it by name. Therefore, recital 34 isn't likely of particular interest in terms of interpreting the quotation exception.

Finally, recital 44 demands that, when applying the exceptions and limitations provided by the InfoSoc. Directive, they should be exercised in accordance with international obligations. Application of exceptions and limitations must not prejudice the legitimate interests of the rightholder or conflict with the normal exploitation of his work or other subject-matter – expressions echoing the three-step-test provision of Berne, TRIPS and the WIPO Copyright Treaty. Additionally, according to the recital, the exceptions and limitations should reflect the increased economic impact that they may have in the context of the new electronic

[65] See *Bobek* ELR 2014, p. 1-4 & 7-10

environment. Therefore, it is explained, the scope of the exceptions and limitations may have to be even more limited when it comes to certain new uses of copyright and subject-matter.

Recital 44 seems to underline a reserved approach that ought to be taken when faced with new technological development. It is reasonable to interpret that the ''increased economic impact'' refers to one aimed at the author's or the rightholder's legitimate interests as it is introduced right after the three-step-test guideline. The recital also places exceptions and limitations firmly in subordination to the three-step-test. Therefore, at the time of drafting the directive, it is clear that the provisions on exceptions and limitations – even the more open-ended ones – weren't meant to be all-encompassing one-size-fit-all solutions. Rather, they were crafted with certain types of acts in mind with the knowledge that the wording of the provisions might, on a literal interpretation, result in some unforeseen consequences to copyright brought about by new technology. In that kind of a situation, the exceptions and limitations – such as the quotation exception – might have to be limited as not to interfere too much with the author's or rightholder's legitimate interests. This in turn shines some clarity on evaluating the scope of the quotation exception.

In conclusion, although the recitals of the InfoSoc. Directive have little to say about the content of the quotation exception itself, there are several recitals explaining the telos of exceptions and limitations in addition to that of the directive as a whole. This in turn helps in outlining the boundaries and the scope of individual provisions. The quotation exception – like all exceptions and limitations – exists to strike a fair balance between the rights and interests of the rightholders and the users of protected subject-matter. It serves the public interest and ought to be harmonized insofar as to ensure the smooth functioning of the internal market. Still, using the quotation exception must not prejudice the legitimate interests of the rightholders and conflict with normal exploitation of the work or other subject-matter. In other words, when determining the scope of the quotation exception, the smooth functioning of the internal market is an expansive factor while the legitimate interests of the rightholders are restrictive factors.

2.5 The CJEU as the Interpreter of EU Law

In order to interpret EU copyright legislation appropriately, it is advisable to elaborate on how EU law is generally interpreted. EU law doesn't contain general rules on interpretation similar to many international legal texts, such as article 1:106 of Principles of European

Contract Law[66] (PECL) and articles 31-33 of Vienna Convention on the Law of Treaties[67] (VCLT). To be specific, EU law doesn't have rules on how legal text should be interpreted and what meanings different terms should be given. EU is also not a signatory of VCLT and its relationship to international law is somewhat complex.[68] In fact, the only rule in the foundational EU treaties regarding interpretation is in article 19 of EUT. According to it, it is the responsibility of the CJEU to ensure that in the interpretation and application of the foundational treaties (EUT & TFEU) the law is observed. Furthermore, the CJEU shall, at the request of courts and tribunals of the Member States, give preliminary rulings on the interpretation of EU law. More plainly, according to the official website of the EU, the role of the CJEU is to ensure that EU law is interpreted and applied the same way in every EU country[69].

As discussed earlier, the CJEU considers EU law to exist within its own autonomous legal system, separate from international law in general.[70] This stance was also outlined in *Van Gend en Loos*, where the CJEU concluded that the Union (the Community at the time) constitutes its own legal order.[71] Regardless, although the EU is not a signatory of VCLT, the CJEU has found that its principles can be applied to the EU to the extent that they represent customary EU law.[72] Mainly EU does this to interpret international agreements to which the EU is a party (it is important to note the influence of Berne, TRIPS and WIPO Copyright Treaty on EU copyright framework). Indeed, one of the ways in which CJEU has applied the VCLT is through treaty interpretation. According to VCLT article 31(1), a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

This is not a far cry from how the CJEU itself interprets EU law. In *Van Gend en Loos*, the CJEU already referred to ''the spirit, the general scheme and the wording of the EEC treaty'' as a basis for its judgment.[73] This echoes what was already brought up in section 1.3, the importance of systemic and teleological interpretation in EU law (among wording). It is not sufficient to simply focus on the telos of a particular legal provision, but rather the

---

[66] The Principles of European Contract Law 2002, (Parts I, II revised 1998, part III 2002), European Union
[67] Vienna Convention on the Law of Treaties (with annex), 23rd of May 1969, in force 27th of January 1980
[68] *Odermatt* 2019, p. 7-9 & p. 20
[69] European Union 2020, section Court of Justice of the European Union (CJEU)
[70] C-6/64 *Costa* ECLI:EU:C:1964:66, p. 593
[71] C-26/62 *Van Gend en Loos* ECLI:EU:C:1963:1, p. 12
[72] *Odermatt* 2019, p. 20
[73] C-26/62 *Van Gend en Loos* ECLI:EU:C:1963:1, p. 12-13

''constitutional telos'' of the EU legal order in whole.[74] In light of TFEU article 26 and cases such as *Deutsche Grammophon* and *Coditel*, it is clear that ensuring the functioning of the single market is a key component of this constitutional *telos* (see section 2.3). This must be kept in mind when interpreting the quotation exception.

The VCLT prioritizes the objective, literal meaning of the word over the subjective meaning that may be found in preparatory works and emphasize the latter only in situations when the objective meaning is left ambiguous or obscure (article 31-32). As mentioned above, this is roughly how the CJEU also interprets EU law, with a slight difference. In a teleological approach, it is not sufficient to simply focus on the telos of the rules, but the telos of the legal context in which those rules exist.[75] Arguments based on subjective intention of the legislator aren't commonly found in CJEU case law. In the absence of any further clarification on the telos of the quotation exception, the interpretive boundaries are to be found, in addition to the telos of the InfoSoc. Directive, in the telos of the EU legal system (in other words, in the articles of EUT and TFEU). This ''meta-teleological'' approach has often been interpreted to mean that the CJEU, if asked to interpret EU law, is likely to adopt a pro-integrationist solution in favor of an anti-integrationist one.[76] The most controversial examples of this meta-teleological interpretation are cases such as *Mangold*[77], *Sturgeon*[78] and *Pringle*[79] where the CJEU arguably tested the boundaries of teleological approach beside the written law and, according to the most fierce critics, even ruled *contra legem*, against written EU law. Though extreme cases like these are undoubtably rare, both the defenders and critics of CJEU legal reasoning mostly agree that this cumulative reasoning is what the court utilizes to interpret EU law.

2.6 Exceptions and Limitations in EU Copyright Law – Safeguarding Fundamental Rights

2.6.1 Autonomous Concepts of the EU

There is no doubt that most copyright exceptions and limitations are autonomous concepts of the EU. What this means is that member states have the option to either implement or not to implement the optional provisions of the InfoSoc. Directive to their legislation. They do

[74] *Maduro* EJLS 2007, p. 140
[75] *Maduro* EJLS 2007, p. 140
[76] See. *Bobek* ELR 2014, p. 4-12
[77] C-144/04 *Mangold* ECLI:EU:C:2005:709. See also *Wiesbrock* MJECL 2011, p. 201-218
[78] Joined cases C-402/07 and C-432/07 *Sturgeon & Others* ECLI:EU:C:2009:716. See also AG *Sharpston* on *Sturgeon & Others*.
[79] C-370/12 *Pringle* ECLI:EU:C:2012:756. See also *Graig* MJECL 2013, p. 215-220

not, however, have the authority to determine the content of these provisions – that authority lies with the CJEU. This is evident due to a series of CJEU rulings on the topic and is the conclusion reached by many legal experts.[80]

In *Padawan*, the CJEU ruled that, when a provision makes no reference to national law in regards to a concept provided therein, the terms in question must be given an independent and uniform interpretation throughout the Union.[81] This conclusion was reached on the basis of earlier, settled case law.[82] In *Padawan*, the concept of ''fair compensation'' in a provision of the InfoSoc. Directive made no reference to national law, leading the CJEU to conclude that ''fair compensation'' is an autonomous concept of the EU and requires uniform interpretation. To support this interpretation, the CJEU referred to the aims of the directive – namely, recital 32 and the need to ensure the functioning of the internal market through uniform interpretation of the provision.[83] This called for ''elaboration of autonomous concepts of European Union law'' because an interpretation according to which member states would be free to determine the limits in an inconsistent and unharmonized manner would be contrary to the objective of the InfoSoc. Directive. Much for the same reasons, the CJEU concluded, In *DR & TV2 Danmark*, that the expression ''by means of its own facilities'' is an autonomous EU concept due to the provision not making any reference to national law[84].

More plainly, the CJEU ruled in *ACI Adam* (regarding private use) that member states have the option to introduce the different exceptions provided for in article 5 of the InfoSoc. Directive but they ''must be applied coherently'' should they make the choice to introduce the provisions.[85] This is necessary, according to the CJEU, to achieve the objective of the InfoSoc. Directive and to ensure the functioning of the internal market as allowing the member states to define the scope of the exceptions unharmoniously would be counter to these objectives. At the same time, the CJEU noted that the member states are free to introduce the different exceptions provided for in article 5 ''in accordance with their legal traditions'' – a statement that could be seen as an odd fit to the court's overall conclusion. If

[80] See f.ex. *Jongsma* 2019, p. 203-204 and *European Copyright Society* 2014, p. 5.
[81] C-467/08 *Padawan* ECLI:EU:C:2010:620, para 32
[82] See f.ex. C-327/82 *Ekro* ECLI:EU:C:1984:11, para 11 and Case C-287/98 *Linster* ECLI:EU:C:2000:468, para 43
[83] C-467/08 *Padawan* ECLI:EU:C:2010:620, paras 33-37. See also C-479/04 *Laserdisken* ECLI:EU:C:2006:549, para 33, where the CJEU concluded that legislative actions on a national level concerning copyright and the related rights might cause distortion to the functioning of the internal market.
[84] C-510/10 *DR and TV2 Danmark* ECLI:EU:C:2012:244, paras 33-34
[85] C-435/12 *ACI Adam* ECLI:EU:C:2014:254, paras 34-35

the member states' independent discretion truly consists entirely of the decision to either implement the provisions or not it is rather difficult to see the influence that different legal traditions might have in this process. On the other hand, the CJEU seems to imply that the list of exceptions and limitations in article 5 were created with taking different legal traditions of the member states into account, citing recital 32 of the InfoSoc. Directive. In other words, the provisions are in accordance with the legal traditions of the member states as they are. Although the legal reasoning of the CJEU can be a controversial topic among legal commentators, this rationale of a harmony between different legal traditions and EU jurisprudence isn't unheard of in judicial literature either[86].

2.6.2 Deckmyn – Exceptions and Limitations Receive Uniform Interpretation

Insofar as copyright exceptions and limitations are concerned, perhaps no other ruling in recent years has been more influential than *Deckmyn*[87]. In that case, the CJEU interpreted the parody exception in article 5(3)(k) of the InfoSoc. Directive. The Brussels Court of Appeals asked the CJEU if ''parody'' is an autonomous concept of the EU and, if so, what kind of conditions must be met in order for a work to be considered a parody. Citing *Padawan* and *ACI Adam*, the CJEU confirmed that ''parody'' indeed must be regarded as an autonomous concept of the EU due to article 5(3)(k) not making any reference to national law. In the absence of any definition of parody in the directive, the CJEU argued that the term's meaning should be determined by considering its usual meaning in everyday language, while also taking into account the context in which it occurs and the purposes of the rules of which it is part. This argumentation echoes the CJEU's cumulative legal interpretation that was discussed above in section 2.5.

There are several key arguments in the *Deckmyn* ruling that should be pointed out. Although the court concurred the Advocate General's view of what is the everyday meaning of ''parody'' – that is to say, a work, that 1) evokes an existing work while being noticeably different from it and 2) constitutes an expression of humor or mockery – it rejected the conditions proposed by the Brussels Court of Appeals as possible requirements for a work to be considered parody.[88] The CJEU concluded that the conditions proposed by the Brussels Court of Appeals (such as the requirement of displaying an original character of its own and mentioning the source of the work) do not follow from the ordinary, everyday meaning of

[86] See f.ex. *Nicola* AJCL 2016, p. 865-890
[87] C-201/13 *Deckmyn* ECLI:EU:C:2014:2132. See especially paras 14-17 & 19
[88] C-201/13 *Deckmyn* ECLI:EU:C:2014:2132, paras 20-24

’’parody’’ nor from the context of the provision. Therefore, the court argued, the provision must be interpreted strictly in order to enable its effectiveness.

Deckmyn also reaffirmed the relationship between fundamental rights and copyright exceptions and limitations. Citing recital 3 of the InfoSoc. Directive, the court argued that the InfoSoc. Directive aims to implement the four freedoms of the internal market and which relates to observance of the fundamental principles of law and especially of property, including intellectual property, and freedom of expression and the public interest. The CJEU pointed out that parody is an appropriate way of expressing an opinion, indicating a link between parody and freedom of expression. Adding to this, the court also pointed out that article 5 of the InfoSoc. Directive seeks to fulfill the objectives laid out in recital 31 – to strike a fair balance between the rights and interests of different rightholders. In particular, a fair balance between the rights and interests of the author and the user of the work must be struck in a case-by-case analysis.[89]

Lastly, there was a remark in *Deckmyn* that proved to be somewhat controversial. The CJEU had granted to Vandersteen and others that the ’’discriminatory message’’ conveyed by the parody drawing in question is something that they have a legitimate interest in not having associated with the protected work. Thus, it would be a legitimate interest of the author or the rightholder that should be taken into account in the balancing exercise. In doing so, the court seemed to venture to the realms of moral rights even though they had been explicitly left outside the scope of harmonization. It is then questionable whether the CJEU should take the moral rights into account in its harmonization efforts. Not only that, the court appeared to recognize interests that do not have a particular basis in European law as these legitimate interests belong not only to the author, but also to any ’’holders of rights’’. Although moral rights themselves aren’t uncommon in European legal systems, they typically aren’t granted to the successors of the author, but rather the author alone. Thus, this conclusion has raised criticism about ambiguity and opening the possibility of private censorship as well as whether copyright law is the right place to evaluate these kinds of questions.[90]

After *Deckmyn,* the question arose: what is left for national courts’ discretion on parody? There have been comments made that if member states are free to choose whether to

---

[89] C-201/13 *Deckmyn* ECLI:EU:C:2014:2132, paras 25-28

[90] C-201/13 *Deckmyn* ECLI:EU:C:2014:2132*,* paras 29-31. See *Jongsma* 2019, p. 132-133 & 192-193 and *Jongsma* IRIPCL 2017, p. 665-666. See also *European Copyright Society* 2014, p. 7.

implement the optional provisions or not, they must also be allowed to introduce the provisions with a narrower scope.[91] Although this kind of reasoning is not without its merits, it would be an odd conclusion to reach when one takes into account that the CJEU explicitly rejected the conditions proposed by the Brussels Court of Appeals. In no uncertain terms, the CJEU denied that limitations & exceptions should be transposed restrictively in national law.[92] This is evident by the court's reasoning in not only *Deckmyn*, but in *TV2 Danmark, Padawan* and *ACI Adam* as well. The court reasoned that an unharmonized application of the limits of the exceptions could potentially cause inconsistencies and would run contrary to the directive's objective of ensuring the functioning of the single market. It is then very unlikely that the CJEU would agree with member states introducing criteria not found in the InfoSoc. Directive for the exceptions[93].

The logical conclusion follows that the discretion allowed for the member states is to be found within the autonomous concept. Following the court's two-fold definition of a parody, it is then left for the national courts to determine if 1) the work at hand is to be considered a parody at all and 2) is the parody lawful (striking a fair balance).[94] The Advocate General, after reviewing the definitions of parody of multiple different legal systems, presented the court with a definition – that parody must evoke an existing work while being noticeably different from it and provoke an expression of humor or mockery.[95] This first criteria is unlikely to disrupt national legal traditions on parody as this is very similar to how member states have defined parody from the beginning.[96] However, it is through the interpretation of fair balance that might result in differences in points of view and can, at least to some extent, revive the national concepts of parody[97]. For the purposes of this thesis, however, it is not necessary to explore the concept of parody any further. Still, insofar as applicable, these arguments no doubt apply to exceptions and limitations in general – including the quotation exception.

2.6.3 An Exhaustive (and a Mandatory?) Set of Exceptions and Limitations

In *Spiegel Online*, the referring court asked whether fundamental rights had an influence in the scope of the exceptions and limitations in article 5(3) and whether fundamental rights

[91] *Jongsma* IRIPCL 2017, p. 670. Also see, regarding quotation, see AG *Trstenjak* on *Painer*, para 190.
[92] *European Copyright Society* 2014, p. 5
[93] *Jongsma* IRIPCL 2017, p. 670-671
[94] *Jongsma* IRIPCL 2017, p. 671-673 and *Seville* NLSIR 2015, p. 12-14
[95] AG *Cruz Villalón* on *Deckmyn*, para 89
[96] *Jongsma* IRIPCL 2017, p. 655-656 & 664-665
[97] *Jongsma* IRIPCL 2017, p. 673-679.

can justify exceptions and limitations beyond those provided in article 5(3). These fundamental rights are enshrined in the Charter of Fundamental Rights of the European Union (CFR).[98] It should be noted that nearly identical questions were referred by the very same court in *Funke Medien*[99] a.k.a *Afghanistan Papers,* as pointed out by Advocate General (AG) Szpunar.[100] The CJEU decided to answer the latter question first.

Szpunar concluded that freedom of expression and media do not justify a limitation or exception beyond those provided in articles 5(2) and 5(3).[101] The CJEU agreed, beginning its reasoning by referencing the telos of the directive, found in the recitals and the preparatory works.[102] The Explanatory Memorandum to Proposal of the InfoSoc. Directive describes the exceptions and limitations in the directive exhaustive.[103] The same is evident from recital 32 of the directive. According to the court, it follows from recitals 3 and 31 that the harmonization aims to safeguard, in particular in the electronic environment, a fair balance between different rightholders' interests.[104] The court also stated that this balancing mechanism is contained withing the InfoSoc. Directive with the author's exclusive rights (articles 2-4) and the exceptions and limitations (article 5).[105] Interestingly, the court hinted towards these exceptions and limitations being possibly mandatory as they represent fundamental rights that the member states must respect. This is slightly peculiar as the provision are worded in a manner that they are optional. Still, this approach is seemingly understandable from a fundamental rights point of view.[106]

Just like the court, AG Szpunar also stated that the exceptions and limitations provided in article 5(3) of the InfoSoc. Directive are already a product of weighing fundamental rights against each other (author's exclusive rights vs freedom of expression) and the legislative choices in this regard should generally be respected. Furthermore, according to Szpunar, allowing the introduction of exceptions and limitations beyond those in article 5(3) on grounds of argumentation based on fundamental rights would be tantamount to introducing into EU law ''a kind of fair use clause'' which would interfere with the effects of the

[98] The Charter of Fundamental Rights of the European Union (OJ C 326, 26.10.2012, p. 391-407)
[99] C-469/17 *Funke Medien NRW* (*Afghanistan Papers*) ECLI:EU:C:2019:623
[100] AG *Szpunar* on *Spiegel Online*, para 61
[101] AG *Szpunar* on *Spiegel Online,* para 81. The last line should be noted: ''This is also the case in the situation where the author of the work in question holds public office and that work discloses his beliefs on matters of public interest, in so far as that work is already available to the public.''
[102] C-516/17 *Spiegel Online* ECLI:EU:C:2019:625, paras 41-42
[103] COM (1997) 628, final, recital 22
[104] C-516/17 *Spiegel Online* ECLI:EU:C:2019:625, para 42
[105] C-516/17 *Spiegel Online* ECLI:EU:C:2019:625, para 43
[106] The Court answered similarly in C-469/17 *Afghanistan Papers* ECLI:EU:C:2019:623*,* para 56-58

directive and its harmonization goals. As a result, Szpunar argued, the protection enjoyed by the author would ultimately depend on how sensitive the national courts are to freedom of expression, which would be very counterproductive to harmonization efforts.[107]

The fundamental rights, according to the court, draw inspiration from the constitutional traditions common to the member states and international instruments for the protection of human rights.[108] In relation to that, the court stated that articles 5(3)(c-d) (in other words, reproduction by press and the quotation exception) are specifically aimed to favor freedom of expression and the press over the interests of the author – something that the court had, to some extent at least, established before in *Painer*.[109] A fair balance between fundamental rights is to be struck in particular between the right to intellectual property (article 17(2) of CFR) and freedom of expression and information (article 11 of CFR). The CJEU added that article 5(5) of the InfoSoc. Directive – the three-step-test – also serves to strike this fair balance as an additional requirement to articles 5(1-4).[110] Thus, the court took the stand that the three-step-test should be regarded as an additional provision on top of the previous ones on exceptions and limitations.[111]

Similarly to AG Szpunar, the CJEU found it troublesome for harmonization purposes and legal certainty to allow member states to move beyond the exhaustive list of exceptions and limitations listed in article 5.[112] After all, recital 31 of the InfoSoc. Directive explicitly states that the existing differences in exceptions and limitations had direct negative effects to the functioning of the internal market – a problem that the harmonization process attempts to overcome. It also follows from recital 32 that these exceptions and limitations should be applied consistently, as no provision in the directive envisages the possibility of the member states to extend their scope at their own accord.[113]

AG Szpunar added that the author's enjoyment of copyright isn't conditional upon actual exploitation of the work by its author. Rather, the author also has the right to prevent exploitation of his work by third parties if said exploitation isn't authorized by the author. Interestingly, Szpunar also made a point about moral rights. He said that, although being left

---

[107] AG Szpunar on *Spiegel Online*, paras 61-63
[108] C-516/17 *Spiegel Online* ECLI:EU:C:2019:625, para 44 and the case law therein
[109] C-516/17 *Spiegel Online* ECLI:EU:C:2019:625, para 45 and C-145/10 *Painer* ECLI:EU:C:2011:798, para 135
[110] C-516/17 *Spiegel Online* ECLI:EU:C:2019:625, para 46
[111] See also C-469/17 *Afghanistan Papers* ECLI:EU:C:2019:623, paras 59-61
[112] This is something that the CJEU has, regarding communication to the public (article 3(1)), established before in C-466/12 *Svensson and Others* ECLI:EU:C:2014:76, paras 34-35
[113] C-516/17 *Spiegel Online* ECLI:EU:C:2019:625, paras 47-49 and the case law therein

outside of InfoSoc. Directive's scope of harmonization, moral rights must be taken into account when interpreting its provisions. This is because the InfoSoc. Directive only constitutes a partial harmonization of copyright. When transposed to the copyright law of the member states, its provisions necessarily interact with other provision of that law, including those concerning moral rights. Therefore, although the InfoSoc. Directive is only meant to harmonize copyright law on certain fields, this cannot be used as a justification to disregard moral rights. This may bring some clarity to the relationship of moral rights and the InfoSoc. Directive especially since the CJEU's reasoning in *Deckmyn* did raise some concerns on this front.[114] AG Szpunar, at least, seems to imply that the directive merely recognizes the existence of moral rights and asserts their validity in copyright law while ultimately leaving them to the discretion of the member states.[115]

---

[114] See f.ex. *Jongsma* IRIPC 2017, p. 665-666 and the citations therein and *European Copyright Society* 2014, p. 7. ECS referred to ECHR (European Convention on Human Rights) article 10(2): ''any limitation to the right to freedom of expression can only be justified if it is "prescribed by law and [is] necessary in a democratic society''

[115] AG Szpunar on *Spiegel Online*, paras 76-77

3. THE QUOTATION EXCEPTION

3.1 Introduction

In this section, the thesis analyzes the quotation exception in great detail. Now that the objectives and the purpose of the EU, the InfoSoc. Directive as well as exceptions and limitations have been sufficiently explained, the content of the quotation exception can be explored in-depth and in a multifaceted way. This section examines ''quotation'' as an autonomous concept of EU law as well as breaks down each of the conditions and expressions in article 5(3)(d) of the InfoSoc. Directive. After this, the thesis is able to present a complete and a multilayered picture of the quotation exception, providing an answer to the first research question and setting up the groundwork for the second question.

The origin of the quotation exception – at least, in regard to EU law – is in the Berne Convention. As explained before, due to the EU being a member of TRIPS, it is obligated to follow articles 1-21 of Berne. Berne includes provisions for exceptions and limitations in articles 9(2), 10 and 10bis. Article 10(1) reads as follows:

> ''It shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries..''

As can be seen from the wording of the provision, there are several conditions included in the quotation exception. Interestingly enough, the imperative ''shall'' implies that the quotation exception is mandatory. In fact, although most of the exceptions and limitations in Berne are ultimately left to the legislators of the contracting states to permit, the quotation exception is the only copyright exception that the Convention requires for the contracting states to adopt. This interpretation is indicated not only by the wording of the provision, but also by judicial literature.[116] Next, this is compared to how the EU has incorporated the quotation exception in its own copyright law.

3.2 The Quotation Exception in the InfoSoc. Directive

EU copyright directives typically make little reference to the laws of the member states when it comes to determining the meaning and the scope of the terms therein. This is also true for article 5(3)(d) of the InfoSoc. Directive – the quotation exception. Due to established case

---

[116] See *Goldstein – Hugenholtz* 2010, p. 41 and *Bently – Aplin* 2018, p. 3-5. This interpretation is further supported by the fact that the language Berne reserves for other exceptions and limitations is very different. See f.ex. articles 10(2) and 10bis, where the wording reads: ''it shall be matter for legislation in the countries of the Union to permit/determine…'' (underlines added).

law, this means that these terms are autonomous concepts of EU law and must be given uniform and independent interpretation throughout the union. Indeed, this rule has caused many key concepts of copyright to turn into autonomous concepts of the EU.[117] Although the CJEU has not explicitly stated so, this has arguably happened to the quotation exception as well[118]. Bearing that in mind, it is time to inspect the quotation exception. Article 5(3)(d) of the InfoSoc. Directive reads as follows:

> ''Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 in the following cases:…
>
> d) quotations for purposes such as criticism or review, provided that they relate to a work or other subject-matter which has already been lawfully made available to the public, that, unless this turns out to be impossible, the source, including the author's name, is indicated, and that their use is in accordance with fair practice, and to the extent required by the specific purpose.''

Article 5(3)(d) closely resembles articles 10(1) and 10(3)[119] of Berne. Much like its sister-provision in the Berne Convention, the quotation exception in the InfoSoc. Directive restricts the right of quotation to works or other subject-matter which have already been lawfully made available to the public. Additionally, both provisions require that the use is in accordance with fair practice and to the extent required by the specific purpose. It is also necessary to, when possible, indicate the source of the work, including the author's name.

In a stark contrast to Berne, the InfoSoc. Directive doesn't describe the quotation exception as mandatory. It is an exception that the member states *may* provide. This is a peculiar choice of words as the EU is obligated to comply with article 10(1) of Berne. As mentioned earlier, the wording used in Berne leaves little doubt that the quotation exception is intended to be mandatory. It is then difficult to see article 5(3)(d) of the InfoSoc. Directive as anything else but an erroneous implementation of the Berne Convention in this regard.

What is also noteworthy is that, in article 5(3)(d), the possible purposes of use are laid out in the beginning of the provision whereas in Berne 10(1), they are left to the very end. This might be an intentional decision as article 5(3)(d) of the InfoSoc. Directive exists to preclude the exclusive right of reproduction conferred on authors from preventing the publication of

---

[117] *Jongsma* 2019, p. 23-24

[118] AG Szpunar, in his opinion on *Metall Auf Metall*, suggested as much by claiming that it ''must be true'' that quotation is an autonomous concept of the EU. See AG *Szpunar* on *Metall Auf Metall,* para 76 and the cases therein

[119] Article 10(3) of Berne: ''Where use is made of works in accordance with the preceding paragraphs of [article 10], mention shall be made of the source, and of the name of the author if it appears thereon''. Berne had a separate provision for the requirement of mentioning the source and the name of the author, while the InfoSoc. Directive incorporated this requirement into article 5(3)(d).

quotations (accompanied by comments or criticism) of works already made lawfully available to the public – as explained by the CJEU in *Painer*[120]. The provision therefore functions to guarantee the users' freedom of expression over the interests of the author in being able to prevent reproduction of extracts of his work, especially in situations where the author might be reluctant to do so. This balancing exercise is in the core of article 5(3)(d) of the InfoSoc. Directive and is often repeated by the CJEU, as shall be seen later.

The quotation exception in the InfoSoc. Directive is further influenced by article 5(5). This article implements the three-step-test into EU copyright legislation and is very similar to Berne's article 9(2) and TRIPS's article 13. The wording indicates that the quotation exception should be subjugated to the three-step-test. Article 5(5) of the InfoSoc. Directive reads as follows:

> ''The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder.''

This would make the quotation exception very conditional as article 5(3)(d) itself includes certain conditions. Added together, this would mean that the member states may provide for a quotation exception related to works or other subject-matter, provided that 1) the work or subject-matter has already been lawfully made available to the public, 2) the source, including the author's name, is indicated (unless impossible), 3) the use is in accordance with fair practice, 4) the use is done to the extent required by the specific purpose, 5) it is only applied in certain special cases, 6) it doesn't conflict with a normal exploitation of the work or other subject-matter and 7) it doesn't unreasonably prejudice the legitimate interests of the rightholder. A literal interpretation results in seven different conditions that should all be met for a use to be considered a quotation, a valid exception to copyright under EU law. These requirements, however, shall be analyzed further on.

None of the preparatory works of the InfoSoc. Directive describe the quotation exception much further than it is already laid out in article 5(3)(d). This may not have been necessary as, considering the nature of directives, the legislative means to define ''quotation'' may have been left to the member states.[121] Even then, the CJEU has been somewhat reluctant to

---

[120] C-145/10 *Painer* ECLI:EU:C:2011:798, paras 119-120

[121] This could also explain why the CJEU, in *Painer*, abstained from ruling on the correctness of the assumption that photographic works are covered by article 5(3)(d) while still making a ruling on a referred question that was crafted on that assumption. See C-145/10 *Painer* ECLI:EU:C:2011:798, paras 122-123

utilize preparatory works to interpret EU legal provisions in the past. Therefore, if one were to discover the legislator's subjective perception of quotation, it might not be of any interpretive significance (although this might be due to change as preparatory work is becoming more available).[122]

3.3 The Meaning of Quotation

3.3.1 The Definition of Quotation

It is evident that the quotation exception provision is open-ended. According to article 5(3)(d) of the InfoSoc. Directive, member states may provide for a quotation exception for ''purposes *such as* criticism and review''. Although the three-step-test requires that the exceptions and limitations are only to be applied in certain special cases, this did not result in crafting an exhaustive list for possible uses of quotation in EU law. Aside from the conditions (although numerous) highlighted before, the scope of the exception is merely defined by what is meant by certain terms in the provision, one of them being ''quotation'' itself.

A precise definition of ''quotation'' is nowhere to be found in the InfoSoc. Directive. Such a definition isn't found in the Berne Convention either. For the longest time, it seems that the definition of quotation had been solely left to the discretion of the member states. However, on 29th of July, 2019, the CJEU gave two rulings where this seems to have changed. In *Metall Auf Metall*[123] and *Spiegel Online*[124], the court stated the following:

> ''As regards the usual meaning of the word '**quotation**' in everyday language, it should be noted 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, of defending an opinion or of allowing an intellectual comparison between that work and the assertions of that user.'' (Boldening and underlining added)

After these rulings, it is fair to conclude that the CJEU has provided for a rough definition of quotation for EU copyright law. The underlined section of the paragraph above appears to display the meaning of the term ''quotation'' as it appears in EU copyright law. It seems to cover all of AG Szpunar's proposed characteristics for a quotation, as presented by him in his opinion on *Metall Auf Metall*.[125] It should be noted that, in Spiegel Online, the court

---

[122] *Odermatt* 2019, p. 20-21
[123] C-476/17 *Metall Auf Metall* ECLI:EU:C:2019:624, para 71
[124] C-516/17 *Spiegel Online* ECLI:EU:C:2019:625, para 78
[125] AG *Szpunar* on *Metall Auf Metall*, paras 62-68

also added that, whether the quotation is made as part of a work protected by copyright or, on the other hand, as part of subject-matter not protected by copyright, is irrelevant[126].

Quotation is defined as a use of a work or of an extract from a work. This sentence has a few implications. First, it doesn't discriminate between different types of works – implying that it covers various types of works. Second, it presents the ''use of a work'' or of ''an extract from a work'' as equally valid options for the purposes of quoting. It would suggest that quoting works in their entirety can be justified. On top of this, however, the court stated that a quotation is used for purposes of illustrating an assertion, of defending an opinion or of allowing an intellectual comparison between that work and the assertions of that user. This sentence is interesting in its apparent exclusivity. It almost presents itself as a finite list of valid purposes for quotation. There are no expressions that would signal towards an open-ended guideline (''for example'' or ''such as'' would be common examples of this). As such, it is noticeably different from the ''purposes'' clause in article 5(3)(d).

3.3.2 *Use of a Work*

''Quotation'' no doubt covers quoting literary works and works of similar nature – in other words, a quotation of text. It is reasonable to consider this the ordinary, traditional meaning of quotation. In fact, when contemplating on the meaning of quotation, both AG Trstenjak and AG Szpunar have stated as much:

> ''The exception for quotations is one of the most traditional exceptions to copyright. It has long been regarded as applying only to literary works. In works of this type, quotations are traditionally signaled by typographical means: inverted commas, italics, a different typeface from that of the main text, footnotes and so on''[127]
>
> '' According to its traditional meaning, a quotation is generally only a partial extract of a text''[128]
>
> ''The quotation exception has its origin and is mainly used in literary works''[129]

Not only is this likely the perception that the general public has of ''quotation'', it could be argued to coincide with article 10(1) of Berne.[130] While article 10(1) of Berne is open-ended, the provision only lists textual quotations as possible examples of quotation. This would allude to quotation of text being the primary meaning of quotation. This way, although Berne article 10(1) doesn't discriminate between different types of works, one could argue that it

[126] This was established in C-145/10 *Painer* ECLI:EU:C:2011:798, para 136
[127] AG *Szpunar* on *Spiegel Online*, para 41
[128] AG *Trstenjak* on *Painer*, para 212
[129] AG *Szpunar* on *Metall Auf Metall*, para 62
[130] AG Szpunar had also referred to Berne 10(1) to support his perception of the traditional meaning of quotation in his opinion on *Spiegel Online*. See AG *Szpunar* on *Spiegel Online*, cit. 17

would not have been necessary to do so. The meaning of quotation as a textual quotation would've limited the exception's coverage sufficiently to certain kinds of acts and works. Interestingly, article 5(3)(d) of the InfoSoc. Directive is worded in more general terms. As possible uses of the quotation exception, the provision lists ''purposes such as criticism and review''. It could be argued that this kind of wording doesn't imply to any specific form of quotation, unlike Berne's article 10(1).

One could reasonably object that the CJEU has, in the past, ruled that the provisions of a directive which derogate from ''a general principle'' established by that directive must be interpreted strictly.[131] In *Infopaq*, the CJEU plainly stated that the requirement of authorization from the rightholder for any reproduction of a protected work *is* the general principle established by the InfoSoc. Directive. Exceptions and limitations to this general principle, therefore, are exemptions that require strict interpretation.[132] It could've been tempting to then conclude that literary works are the extent of the works that the quotation exception can be applied to.

But, as it turns out, this is certainly not the case for the quotation exception. As mentioned before, article 10(1) of Berne merely describes the exception as a quotation from ''a work'' – without further categorization to certain types of works. In article 2(1) of Berne, literary and artistic works are said to include ''every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression''. This is said to include a vast range of different types of works, such as books, dramatic works, musical works, choreographic works, cinematographic works, paintings, photographic works and so on. Although article 10(1) of Berne can be said to allude to quoting merely literary works, arguments have been made that the provision was meant to cover all types of works from the start. Lionel Bently and Tanya Aplin have argued that article 10(1) of Berne encompasses much of what is understood by the notion of ''fair use''[133], a copyright exception doctrine

---

[131] C-05/08 *Infopaq* ECLI:EU:C:2009:465, paras 56-58

[132] The provision in question, in *Infopaq*, was article 5(1) of the InfoSoc. Directive which deals with temporary reproductions. However, similar argumentation have been used in cases like C-435/12 *ACI Adam* ECLI:EU:C:2014:254 (paras 22-23), C-201/13 *Deckmyn* ECLI:EU:C:2014:2132 (para 22) and C-145/10 *Painer* ECLI:EU:C:2011:798 (paras 109 & 133), which suggests that it applies to all exceptions and limitations.

[133] Title 17 U.S. Code (The Code of Law of the United States of America) § 107 – the Fair use doctrine – is a general limitation clause on exclusive rights. It permits the reproduction of works for various purposes in cases that are considered *fair*. Whether a use is fair or not is decided on a case-by-case analysis. Some factors that judges can consider are the purpose and character of the use, the nature of the copyrighted work, the amount and substantiality of the portion used, and the effect of the use upon the potential market for or value of the work. For more information, see *Stim* 2020, section The 'Fair Use' Rule: When Use of Copyrighted Material Is Acceptable.

utilized in US copyright law.[134] They argue that, according to the wording of the Convention and the travaux preparatoires, the quotation exception applies to all types of works covered under the Convention and can have ordinary meaning outside quotations of text, such as quoting elements of artistic paintings and musical works.

Although this is arguably a robust argument, Bently's and Aplin's analysis of article 10(1) of Berne might have been even stronger were it to have been presented on article 5(3)(d) of the InfoSoc. Directive. Due to its membership in the TRIPS Agreement and the WIPO Copyright Treaty, the EU is obligated to subscribe to the conception of ''work'' laid out in article 2(1) of Berne. Additionally, unlike article 10(1) of Berne, article 5(3)(d) of the InfoSoc. Directive makes no allusions to any specific categories of works whatsoever. Finally, as explained in section 2.5, EU provisions are interpreted by giving the terms their ordinary meaning while also considering the legislative context in which they occur as well as the coherence of the entire EU legal system – the telos and the meta-telos. As explained in sections 2.3-2.4, the InfoSoc. Directive was specifically created to harmonize laws on copyright and related rights to foster the development of the information society in Europe, to respond to the economic realities brought about by new technological development as well as to reassess the existing limitations and exceptions in the new electronic environment. Against this background, it could be argued that retaining the original, traditional meaning of quotation would have been very counterproductive.

The CJEU had implied as early as in *Painer* that the quotation exception can be applied to photographic works.[135] In that case, the court had agreed to answer the referred questions on the established assumption (by the parties involved) that photographic works are covered by article 5(3)(d) – albeit without ruling on the correctness of that assumption. This can be interpreted as the CJEU greenlighting the notion of applying the quotation exception on different types of works. It should be noted that AG Trstenjak, in his opinion on *Painer*, also appeared to tacitly approve the idea of applying the quotation exception on photographic works[136].

Later, the CJEU went further down this road. In his opinion on *Metall Auf Metall*, AG Szpunar stated that, although quotation has its origin and is mainly used in literary works, he sees no reason why, under EU copyright law, the quotation exception couldn't be applied

[134] Bently – Aplin 2018, p. 1-8 & 18-21
[135] C-145/10 *Painer* ECLI:EU:C:2011:798, paras 122-123
[136] AG *Trstenjak* on *Painer* para 212

to other categories of works, in particular, musical works.[137] The CJEU confirmed AG Szpunar's view that the exception can indeed be applied to musical works, strongly implying that it can be applied to all kinds of works.[138] Furthermore, in his opinion on *Spiegel Online*, AG Szpunar claimed that, at the present time (in comparison to the origins of the word ''quotation''), he didn't see it inconceivable that the quotation exception could be applied to works such as musical works, cinematographic works and works of visual art.[139] Although neither confirming or denying AG Szpunar's assertion, the CJEU described the quotation exception as the use of ''a work'' or ''of an extract from a work'' without discriminating between different categories of works.[140] The court, thus, seemed to assert its earlier interpretation of quotation as one extending outside its traditional meaning. There do not seem to be any arbitrary restrictions to the scope of the exception in terms of different categories of works.

3.3.3 In Whole or in Part

According to article 5(3)(d) of the InfoSoc. Directive, quotation is described as a use of a work or of an extract from a work. In other words, no specifications on the extent of a quotation are made. This raises the question whether quoting a work in its entirety can be justified under the provision. According to AG Szpunar, the academic legal opinion on this question is divided.[141] Interestingly, in the Brussels Act of the Berne Convention (1948), article 10(1) permitted ''short quotations from newspaper articles and periodicals''. In the very next revision of the Convention, the Stockholm Act (1967), the word ''short'' had been removed. Instead, the provision only demanded that the quotation is compatible with ''fair practice'' and that its ''extent does not exceed that justified by the purpose''. It appears then that quoting a work in its entirety can also be permissible as long as the use meets these two conditions – a conclusion that AG Szpunar also arrived to.

The CJEU also seems to agree that quoting a work in its entirety can sometimes be justified. AG Trstenjak had concluded that, although quotations have originally referred to partial extracts of texts, there are instances where a full quotation can also be in accordance with article 5(3)(d).[142] He stated that, in the case of photos, ''a complete reproduction may be

[137] AG *Szpunar* on *Metall Auf Metall*, para 62
[138] C-476/17 *Metall Auf Metall* ECLI:EU:C:2019:624, paras 68-71.
[139] AG *Szpunar* on *Spiegel Online*, para 42.
[140] C-516/17 *Spiegel Online* ECLI:EU:C:2019:625, paras 78-79
[141] AG *Szpunar* on *Spiegel Online*, para 45 and the citations therein
[142] AG *Trstenjak* on *Painer*, para 212

necessary in order to create the necessary material reference back to the work''. This is understandable as, if article 5(3)(d) would only approve partial publications of photos, this would be very impractical and heavily restrict the provision's applicability. He added that, in the case of a full quotation, ''particular importance is attached to the other requirements'', such as the requirement of fair practice and the examination of the three-step-test under Article 5(5) of the directive.[143] As explained in section 3.3.2, the court answered the referred question on the assumption that the quotation exception can be applied to photos, although without ruling on the correctness of that assumption.

Therefore, it seems that the CJEU has greenlighted the notion that full quotations can be permissible under article 5(3)(d) of the InfoSoc. Directive as long as all the other conditions of the provision are met. It could be, however, that this is more acceptable in the case of works where quoting only extracts or parts would be impractical or defeat the purpose of the quotation. Examples of these kinds of works are arguably photos, paintings and very short poems.

3.4 The Dialogue Requirement

3.4.1 A Dialogue between the Quoting Work and the Quoted Work

The expression ''for purposes such as criticism or review'' in article 5(3)(d) of the InfoSoc. Directive can arguably be easily overlooked as not of great significance. At first glance, this sentence only appears to be a non-exhaustive, open-ended guide describing possible purposes that a quotation can be used for. In reality, this expression contains an important qualification that a use has to meet in order to be considered a quotation within the meaning of the provision. This qualification is known as the *dialogue* requirement.

Although not addressed by the court at the time, the dialogue requirement was hinted towards as early as in *Painer* or, rather, in AG Trstenjak's opinion on the case. He provided several supplementary remarks on the quotation exception that weren't specifically requested by the referring party as he deemed them potentially useful for the settlement of the main proceedings.[144] AG Trstenjak stated that the expression ''for purposes such as criticism or review'' indicates that the reproduction has to take place for what he called ''quotation purposes''. He added that, in natural language usage, the work must be reproduced ''without modification in identifiable form''. Furthermore, he stated that there must be a ''material

[143] AG *Trstenjak* on *Painer*, para 213
[144] AG *Trstenjak* on *Painer*, para 208

reference'' back to the quoted work in the form of a description, commentary or analysis. Trstenjak explained that a quotation must be ''a basis for discussion''. Lastly, he stated that whether these conditions have been met must be decided through case-by-case analysis.[145] Although AG Trstenjak inferred these requirements out of the wording of article 5(3)(d), the CJEU itself didn't address this notion at the time.

It wasn't until *Metall Auf Metall* that this topic was revisited. the Federal Court of Justice of Germany asked the CJEU if it could be said that a work or other subject-matter is used for quotation purposes if it's not evident that a work or subject-matter of another person is being used. In that case, AG Szpunar stated that the expression ''for purposes such as criticism and review'', although not being an exhaustive list of quotation purposes, means that a quotation must enter into ''some kind of dialogue'' with the work quoted. He argued that this dialogue could be confrontational, a tribute or it could take place in any other way as long as there is interaction between the quoted work and the quoting work. According to Szpunar, artistic quotations, such as musical quotations, in particular, often do not take place for this kind of purpose but rather ''pursue other objectives''.[146]

3.4.2 Unaltered and Distinguishable

Furthermore, adding to the first point, Szpunar stated that a quotation must be ''unaltered and distinguishable'' from the quoting work. A quotation should be incorporated to the quoting work, without modification, in a manner that it can be distinguished ''as a foreign element''. This, Szpunar argued, is necessary in order to fill the first requirement as the quoting work cannot enter into a dialogue with the quoted work if the quotation is indistinguishable from the quoting work. In his opinion, these two conditions make a distinction between quotation and plagiarism.[147]

The court itself had little to add to AG Szpunar's stance on the matter. It confirmed that taking a sound sample from a musical work and incorporating it into a new work may indeed amount to a quotation within the meaning of the provision, provided that it meets all the requirements laid out by the definition of quotation and the wording of article 5(3)(d) – including the dialogue requirement.[148] Furthermore, the court plainly stated that such

[145] AG *Trstenjak* on *Painer*, paras 209-211
[146] AG *Szpunar* on *Metall Auf Metall*, para 64
[147] AG *Szpunar* on *Metall Auf Metall*, paras 65-66. It should be noted that *AG Trstenjak*, in his opinion on *Painer*, also made an implication towards the requirement that a quote must be unaltered and distinguishable, para 210.
[148] C-476/17 *Metall Auf Metall* ECLI:EU:C:2019:624, para 72

dialogue isn't possible when the quoted work cannot be identified.[149] Thus, the expression ''for purposes such as criticism and review'' is a lot more relevant than it first might appear. Not only does this passage contain the dialogue requirement, but the dialogue requirement itself contains the requirements of ''unalteration'' and ''distinguishability''. The quoting work must enter into a dialogue with the quoted work, which admittedly can happen for many purposes (criticism, review, analysis, tribute etc.). Unless the quoted work is recognizable as a foreign element, however, such dialogue cannot take place.

3.5 Lawfully Made Available to the Public

In *Spiegel Online*, the referring court asked the CJEU about the meaning of the expression ''lawfully made available to the public'' in article 5(3)(d). Specifically, the referring court asked, when determining whether a work has been lawfully made available to the public, should the focus be on whether that work was published in its specific form with the author's consent. The court began with emphasizing the expression ''lawfully made available to the public'' having to be understood as meaning ''the act of making a work available to the public'' – an interpretation it had established in *Painer*[150]. The court had compared the English, the French and the German versions of the expression and concluded that it always indicates towards the act of making a work available to the public. Furthermore, the quotation exception only covers works that have been *lawfully* made available to the public. The court concluded that a work has been lawfully made available to the public if it has been done with the authorization of the copyright holder or in accordance with a non-contractual license or a statutory authorization. The CJEU added, however, that it is up for the national courts to decide on a case-by-case analysis whether a work has been lawfully made available to the public.[151]

3.6 Indicating the Source

According to article 5(3)(d), a quotation must indicate the source, including the author's name, unless this turns out to be impossible. The requirement of indicating the source is fairly self-explanatory and has received little elaboration over the years. For example, in his opinion on *Metall Auf Metall*, AG Szpunar merely stated that indicating the source can be

[149] C-476/17 *Metall Auf Metall* ECLI:EU:C:2019:624, para 73
[150] C-145/10 *Painer* ECLI:EU:C:2011:798, para 128
[151] C-516/17 *Spiegel Online* ECLI:EU:C:2019:625, paras 85-89 & 91

done, for example, in the quoting work itself, in the description of the work or even the title of the work.[152] It seems then that the source can be indicated in a myriad of ways.

This requirement does contain some nuances that should be highlighted, however. In *Painer*, the referring court asked if the application of article 5(3)(d) is precluded in the event that the name of the author or performer is not attached to the work or other protected matter quoted. AG *Trstenjak* noted that, although the provision doesn't define when indicating the source and the author should be considered impossible, the use of the word ''impossible'' (instead of lighter expressions, such as ''unreasonably difficult'') suggests that the criterion is fairly strict.[153] This would coincide with the principle of high level of protection, enshrined in recitals 4, 9, and 10 of the InfoSoc. Directive. Furthermore, AG *Trstenjak* stated that the expression ''turns out to be'' implies that a certain amount of effort is expected of the person quoting the work to ascertain the source and the author's name. However, AG *Trstenjak* also noted that, since the quotation exception exists to serve freedom of expression and freedom of the press, being unable to identify the author should not disqualify the exception from being used.[154] Whether it should be considered to have been impossible to identify the author at any given case should be left to case-by-case analysis. A failure to comply with this requirement should, in Trstenjak's view, result in an unlawful publication[155].

The court itself did not comment on AG Trstenjak's interpretation nor did it elaborate the requirement in a similar fashion, but it did provide some insight on the matter. First, the court understood the requirement meaning that the quoted work has already lawfully been made available to the public.[156] Furthermore, if one could reasonably well be able to identify the author and decides not to indicate the author, the quotation would amount to an unlawful publication.[157] The court noted, however, that there can be instances where a lawful publication occurs without the author being indicated. In the case at hand, the court entertained the possibility that national security authors had made the contested photographs available to the public in accordance with article 5(3)(e) – an exception that requires no indication of the author.[158] In that instance, the photographs would have been lawfully made available to the public without the author ever being indicated. Therefore, the subsequent

[152] AG *Szpunar* on *Metall Auf Metall*, para 68
[153] AG *Trstenjak* on *Painer*, para 194-195
[154] AG *Trstenjak* on *Painer*, para 196-197
[155] AG *Trstenjak* on *Painer*, para 202-205
[156] C-145/10 *Painer* ECLI:EU:C:2011:798, para 139
[157] C-145/10 *Painer* ECLI:EU:C:2011:798, para 141
[158] C-145/10 *Painer* ECLI:EU:C:2011:798, paras 144-149

use of the photographs by the press in accordance with article 5(3)(d) would require the indication of the source but not necessarily the name of the author.

Thus, it remains somewhat unclear when identifying the author should be considered impossible. AG Trstenjak seemed to suggest that a person wanting to quote a work might have to resort to a certain amount of investigative work if the author's name isn't immediately found alongside the work. The court's interpretation appears to be somewhat lighter as it only seems to focus on the initial act of lawful publication. That is to say, if national security authorities made the works available in accordance with article 5(3)(e) and didn't indicate the author – which they weren't required to do –, the press would be free to quote the works while only indicating the source. Then again, the court stated that the press wouldn't ''necessarily'' need to indicate the name of author in this kind of situation. This would suggest that the press might in some circumstances still have to indicate the author even if the original lawful publication of the work didn't provide the name of the author. Presumably this would be required if the name of the author has surfaced since the original publication and is to be found with a reasonable effort. It appears then that AG *Trstenjak* was correct in his assumption that a certain amount of research is required of a person wanting to quote a work before concluding that identifying the author is impossible. It is also apparent that determining when this ''impossibility standard'' has been reached is a question for the national courts to answer in a case-by-case analysis.

3.7 National Discretion

3.7.1 Exceptions and Limitations

In *Spiegel Online*, the Federal Court of Justice of Germany had referred to the CJEU several questions about the exceptions and limitations of the InfoSoc. Directive. In one of the referred questions, the referring court asked, in no uncertain terms, if the provisions of EU law on exceptions and limitations allow any discretion in terms of implementation in national law. Although not directly aimed at the quotation exception, the answer to this question is obviously relevant in order to fully understand the national discretion allowed to the member states in implementing the quotation exception. In addition, several statements are made directly about the quotation exception. The referring court had asked similar questions in *Metall Auf Metall* and *Afghanistan Papers* as well, albeit in slightly different context. The response of AG Szpunar and the CJEU was multilayered. Therefore, it is reasonable to go through the relevant points in an orderly manner.

AG Szpunar referred to his opinion on *Metall Auf Metall* where he had answered a similar question.[159] In it, AG Szpunar had referred to *Melloni* where the CJEU, based on article 53 of the CFR, confirmed that when an EU legal act calls for national implementation measures, the member states are free to apply national standards of protection of fundamental rights as long as it doesn't conflict with the CJEU's interpretation of the level of protection or compromise the primacy, unity and effectiveness of EU law (as was mentioned in sections 2.4.2 and 2.6, exceptions and limitations typically exist to safeguard fundamental rights of the users of works).[160] It follows from this that a member state cannot compromise the efficacy of an EU provision by applying its own national standards of protection of fundamental rights if the said provision is not contrary to CFR.[161] This brings clarity to the question of the relationship of EU provisions and fundamental rights.

When it came to transposing the InfoSoc. Directive and the latitude allowed to the member states therein, AG Szpunar had more to add. First, provisions that are worded unconditionally and in a mandatory way are just that and should be treated as such by the member states.[162] This applies, in particular, to articles 2 to 4 of the directive. Just as was discussed in section 2.6.1, Szpunar noted that concepts that do not refer to the law of the member states are autonomous concepts of the EU. For this reason, he outlined that this must be true for the concept of ''quotation'' in article 5(3)(d).[163]

Furthermore, AG Szpunar stated that the exclusive rights provided for ''unconditionally and compulsorily'' in articles 2 to 4 of the InfoSoc. Directive are subject only to the exceptions and limitations listed *exhaustively* in article 5(1) to (3) of the directive.[164] Due to most of the exceptions and limitations being optional, the member states have a certain amount of latitude in the form of choice and wording of the exceptions they find most appropriate. Still, citing *ACI Adam*[165], Szpunar reminded that member states aren't allowed to introduce new exceptions nor extend the scope of the existing ones. He also made note that the degree of latitude is further limited since some of the exceptions ''reflect the balance struck by the EU legislature between copyright and various fundamental rights''. In those cases, failing to

[159] AG *Szpunar* on *Spiegel Online*, para 20 and on *Metall Auf Metall*, para 73
[160] C-399/11 *Melloni* ECLI:EU:C:2013:107, para 60. See also C-469/17 *Afghanistan Papers* ECLI:EU:C:2019:623, paras 30-32
[161] C-399/11 *Melloni* ECLI:EU:C:2013:107, para 63. See also AG *Szpunar* on *Metall Auf Metall*, para 73
[162] AG *Szpunar* on *Metall Auf Metall*, para 75
[163] AG *Szpunar* on *Metall Auf Metall*, para 76
[164] AG *Szpunar* on *Metall Auf Metall*, para 77
[165] C-435/12 *ACI Adam* ECLI:EU:C:2014:254, paras 26-27

provide for certain exceptions and limitations in national law could be against the CFR. This raises the question whether the optional exceptions and limitations in article 5(3) are entirely optional at all.

Thus, AG Szpunar concluded that the member states are obliged to provide for the exclusive rights laid out in articles 2-4 of the InfoSoc. Directive, noting that their scope is, at least to some extent, defined by CJEU case law. Those rights can only be limited by the exceptions and limitations listed in article 5 of the InfoSoc. Directive. No provision of any kind in national law can contest this obligation. Still, Szpunar stated that when it comes to implementing these provisions, the member states are nevertheless free as to the choice of ''form and methods'' they consider appropriate, as is the case in directives.[166]

The CJEU largely agreed with the Advocate General's opinion on this question. The court made note that the InfoSoc. Directive seeks only to harmonize certain aspects of the law on copyright and related rights.[167] This is evident by the fact that many provisions disclose the legislator's intention to leave certain aspects to national discretion. With that being said, the court essentially ruled that a provision laid out in unequivocal terms without being qualified by any conditions must be regarded as a measure of full harmonization.[168] In the case of the said provision not being subject in its implementation or effects to any measure being taken in any particular form, the provision demands full harmonization merely in the field of substantive law. This remark echoes AG Szpunar's point as to the free choice of ''forms and methods''. In the end, however, the free choice of said forms and methods isn't contextualized much further. A reasonable conclusion could be made that the member state discretion left in implementing exceptions and limitations is rather narrow.

3.7.2 The Quotation Exception

Although the CJEU had little to add on national discretion in regard to implementing exceptions and limitations in *Spiegel Online*, the court analyzed the quotation exception further. The court reminded that the national discretion available for member states in implementing a certain exception or limitation is always determined in a case-by-case analysis, in particular, according to the wording of the provision and the degree of

---

[166] AG *Szpunar* on *Metall Auf Metall*, para 78. Szpunar reaffirmed this view in his opinion on *Spiegel Online*, para 24

[167] C-476/17 *Metall Auf Metall* ECLI:EU:C:2019:624, para 82

[168] C-476/17 *Metall Auf Metall* ECLI:EU:C:2019:624, paras 83-86. The case at hand dealt with the exclusive rights of a phonogram producer in article 2(c) but, as per the reasoning used by the court, the argument can be extended to all of the provisions of the InfoSoc. Directive.

harmonization efforts intended by the legislator, based on the exception's or the limitation's impact on the smooth functioning of the internal market.[169] Furthermore, the court outright stated that the quotation exception provision does not constitute full harmonization of its scope[170].

According to article 5(3)(d), a quotation must be ''in accordance with fair practice, and to the extent required for a specific purpose''. The court perceived this as built-in latitude afforded to member states in the implementation and application of the provision as the member states enjoy ''significant discretion'' in striking a fair balance between the relevant interests.[171] Furthermore, the court stated that the section of the provision permitting quotations ''for purposes such as criticism and review'' is merely illustrative and allows further national discretion (although, as evident from section 3.4, this creates the requirement of entering into a dialogue with the original work). The court added that, according to the preceding legislative drafts, the exceptions and limitations in the InfoSoc. Directive are deliberately not dealt in detail and only lay the minimum conditions. It is then for the member states to define the detailed conditions of use, as long as they remain within the confines set out by the provision.

3.7.3 The Boundaries of Discretion

Regardless of this, the court reminded that the member states' discretion is further limited by several factors. First, the member states aren't always allowed to determine the parameters governing the exceptions and limitations in an unharmonized manner as they must be exercised within the limits imposed by EU law.[172] This has been a consistent rule in CJEU case law and the court has held as such in cases like *Painer*[173], *Deckmyn*[174] and *Afghanistan Papers*[175]. The court stated that the discretion open to the member states is highly circumscribed by the requirements of EU law.[176] The member states are only allowed to provide for the exceptions and limitations laid out in article 5 of the InfoSoc. Directive if

[169] C-516/17 *Spiegel Online* ECLI:EU:C:2019:625, para 25 and the citations therein. See also C-469/17 *Afghanistan Papers* ECLI:EU:C:2019:623, para 40
[170] C-516/17 *Spiegel Online* ECLI:EU:C:2019:625, para 27. See also C-469/17 *Afghanistan Papers* ECLI:EU:C:2019:623, para 42
[171] C-516/17 *Spiegel Online* ECLI:EU:C:2019:625, paras 28-29. See also C-469/17 *Afghanistan Papers* ECLI:EU:C:2019:623, para 41
[172] C-516/17 *Spiegel Online* ECLI:EU:C:2019:625, para 31
[173] C-145/10 *Painer* ECLI:EU:C:2011:798, para 104
[174] C-201/13 *Deckmyn* ECLI:EU:C:2014:2132, para 16
[175] C-469/17 *Afghanistan Papers* ECLI:EU:C:2019:623, para 46
[176] C-516/17 *Spiegel Online* ECLI:EU:C:2019:625, paras 32-34. See also C-469/17 *Afghanistan Papers,* ECLI:EU:C:2019:623, paras 47-49

they comply with all the conditions laid down in that provision. The member states must also adhere to the general principles of the EU law, such as the principle of proportionality, which means that the measures adopted must be appropriate for the desired objective and not go beyond what is necessary to achieve it.

Secondly, the court affirmed that, within the discretion enjoyed by the member states in terms of implementing exceptions and limitations, the objectives of the InfoSoc. Directive must not be compromised. These objectives include the proper functioning of the single market (recital 1) and a high level of protection for intellectual creation (recital 9). At the same time, the member states must secure the effectiveness of the exceptions and limitations in order to safeguard a fair balance between different rights and interests, as is demanded by recital 31 of the InfoSoc. Directive. The last point is something that the court has highlighted in the past in cases such as *Football Association Premier League*[177] and *Deckmyn*[178].[179]

As the third requirement, the CJEU stated that the discretion available to the member states is further circumscribed by article 5(5) of the InfoSoc. Directive – in other words, the three-step-test.[180] Therefore, the exceptions and limitations provided for in the directive shall only be allowed in certain special cases provided that they do not conflict with normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the copyright holder. Thus, with *Spiegel Online*, the court has reaffirmed that exceptions and limitations are indeed further subjugated by the conditions of the three-step-test.

Fourthly, the court reminded that the member states must oblige with the principles of CFR when implementing EU law. The limitations and exceptions implemented must be based 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''.[181] This conclusion was backed by cases such as *Bastei Lübbe*[182] and *UPC Telekabel Wien*[183] where the CJEU resorted to similar argumentation. Presumably, when talking about exceptions and

[177] Joined cases C-403/08 and C-429/08 *Football Association Premier League and Others* ECLI:EU:C:2011:631, para 163
[178] C-201/13 *Deckmyn* ECLI:EU:C:2014:2132, para 23
[179] C-516/17 *Spiegel Online* ECLI:EU:C:2019:625, paras 35-36. See also C-469/17 *Afghanistan Papers* ECLI:EU:C:2019:623, paras 50-51
[180] C-516/17 *Spiegel Online* ECLI:EU:C:2019:625, para 37. See also C-469/17 *Afghanistan Papers* ECLI:EU:C:2019:623, para 52
[181] C-516/17 *Spiegel Online* ECLI:EU:C:2019:625, para 38. See also C-469/17 *Afghanistan Papers* ECLI:EU:C:2019:623, para 53
[182] C-149/17 *Bastei Lübbe* ECLI:EU:C:2018:841, para 45
[183] C-314/12 *UPC Telekabel Wien* ECLI:EU:C:2014:192, para 46

limitations, the intercepting fundamental rights are mainly the right to property (CFR article 17) and, on the other hand, freedom of expression and freedom of arts (CFR articles 11 and 13). As the CJEU is the body that interprets EU law, this fair balance is at least partly enshrined in the court's case law.

3.7.4 Fundamental Rights as Interpretive Boundaries

In Spiegel Online, the CJEU was considering if the national courts are allowed to depart from the restrictive interpretation of articles 5(3)(c-d) in favor of one that ''takes full account of the need to respect freedom of expression and freedom of information, enshrined in Article 11 of the Charter''. The court reiterated the importance of striking a fair balance between various fundamental rights in the EU legal order. Furthermore, national courts must interpret their national law in a manner consistent with the directive as well as refrain from interpretation that would be in conflict with fundamental rights or general principles of EU law. Therefore, any derogation from a general rule must, in principle, be interpreted strictly.[184]

Still, the court reminded that the interpretation of exceptions and limitations must allow their ''effectiveness to be safeguarded and their purpose to be observed'' to ''ensure observance of fundamental freedoms''.[185] Interestingly, the court stated that, although the right to intellectual property is enshrined in article 17(2) of the CFR, there is nothing in the wording of the provision or the court's case law that suggests that it must be protected as an ''absolute right'' – a viewpoint it has raised in numerous cases.[186] The CJEU and other EU bodies as well as international organizations regularly refer to ''absolute rights'' as a subcategory of fundamental rights. What is typically meant by them are rights that are inviolable and cannot be limited or infringed on under any circumstances.[187] Examples of these, in CFR, would be human dignity, right to life and prohibition of torture (articles 1, 2 and 4). Unlike these inviolable rights, the court seems to argue, the right to intellectual property can be interfered with to protect the rights of another or the public interest[188].

---

[184] C-516/17 *Spiegel Online* ECLI:EU:C:2019:625, paras 50-53 and the case law therein. See also C-469/17 *Afghanistan Papers* ECLI:EU:C:2019:623, paras 65-69 & C-05/08 *Infopaq* ECLI:EU:C:2009:465, para 56

[185] C-516/17 *Spiegel Online* ECLI:EU:C:2019:625, para 55. See also C-469/17 *Afghanistan Papers* ECLI:EU:C:2019:623, para 71

[186] C-516/17 *Spiegel Online* ECLI:EU:C:2019:625, para 56 and the case law therein. See also C-469/17 *Afghanistan Papers* ECLI:EU:C:2019:623, para 72

[187] See, for example, *Council of Europe* 2020, section Some Definitions and SEC (2011) 567 final, p. 7 & 9-10 and *European Commission* 2020, section Fundamental Rights

[188] Although this conclusion is understandable, the court's arguments do not strike as particularly strong. It is true that CFR article 17(2) doesn't explicitly state that the right to intellectual property is inviolable. Then

Furthermore, the court pointed out that, according to article 52(3) of CFR, in so far as the rights guaranteed by the CFR correspond with those guaranteed by the European Convention on Human Rights[189] (ECHR), their meaning and scope shall be the same as they are in ECHR. Freedom of expression is one of those rights (ECHR article 10(1)) and articles 5(3)(c) and (d) exist to serve this right. It is clear from the case law of the European Court of Human Rights (ECtHR) that, when determining a fair balance between copyright and freedom of expression, whether the ''nature of the 'speech' or information at issue is of particular importance'' should be taken into account. If so, more weight should be given to freedom of expression. An example of this kind of speech would be speech or information ''in political discourse and discourse concerning matters of the public interest''. The court then concludes by saying that, when striking a fair balance between author's exclusive rights and copyright exceptions and limitations, the national courts must rely on an interpretation that fully adheres to the fundamental rights enshrined in the CFR while, at the same time, respecting the wording of the provisions and safeguarding their effectiveness. With this, the CJEU seems to have, to some extent, greenlighted the idea that fundamental rights can expand the scope of exceptions and limitations.[190]

---

again, the provision doesn't appear to use any weaker wording than some of those that protect absolute rights. In comparison to right to life (article 2) and prohibition of torture (article 4) respectively: ''No one shall be condemned to the death penalty, or executed.'' and ''No one shall be subjected to torture or to inhuman or degrading treatment or punishment''. Compare this to right to (intellectual) property (article 17(2)): ''Intellectual property shall be protected''. Perhaps it would've been more sustainable to state that, although the protection of intellectual property must be secured, its level is determined by secondary legislation and case law.

[189] The Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4th of November 1950

[190] C-516/17 *Spiegel Online* ECLI:EU:C:2019:625, paras 57-59 and the case law therein and *Ashby Donald and Others v. France* 2013, para 39. See also C-469/17 *Afghanistan Papers* ECLI:EU:C:2019:623, paras 73-76

4. DSM DIRECTIVE AND ONLINE CONTENT-SHARING SERVICES

4.1 Introduction

Now that the quotation exception has been analyzed rigorously and in-depth, its compatibility with the DSM Directive and online content-sharing services can be properly evaluated. For this purpose, it is necessary to have an overview of the DSM Directive. This section explains why the DSM Directive was initiated, what are its objectives and purpose, what changes did it experience before the finalized version and what are ''online content-sharing services'' according to the directive. All of these topics are examined with a particular emphasis on matters concerning article 17 of the directive and the quotation exception.

On 14th of June, 2016, the European Commission gave its proposal for a directive of the European Parliament and of the Council on copyright in the Digital Single Market (DSM Directive).[191] The explanatory memorandum of the document gives an explanation as to why the new directive is necessary. The reasons are similar as to why the InfoSoc. Directive was originally created. The evolution of digital technologies has changed how copyright-protected works are created, produced, distributed and exploited. Thus, new uses, actors and business models have emerged. Cross-border uses have intensified and new opportunities for consumers have materialized. The commission stated that, although the objectives and the principles of EU copyright framework remain sound, there is a need to adapt it to these new changes to avoid fragmentation in the internal market.

Very early on, the proposal brings up exceptions and limitations. Although exceptions and limitations are, according to the commission, harmonized on EU level, the proposal raises concerns whether these exceptions and limitations are ''still adapted to achieve a fair balance'' between the rights and interests of authors and users. As these provisions remain national, the commission argues that legal certainty around cross-border usage is unclear. Still, at this stage, the commission only identifies three areas that require union-level intervention, when it comes to exceptions and limitations. These areas are 1) digital and cross-border uses in the field of education, 2) text and data mining in the field of scientific research, and 3) preservation of cultural heritage. It is evident that, at least originally, the aim was very much in public policy objectives. Quotation, for example, is only mentioned

[191] COM (2016) 593, final

once; in recital 34, in relation to the rights granted to the publishers of press publications and exceptions and limitations that go along with it. This recital only deals with granting the publishers of press publications the same rights as the authors of other works guaranteed by the InfoSoc. Directive, as well as making them subject to the exceptions and limitations of the same directive.[192]

The proposal also raises concerns related to the fact that, amidst the emergence of the digital age, the Internet has become the main marketplace for the distribution and access to copyright-protected content. In this new framework, rightholders have difficulties receiving proper remuneration for online distribution of their works and seeking licensing to their rights. This, the commission argues, could hinder European creativity and production of creative content. Therefore, the proposal perceives it necessary to guarantee the rightholders their fair share of the value that is generated through the use of their works. It is in this framework that the proposal aims to establish regulation that would improve the position of the rightholders to negotiate and receive remuneration ''for the exploitation of their content by online services giving access to user-uploaded content''. This section is important as it highlights the balancing exercise between the rights of authors and other rightholders and users of works in this new framework. It is against this background that the application of exceptions and limitations, such as quotation, must be evaluated.[193]

Furthermore, in the explanatory memorandum, it is explained that the member state discretion in creating and adapting exceptions and limitations is limited due to exceptions and limitations being harmonized on EU level. In addition, because the issues raised by the proposal are cross-border in nature, national interference wouldn't be sufficient. It is, therefore, necessary for the union to intervene in order to achieve full legal certainty and guarantee the high level of protection established by the EU legal order. The commission seems to suggest that the emergence of the digital age has brought about the Internet's role as the main marketplace for the distribution and access to copyrighted content. In this new context, issues surrounding copyright are, by essence, cross-border in nature. This serves to further justify the nature of copyright exceptions and limitations as harmonized EU concepts. It is likely that national discretion in this field, at the very least, is not to increase in the

[192] COM (2016) 593, final, p. 2 & 19
[193] COM (2016) 593, final, p. 3

future. It is entirely possible, however, that union-level harmonization efforts will extend deeper.[194]

It is important to note, however, that the DSM Directive merely exists to complement the existing copyright regulation, including the InfoSoc. Directive.[195] The proposal identified several key issues where union-level intervention was required but it is not meant to be an overhaul of EU copyright rules per se. Rather, the directive is an attempt to realize a connected digital single market – one of the main goals of Jean-Claude Juncker's political guidelines for the European commission laid out during his candidacy and which is perceived to be of great economic significance.[196] It is then an extension and modernization effort of EU copyright while retaining the essence of existing EU copyright legislation. The proposal introduces certain mandatory copyright exceptions for public policy objectives and requires the member states to establish mechanisms to facilitate the clearance of copyright and related rights in certain fields. It will also impose certain obligations to information society service providers although, according to the commission, ''these obligations remain reasonable in view of the nature of the services covered'', referring to the impact these services have to online content market and the amount of copyright-protected content these services store[197].

Finally, the proposal touches on fundamental rights. The commission perceived it important to strengthen the bargaining position of authors and performers and the control that rightholders have on their copyright-protected content. The fundamental right to intellectual property (CFR article 17(2)), the commission would seem to argue, had not been properly safeguarded in the digital environment prior to this directive. It is through improving licensing practices and rightholders' revenues that the proposal aims to tackle this imbalance. Still, the commission assures that the directive will have a limited impact to freedom of expression and information (CFR article 11) ''due to the mitigation measures put in place and a balanced approach to the obligations set on the relevant stakeholders''. It is evident that the proposal intends to strike a fair balance between different rights and interests in the digital environment as well.[198]

---

[194] COM (2016) 593, final, p. 5
[195] COM (2016) 593, final, p. 3-4
[196] *Juncker* 2014, p. 6. See also COM (2015) 192, final, p. 6-8
[197] COM (2016) 593, final, p. 5-6
[198] COM (2016) 593, final, p. 9

4.2 The Reception – Calls for a *New* Quotation Exception

The proposal experienced a fair share of changes before the directive reached its adopted form. After being rejected in its initial form by the European parliament, a report[199] on the proposal was presented, consisting of 86 amendments to it, some of which were approved. In addition to that, several committees within the union saw some areas of improvement in the proposal. For the purpose of this thesis, the focus will be on questions that deal with the quotation exception (or exceptions and limitations in general), the online content-sharing services and the relationship of the two.

The Committee of Culture and Education raised concerns that the proposal doesn't appropriately acknowledge the position of consumers that occupy the digital environment. According to the committee, it is important to realize that the users of these services aren't just passive recipients, but also active contributors of content. In that framework, the committee raised concerns that the existing copyright exceptions and limitations aren't capable of providing legal certainty to users in the digital environment. Rather, the committee proposed ''a new exception governing the digital non-commercial, proportionate use of quotations and extracts of copyright-protected works or other subject-matter by individual users'' as well as other exceptions and limitations to counterbalance the obligations laid out by (then)[200] article 13 of the directive.[201]

The Committee of Culture and Education believed that the existing quotation exception of the InfoSoc. Directive wasn't sufficient for covering content that has emerged in certain information society services, uploaded by the users of the said services. In the proposed recital 21a of their opinion, the committee described these works as content uploaded by users that ''sometimes comprises short extracts or short quotations from protected works or other subject-matter, which may be altered, combined or transformed''.[202] The committee went on to state that such use is nowadays widespread online and is often done for the purposes of illustration, caricature, parody, pastiche, criticism or review. The committee also believed that the new exception justifying this kind of content wouldn't cause significant

[199] A (2018) 0245
[200] In the initial proposal of the DSM Directive, the provision dealing with uses of protected content on online content-sharing services was article 13. In the final, adopted directive, it was reshaped and relocated to article 17.
[201] AD (2017) 595591, p. 5
[202] AD (2017) 595591, p. 16

economic harm to the rightholders – on the contrary, the user-uploaded content might even serve to advertise the work used therein.

In its proposed recital 21b, the committee argued that this kind of user-uploaded content isn't properly covered by the existing exceptions and limitations. The committee raised concerns that these circumstances would then create legal uncertainty for both users and rightholders, which leads to frustration and abuses. That is why the committee deemed it necessary to provide for a new specific exception to authorize ''the short, proportionate and non-commercial uses of extracts or quotations from protected works or other subject-matter'' within content uploaded by a user.[203]

Therefore, the committee proposed a new article 5a to introduce this new quotation exception. It was intended to cover the use of short extracts and quotations from works or other subject-matter, uploaded by users in the creation of a new work for the purposes of criticism, review, illustration, caricature, parody and pastiche. As per the wording, it would apply to digital, non-commercial and proportionate uses. It would've been subject to the existing conditions of the quotation exception (applies to works lawfully made available to the public, indication of the source when possible, use accordance with fair practice in a manner that doesn't extend beyond the specific purpose). It would've applied without prejudice to the provisions of article 13 of the DSM Directive. The committee on the Internal Market and Consumer Protection concurred this idea by proposing article 5(b) titled ''user-generated content exception''.[204] In essence, this article would've been very similar to the exception proposed by the committee on Culture and Education – a new quotation exception, designed to cover for the perceived shortcomings of the existing exceptions and limitations in relation to digital uses.

4.3 Online Content-Sharing Services

The Committee on Legal Affairs, in their report, seemed to solidify the term ''online content sharing service'' – describing the services that, according to these committees, are in need of the new copyright exception.[205] The committee described an online content-sharing service as an information society service ''one of the main purposes of which is to store and give access to the public to copyright-protected works or other protected subject-matter uploaded by its users, which the service optimizes''. Although the Committee on Legal

[203] AD (2017) 595591, p. 16-17
[204] AD (2017) 599682, p. 36-37
[205] A (2018) 0245, p. 48

Affairs agreed that there is a need for a new exception to cover for the kind of user-uploaded content described by the Committee on Culture and Education, it did not draft a proposal for this new exception, unlike the previously mentioned Committees. [206] Rather, the Committee on Legal Affairs only proposed for article 13 of the DSM Directive that, while online content sharing services have an obligation, in absence of a licensing agreement, to take appropriate and proportionate measures leading to the non-availability of works or other subject-matter that infringe on copyright, these measures must not impact the availability of non-infringing works or other subject-matter[207]. Based on the earlier remarks, this would likely include works that fall into the ''new quotation exception'' proposed by the committees before.

4.4 The Adopted Text – DSM Directive Finalized

4.4.1 The Telos of the DSM Directive

Despite facing severe initial challenges, the DSM Directive was ultimately adopted by the European parliament on 15th of April 2019 and published on 17th of May of the same year. The directive was greatly expanded and saw numerous amendments before reaching its finalized form.[208] Issues surrounding the use of protected content by online content-sharing service providers was one of the main focus points of these changes. Indeed, many of the changes around these issues closely follow the concerns raised by the committees earlier. As a result, many existing recitals were amended as well as new ones were added. Through them, the telos of the final DSM Directive can accurately be interpreted.

As an addition to the existing EU copyright framework, the DSM Directive seeks to achieve many of the same objectives pursued by other directives on copyright and related rights. These include securing the functioning of the internal market, high level of protection for rightholders and creating a framework in which exploitation of works and other subject-matter can take place (recital 2). This kind of harmonized legal framework aims to contribute to the proper functioning of the internal market and stimulate innovation, creativity, investment and production of new content in the digital environment. However, the directive makes note of the fact that rapid technological advancements have changed ways in which works or other subject-matter are created, produced, distributed and exploited (recital 3). This results in the emergence of new business models and actors which in turn calls for future-proof legislation that doesn't restrict technological development. Still, the directive

[206] A (2018) 0245, p. 19-20
[207] A (2018) 0245, p. 64
[208] TA (2019) 0231

declares, the existing objectives and principles of the EU copyright framework remain sound. There is just a need to address legal uncertainty as regards to certain uses, such as cross-border uses.

When it comes to online content-sharing services, the directive recognizes them as a main source of accessing copyright-protected content online (recital 61). While praising them as means of providing wider access to cultural and creative works, and offering great opportunities for cultural and creative industries to develop new business models, the directive raises concerns on some legal challenges that had not been addressed on union level prior to it. These challenges concern such themes as whether these services engage in copyright-relevant acts and whether they should obtain authorization from rightholders for content that is uploaded into these services by users. The goal is for the rightholders to have more influence in determining whether (and under which circumstances) their works or subject-matter may be used as well as to obtain appropriate remuneration for such use. This is to be done by establishing a licensing market between the rightholders and online content-sharing services. Still, none of the provisions in the directive are intended to prejudice the existing exceptions and limitations in EU law and this kind of non-infringing content should not become unavailable due to cooperation between rightholders and online content-sharing service providers (recital 66).

The 70th recital states that any step taken by online content sharing service providers and rightholders, to prevent the availability of works or other subject-matter which infringe on copyright, should be without prejudice to the application of exceptions and limitations – in particular to those which guarantee the freedom of expression of users. Therefore, users should be allowed to upload content generated by users ''for the specific purposes of *quotation*, criticism, review, caricature, parody or pastiche'' (italics added). According to the document, this is particularly important for striking a fair balance between fundamental rights laid out in the CFR, especially between freedom of expression and arts, and the right to intellectual property. What is especially interesting is that, according to the recital, these exceptions and limitations – including quotation – should be made mandatory. This is a stark contrast to the InfoSoc. Directive where these exceptions and limitations are presented as optional. Still, the mandatory quotation exception in the DSM Directive could be seen as more consistent with article 10(1) of Berne than its counterpart in the InfoSoc. Directive (see section 3.1-3.2).

4.4.2 Article 17(7)

The provision that deals with the use of protected content by online content-sharing service providers – formerly article 13, now article 17 – was greatly expanded from its original form in the final version of the directive. The concerns raised by the numerous committees (which were discussed in sections 4.2-4.3) are clearly visible in the wording of the new article. In relation to preventing the availability of works and subject-matter that infringe on copyright and related rights, article 17(7) of the DSM Directive states the following:

> ''The cooperation between online content-sharing service providers and rightholders shall not result in the prevention of the availability of works or other subject-matter uploaded by users, which do not infringe copyright and related rights, including where such works or other subject-matter are covered by an exception or limitation.
>
> Member States shall ensure that users in each Member State are able to rely on any of the following existing exceptions or limitations when uploading and making available content generated by users on online content-sharing services:
>
> (a) quotation, criticism, review;
>
> (b) use for the purpose of caricature, parody or pastiche.'' (Underlines added)

The first paragraph would appear to cover all the exceptions and limitations that any given member state has chosen to adopt. It appears to require the member states to respect those exceptions and limitations on online content-sharing services as well. The second paragraph, however, is more specific. The imperative ''shall'' requires the member states to adopt the set of exceptions and limitations below it when dealing with copyright-protected content on online content-sharing services. This is especially interesting when one considers that the DSM Directive only complements the InfoSoc. Directive while not replacing it. Therefore, this would suggest that whether or not a member state has chosen to adopt the corresponding exceptions and limitations in the InfoSoc. Directive (and while still retaining the right to do so or not), it still has to adopt these exceptions and limitations in regard to online content-sharing services due to article 17(7) of the DSM Directive. Thus, it would be possible, using quotation as an example, for the member states to prevent the non-availability of user-generated content that falls under the scope of the quotation exception on online content-sharing services while, simultaneously, not allowing its subjects to rely on the quotation exception outside these services.[209] Still, online content-sharing services have become the main marketplace for the distribution and access to copyright-protected content, as noted in

---

[209] This interpretation might only be theoretical as, as was pointed out in section 2.6.3, copyright exceptions and limitations often enshrine the legislator's attempt to strike a fair balance between various fundamental rights (namely freedom of expression & arts and right to property). It is then questionable whether some of these exceptions and limitations are truly optional at all.

recital 61 of the DSM Directive. Therefore, it would be realistic to say that the aforementioned exceptions and limitations have, *de facto*, become largely mandatory on union level.

The choice to make these specific exceptions and limitations mandatory in article 17 might be a conscious effort by the EU to preserve the kind of internet culture that has emerged in these services and was drawn attention to by the committee of Culture and Education and the committee on the Internal Market and Consumer Protection (see section 4.2). The committees had referred to ''user-generated content'' that often consisted of ''short extracts or short quotations from protected works or other subject-matter'' for the purposes of ''illustration, caricature, parody, pastiche, criticism or review'' as a way to describe this phenomena. Indeed, the public controversy sparked by article 13/17 of the DSM Directive was heavily centered around concerns for the continuation of this kind of internet culture – one with heavy emphasis on freedom of expression and information.[210] In pursuant to safeguarding this kind of internet culture, it would be logical to enforce these specific exceptions and limitations on online content-sharing services. This can be interpreted as the EU not wanting to prevent this type of cross-border using and sharing of protected works and other subject-matter – if anything, it seeks to actively uphold it (although while attempting to rebalance the rights and interests of different stakeholders).

4.4.3 The Quotation Exception in the DSM Directive

Article 17(7) is the only article that mentions the quotation exception in the DSM Directive. There is no sign of a new, ''extended quotation exception'' that was proposed by the committees mentioned before (see section 4.2) – the exception that was, according to the committees, required to safeguard the internet culture described above. In fact, there is no mention of it in the entire directive, let alone article 17. Additionally, nothing in the wording suggests that the quotation exception in article 17(7)(a) of the DSM Directive differs from the quotation exception in article 5(3)(d) of the InfoSoc. Directive. On the contrary, article 17(7) speaks explicitly of ''existing exceptions or limitations'', strongly indicating the unchanged nature of these provisions.[211] After all, the DSM Directive is based on and

[210] *Reda* 2020 b, section Public Debate. See also *Liberties* 2017, Article 13 Open Letter.
[211] It should be noted that, oddly enough, article 17(7)(a) seems to present ''criticism'' and ''review'' as stand-alone existing exceptions to the copyright. This is despite the fact that they aren't mentioned as such in the InfoSoc. Directive. Rather, criticism and review are only presented as potential purposes for the quotation exception in article 5(3)(d) – not as exceptions of their own kind. This might simply be the result of sloppy legislative drafting work. Still, it doesn't seem likely that they would present any major judicial problems down the road.

complements the existing EU copyright framework, but it doesn't replace it. It is then fair to conclude that the quotation exception in article 17(7)(a) of the DSM Directive is the same exception as the one in article 5(3)(d) of the InfoSoc. Directive.

Therefore, despite the concerns raised by the committees, the legislator evidently didn't find it necessary to create a new quotation exception for the purposes of article 17 but found the existing quotation exception sufficient. This interpretation isn't without its merits because, although the previously mentioned committees raised noteworthy points about the need to safeguard user-generated content online, it isn't immediately obvious why the existing quotation exception wouldn't cover these kinds of uses. ''Short extracts or short quotations from protected works or other subject-matter'' for the purposes of ''illustration, caricature, parody, pastiche, criticism or review'' were the words used to describe this user-generated content. Although the term ''quotation'' has its origin in literary works and is strongly associated to them[212], the quotation exception in the EU copyright framework is certainly not that restricted.

The CJEU had implied as early as in *Painer* that the quotation exception can be applied to photographic works.[213] In his opinion on *Metall Auf Metall*, AG Szpunar stated that he sees no reason why the quotation exception couldn't be applied to other categories of works than literary works, in particular, musical works.[214] The CJEU confirmed AG Szpunar's view that the exception can indeed be applied to musical works, strongly implying that it can be applied to all kinds of works.[215] Furthermore, in his opinion on *Spiegel Online*, AG Szpunar claimed that, ''at the present time'' (in comparison to the origins of the word ''quotation''), he didn't see it ''inconceivable'' that the quotation exception could be applied to works such as musical works, cinematographic works and works of visual art.[216] Although neither confirming or denying AG Szpunar's assertion, the CJEU described the quotation exception as the use of ''a work'' or ''of an extract from a work'' without discriminating between different categories of works.[217]

Thus, based on existing CJEU case law, there do not seem to be any arbitrary restrictions to the scope of the quotation exception in terms of different categories of works. This can make

[212] See AG *Szpunar* on *Metall Auf Metall*, para 62 & AG *Szpunar* on *Spiegel Online*, para 41.
[213] C-145/10 *Painer* ECLI:EU:C:2011:798*,* paras 122-123
[214] AG *Szpunar* on *Metall Auf Metall*, para 62
[215] C-476/17 *Metall Auf Metall* ECLI:EU:C:2019:624, paras 68-71.
[216] AG *Szpunar* on *Spiegel Online*, para 42.
[217] C-516/17 *Spiegel Online* ECLI:EU:C:2019:625, paras 78-79

one conclude that the existing quotation exception is indeed capable of responding to challenges brought by the digital age without having to extend its scope. Still, there are certain features to the quotation exception that can make the provision's compatibility with online content-sharing services and the user-generated content therein complicated. These issues shall be elaborated on next.

5. The Quotation Exception – A Future-Proof Provision?

5.1 DSM Directive and Quotation – in Search for a Fair Balance in Modern Copyright Environment

As of writing this thesis, the DSM Directive is still very new. Although it is in force, the directive is still in the process of national implementation and hasn't experienced any application. In fact, the only case brought up in relation to it, to date, is one by Poland, brought on 24th of May 2019.[218] Admittedly, the case is precisely about article 17. The Republic of Poland aims to no less than annul article 17(4)(b) and article 17(4)(c) or, alternatively, annul article 17 in its entirety. Poland argues that the provisions in question infringe on freedom of expression and information guaranteed by article 11 of the CFR – precisely the values that the exceptions and limitations, like quotation, aim to safeguard. It should be noted that Poland isn't alone with these grievances[219]. It is then evident that some of the concerns around these fundamental rights in relation to the DSM Directive remain, despite the EU's apparent attempt to reach a compromise. Keeping the telos of the exceptions and limitations in mind, these concerns ultimately come together into one question: are the existing exceptions and limitations able to strike a fair balance between the rights of different stakeholders on online content-sharing services? Are they, in that sense, future-proof?

These kinds of questions are inherently somewhat complicated. What is ultimately ''fair balance'' can only be found in case-by-case analysis and is subject to differ depending on the viewpoint. To answer these questions in any satisfactory way, they should be approached from a certain, fixed viewpoint. For the purpose of this thesis, they must be approached from the viewpoint of the EU copyright framework. Therefore, one must consider the meaning and the purpose of the quotation exception as part of the EU copyright framework. These, in turn, must be compared to the relevant provisions and recitals of the DSM Directive.

It is important to remember, however, that the balancing exercise between different fundamental rights is, naturally, a two-way street. Ever since *Promusicae*, the CJEU has ruled that, when transposing an EU directive, the member states must rely on an interpretation which ''allows a fair balance to be struck between the various fundamental rights protected by the Community legal order''.[220] Based on existing CJEU case law and copyright directives, it is safe to say that the union has so far chosen to maintain a high level

---

[218] C-401/19 *Poland* v *European Parliament* and *Council of the European Union* [case in progress]
[219] *Reda* 2019, section EU Copyright Reform: Our Fight Was Not in Vain
[220] C-275/06 *Promusicae* ECLI:EU:C:2008:54, para 68

of protection of intellectual property, traditional to continental Europe. Indeed, this isn't immediately unjustifiable from a fundamental right viewpoint either, given that the right to property – including intellectual property – is a fundamental right. On top of that, the CJEU has, in the past, ruled that provisions of a directive which derogate from a general principle established by that directive must be interpreted strictly.[221] In *Infopaq*, the CJEU plainly stated that the requirement of authorization from the rightholder for any reproduction of a protected work is the general principle established by the InfoSoc. Directive. Exceptions and limitations to this general principle, therefore, are exemptions that require strict interpretation. In Infopaq, the court implied that the requirement of strict interpretation calls for these provisions to be interpreted in light of article 5(5), the three-step-test.

Nevertheless, the CJEU has shown numerous times that it is willing to use fundamental rights -based arguments to ultimately determine the scope of certain concepts of EU law, such as those concerning copyright.[222] It has done this for several exceptions and limitations, but also in regards to author's exclusive rights. In cases such as *Renckhoff* and *GS Media*, the court relied on fundamental rights -based argumentation in order to determine the relationship of hyperlinking to ''communication to the public''.[223] In *GS Media* especially, the CJEU outlined how too far reaching exclusive rights would unreasonably restrict the users' rights to freedom of expression and information. Although slightly different in the referred questions and outcomes, the court made it clear in both cases that the Internet is of particular importance to freedom of expression and information, and that ''hyperlinks contribute to its sound operation as well as to the exchange of opinions and information in that network characterized by the availability of immense amounts of information''. It would appear that the court, in these cases, recognized the Internet's potential, significance and special character as well as its importance to fundamental rights, and aligned its interpretation of copyright provisions accordingly.

On top of balancing between different fundamental rights, the CJEU has reminded the member states of, when transposing EU directives, accounting for the principle of proportionality, one of the guiding principles of EU law, which states that measures adopted must be appropriate for attaining their objective and must not go beyond what is necessary

---

[221] C-05/08 *Infopaq* ECLI:EU:C:2009:465, paras 56-58
[222] *Jongsma* IPRI 2019, p. 2
[223] C-160/15 *GS Media* ECLI:EU:C:2016:644, paras 44-45 & C-161/17 *Renckhoff* ECLI:EU:C:2018:634, paras 40-41.

to achieve it.[224] In *Deckmyn*, the court held that this is true also for (in that case) the parody exception as parody is a way to practice freedom of expression as opposed to the rightholders' rights in articles 2 and 3 of the InfoSoc. Directive.[225] In *Painer*, the court stated that quotation is also to serve freedom of expression as opposed to the reproduction right of the author.[226]. This would indicate that articles 2 and 3 (and presumably 4) of the InfoSoc. Directive essentially embody the right to intellectual property, as it is guaranteed in CFR. The court emphasized, however, that the act of striking a fair balance is ultimately the result of a case-by-case analysis where all circumstances must be taken into account. As explained earlier, this can also take place on grounds of moral rights - despite the fact that moral rights weren't subject to harmonization efforts.

5.2 The Dynamic Quotation Exception

It is against this background, as well as the telos of the DSM Directive, that the quotation exception should be analyzed. After *Painer*, *Metall Auf Metall* and *Spiegel Online*, it would seem apparent that the CJEU has chosen to implement a broad definition of quotation. The emergence of new ways of creation and new forms of works in on itself will likely not render the exception ineffective. In principle, it is safe to say that the quotation exception can be applied to all kinds of works and subject-matter – even those, that have only recently emerged on online content-sharing services.

Furthermore, at least in theory, the quotation exception shouldn't cause any major fragmentation of the internal market in regard to the implementation of the directive. Article 17(7) creates a mandatory obligation for the member states to respect the existing quotation exception which has a notable case history. Due to the cross-border nature of online content-sharing services, the choice to make these exceptions and limitations mandatory makes sense as a necessity for harmonization efforts.[227] Based on existing case law, it is known that member states must follow all the conditions laid out in article 5(3)(d) of the InfoSoc. Directive. The court has also given numerous rulings on how certain expressions in the provision should be interpreted. On top of this, the member states must also achieve the level of protection of fundamental rights provided by the CFR (as interpreted by the court). The court has also emphasized that the degree of harmonization (on any given exception or limitation) is decided on a case-by-case basis which, in turn, is based on their impact on the

---

[224] C-275/06 *Promusicae* ECLI:EU:C:2008:54, para 68
[225] C-201/13 *Deckmyn* ECLI:EU:C:2014:2132, paras 26-34
[226] C-145/10 *Painer* ECLI:EU:C:2011:798, paras 134-135
[227] *Metzger – Senftleben* 2020, p. 11

smooth functioning of the internal market. Although the member states have certain built-in tools for national discretion (what is ''fair practice'' and ''the extent required by the specific purpose''), the CJEU has plenty of legislative power to define the scope of the quotation exception further if it deems it necessary in order to achieve the objectives of the DSM Directive.[228] It is then important to remember that, although certain problems may emerge in introducing the quotation exception to online content-sharing services, many of them can likely be properly addressed through CJEU interpretation.

The court has repeatedly exercised this legislative power in relation to the quotation exception already. In *Painer*, relying on fundamental rights, the court issued that it was irrelevant whether the quotation is made as part of a work protected by copyright or, on the other hand, as part of a subject-matter not protected by copyright – in either cases, the application of the exception isn't excluded.[229] The court explicitly explained that this is done to favor freedom of expression over the author's interest in being able to prevent reproductions of extracts of his work. Furthermore, in *Metall Auf Metall* and *Spiegel Online*, the court plainly stated that the right to intellectual property isn't an inviolable, absolute right. In those cases, as explained in section 3.3.2, the court went outside the traditional definition of quotation in favor of one that would apply to all kinds of works – an approach suggested by AG Szpunar and one that the court had seemingly greenlighted in *Painer*. Although not done on grounds of fundamental rights, this interpretation certainly favors freedom of expression and information over the right to property. It is arguably yet another instance where the CJEU moved away from a strict interpretation of exceptions (as established in *Infopaq*.) to one that strikes a fair balance between different fundamental rights. After all, one could have reasonably expected the court to retain the traditional meaning of quotation (quotation of literary works), which it chose not to do.

5.3 Quotation and Freedom of Expression – Trouble in the Horizon?

5.3.1 Dialogue and Unalteration

However, although the scope of the quotation exception has greatly been expanded through CJEU case law, it has arguably also been severely diminished. To elaborate this, one must revisit what was established in *Metall Auf Metall*. As explained in section 3.4, the expression ''for purposes such as criticism and review'' turned out to have a far larger impact on the

[228] This is precisely what the court did in *Deckmyn*, for example, by determining that ''parody'' must enjoy uniform interpretation throughout the union, to ensure its effectiveness as a means to balance copyright and freedom of expression. See *Jongsma,* 2017

[229] C-145/10 *Painer* ECLI:EU:C:2011:798, paras 134-136

application of the quotation exception than one might have expected at first glance. AG Szpunar interpreted this as meaning that a quotation must enter into ''some kind of dialogue'' with the work quoted, which could be confrontational, a tribute or it could take place in any other way as long as there is interaction between the quoted work and the quoting work. A quotation should be incorporated to the quoting work, without modification, in a manner that it can be distinguished as a foreign element (being unaltered and distinguishable). In his opinion, these two conditions make the distinction between quotation and plagiarism as well as make dialogue with the two works possible. The CJEU agreed with AG Szpunar on these points and ruled accordingly.

This, in turn, drew a fair share of criticism from experts who would've preferred the court wield its legislative power differently.[230] The European Copyright Society (ECS) criticized AG Szpunar's perception of quotation as ''recklessly conservative'' and argued that a more substantial role to the concepts of ''fair balance'' and ''fair practice'' should've been given.[231] Citing *Painer*, ECS noted that the CJEU considers the intention of the quotation exception to be to ''strike a fair balance between the right to freedom of expression of users of a work or other protected subject-matter and the reproduction right conferred on authors''. ECS expressed that, not only should the quotation exception cover sound samplings, but it should do so even when the quoted work isn't distinguishable from the quoting work – in other words, even when a listener wouldn't be able to tell that another person's work or subject-matter is being used. ECS argued that this kind of interpretation would be in line with articles 13 (freedom of arts) and 11 (freedom of expression and information) of the CFR. ECS also appeared to be doubtful that the requirements presented by AG Szpunar can truly be said to arise from the everyday meaning of ''quotation''.

Daniël Jongsma also criticized AG Szpunar's interpretation of the quotation exception for very similar reasons.[232] First, he found that Szpunar's argument, that the phrase ''for purposes such as criticism and review'' in article 5(3)(d) creates a requirement for the quoting work to enter into a dialogue with the quoted work, was ''very weak''. Citing *Painer*, he stated that safeguarding the right to freedom of expression is the *raison d'être* of the provision and, although not strictly against the wording of the provision, Szpunar's interpretation greatly reduces its effectiveness to do so. He implied that, in the case of

[230] See. *Jongsma* IPRI 2019 and *Bently & others* 2019
[231] *Bently & others* 2019, p. 2-4 & 17-21.
[232] *Jongsma* IPRI 2019, p. 8-11

ambiguous wording, such as in this case, more weight should be given to freedom of expression as, according to him, a more permissive interpretation on that front would not by itself seriously hamper the rights of authors. This is because a quotation would still have to fill the requirements of fair practice and necessity, as per the wording of article 5(3)(d) of the InfoSoc. Directive. Therefore, Jongsma argued, the systemic arguments based on international law and fundamental rights ''far outweigh the relatively weak textual arguments''. He added that a requirement to enter into a dialogue does not arise from every day meaning of ''quotation'' as, as an example, using the phrase ''to be or not to be, that is the question'' is universally understood as a quotation of Shakespeare's Hamlet, whether an interaction with the quoted work follows next or not. For the same reasons, he rejected the requirement of unalteration, arguing that it is common in arts to refer to the reuse of elements from a prior creation as ''quotations'', regardless of whether they stand out as foreign elements in the quoting work or not[233].

The critique seems to be mostly aimed at these perceived unnecessary conditions that the quotation exception has to meet which would result in a severe imbalance between different fundamental rights. In other words, these conditions would restrict freedom of expression and information without proper justification in relation to the right to property. These concerns appear to be valid as the requirement for a ''dialogue'' (as well as unalteration and distinguishability) may seriously affect the provision's capability of safeguarding freedom of expression. In *Metall Auf Metall*, the court ruled that the quotation exception doesn't apply to phonogram sampling, unless that use has the intention of entering into dialogue with the work from which the sample was taken. AG Szpunar, in his opinion, admitted that ''sampling in general, and the use of the phonogram at issue in the main proceedings in particular, do not satisfy those conditions. The aim of sampling is not to enter into dialogue with, be used for comparative purposes, or pay tribute to the works used''.[234] Therefore, although the quotation exception, in theory, applies to all kinds of works, these two additional requirements might *de facto* disqualify certain types of works. This is arguably true for sound sampling, but it is not impossible to imagine other types of uses that do not conform to these additional requirements. It is arguably the experience of many that a lot of the user-generated content generally encountered on online content-sharing services do not

[233] On this point, See also *Bently – Aplin* 2018, p. 18-21
[234] AG *Szpunar* on *Metall Auf Metall*, para 67.

concern themselves with unalteration, distinguishability or dialogue with the original work, as the quotation exception would require.

5.3.2 Indicating the Author – Hinderance to Creativity?

There is another requirement to the quotation exception that has been addressed to a lesser extent in this regard. As mentioned earlier, article 5(3)(d) also dictates that a quotation is permissible provided that the source, including the author's name, is indicated, unless this turns out to be impossible. Although indication of the source and the author's name is fairly self-explanatory, it is not as easy to answer when one should be considered exempted from this requirement. In other words, at what point should one be allowed to conclude that identifying the author is impossible is nowhere near as obvious. As explained in section 3.6, both AG Trstenjak and the CJEU seemed to agree that at least some research effort and vigilance can be expected of a user on this front.

It is reasonable to expect that this requirement may encounter similar problems as the dialogue -requirement. As explained before, article 17 received plenty of backlash precisely on grounds of fundamental rights. Activists and experts alike were worried about the negative impact that the provision might have on an internet culture that heavily emphasizes freedom of expression, information and arts. Online content-sharing services, where the user is both a consumer and a contributor, have a large role in this framework. Not only do they serve as platforms to share and distribute works and other subject-matter, they also serve as sources and means to introduce new, user-uploaded works.

Just as this plurality of user-generated content typically does not concern itself with unalteration, distinguishability and dialogue with the original work, same is no doubt true when it comes to indicating the source. Amidst the environment of ever-increasing amount of new works and information it is common to encounter works origin of which are unknown and difficult to identify. The author's identity is easily lost in the circulation of information, art and expressions, typical to online environment. Therefore, how much effort is to be expected of one to identify the author before being allowed to deem it impossible – that is a question that might become topical in the future. In the vastness of these online platforms, the relevant information simply being ''available'' is hardly going to suffice. The CJEU can wield significant legislative power in determining the proper standard.

The CJEU, as well as the EU as a whole, have clearly recognized the Internet's importance and significance to freedom of expression, information and arts. Indeed, it was precisely for

this reason that the court considered hyperlinking a form of quotation – because it contributes to the sound operation of freedom of expression and information online. The quotation exception exists to safeguard freedom of expression, which means that its importance is amplified in the online environment. It is then entirely possible that the CJEU will adopt a relatively low standard of ’’impossibility’’ for the purposes of article 17(7), should it ever need to address that question. At the same time, it wouldn’t be alien for the continental European tradition to resort to high protection of intellectual property. Taking it to the extreme, however, would make it difficult to realize the objectives of the DSM Directive and wouldn’t sit well with users’ fundamental rights.

6. CONCLUSION

6.1 Quotation – an Autonomous Concept of EU Law

Although the CJEU hasn't plainly stated so, it is all but certain that ''quotation'' is an autonomous concept of EU law. According to the established principle in CJEU case law, when a provision makes no express reference to the law of the member states – which article 5(3)(d) of the InfoSoc. Directive does not do – for the purpose of determining its meaning and scope, they must be given an autonomous and uniform interpretation throughout the union. This is done to secure uniform application of EU law as well as the principle of equality. This rule has resulted in many concepts in EU copyright law becoming autonomous concepts of EU law, including one of the exceptions and limitations – the parody exception. Therefore, there is every reason to conclude (and no reason not to conclude) that quotation is an autonomous concept of EU law.

In *Metall Auf Metall* and *Spiegel Online*, it can clearly be seen that the CJEU has adopted an autonomous meaning to the concept of ''quotation'' – a definition of the term within EU copyright law. A quotation is described as ''a 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, of defending an opinion or of allowing an intellectual comparison between that work and the assertions of that user''. This, according to the court, is the meaning of quotation in everyday language. By taking into account the legislative context in which it occurs as well as the purposes of the rules of which it is part, it forms the autonomous concept of ''quotation'' within EU law. Due to the telos and the meta-telos of the legal framework of which it is part – that is to say, the purpose of EU copyright law as well as the EU as a whole – the concept of quotation has expanded far outside the confines of its traditional meaning. It is applicable to all kinds of works. Not just to literary works, but also to musical, photographic, cinematographic and works of visual art – just to name a few. It can also be lawful to quote works in their entirety provided that all the conditions in article 5(3)(d) of the InfoSoc. Directive are met. The provision is also welcoming of new methods of quoting made possible by technological advancement, such as hyperlinking.

Article 5(3)(d) of the InfoSoc. Directive also requires that a quotation meets certain conditions in order to be a lawful exception to copyright. The expression ''for purposes such as criticism and review'' means that the quoting work must enter into some kind of dialogue with the quoted work. The dialogue can be confrontational, a tribute or take place in any other way, as long as it is there. In relation to this, it is required that the quotation is unaltered

and distinguishable. The quotation must be incorporated into the quoting work without modification in a way that it is easily distinguishable as a foreign element. This, according to the CJEU, is required in order for any dialogue between the two works to be possible to take place. Additionally, the provision states that quotations are only permissible out of works which have been lawfully made available to the public. This is understood as the act of making a work available to the public with the authorization of the copyright holder or in accordance with a non-contractual license or a statutory authorization. Finally, unless it turns out to be impossible, the source, including the author's name, must be indicated. This requirement can be fulfilled in numerous ways and isn't confined to any particular form.

The quotation exception, however, does not constitute a full harmonization. In fact, there are plenty of ways in which national courts can exercise discretion and maintain their own copyright traditions. National courts can ultimately decide whether a work has been lawfully made available to the public. They also have the final say in whether the quoting work has entered into a dialogue with the quoted work or not. Furthermore, national courts can determine when identifying the author for the purpose of indicating his name in a quotation shall be considered impossible and, subsequently, the user should be exempted from this rule. Last, but certainly not least, the national courts get to determine if a quotation is in accordance with fair practice and the extent of a quotation is appropriate for the specific purpose. These final two requirements in article 5(3)(d) appear to be built-in conditions designed to be left to national discretion. The courts have a reasonably wide free reign to consider all the relevant factors and legitimate interests that the stakeholders might have in any given case.

Nevertheless, there are some interpretive boundaries circumscribed by EU law that member states must respect. First, member states aren't allowed to implement the exceptions and limitations in an unharmonized manner. If a member state chooses to provide for the quotation exception in their national copyright law, they must comply with all the conditions laid out in article 5(3)(d). They must also comply with the general principles of EU law, such as the principle of proportionality. Furthermore, national courts aren't allowed to compromise the objectives of the InfoSoc. Directive, such as establishing a high level of protection for authors and ensuring the proper functioning of the internal market. The member states must also safeguard the effectiveness of the exceptions and limitations and to permit observance of their purpose. For the quotation exception, that purpose is to secure the freedom of expression of users. The national courts must also take into account that article

5(3)(d) is subservient to article 5(5), the three-step-test. This means that the quotation exception is only to be applied in certain special cases which do not conflict with normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author. Lastly, the national courts must rely on an interpretation that allows a fair balance to be struck between the various fundamental rights protected by the CFR. When dealing with the quotation exception, this balance is namely to be found between freedom of expression and right to property.

6.2 Compatibility with Online Content-Sharing Services

The quotation exception in EU copyright law was designed from the beginning to be future-proof – compatible with technological development as well as new ways of creating and using protected content. Ever since *Painer*, the CJEU was open to the idea of quoting photographic works. Since then, the court has made it clear that the quotation exception is applicable to all kinds of works as long as all the conditions of the exception are met. Furthermore, in EU copyright law, any references to ''short'' extracts or quotations have been absent from the start even though similar restrictions haven't been unusual to quotation exception provisions in other legal frameworks, including earlier versions of the Berne Convention. Instead, quotations are permissible to the extent required by the specific purpose, which, presumably, can justify quoting works in their entirety. After all, arbitrary restrictions to the extent of a quotation wouldn't sit well with works such as photographs, paintings and short poems.

Furthermore, EU has recognized the Internet's significance and potential as well as considers its sound operation important to fundamental rights, such as freedom of expression and information. The importance of fundamental rights, which are safeguarded by numerous exceptions and limitations, is amplified in the online environment. It is precisely for this reason that the EU decided to make certain exceptions and limitations – including the quotation exception – mandatory for online content-sharing services in spirit of article 17(7) of the DSM Directive. That is to say, the cooperation between online content-sharing service providers and rightholders in preventing the availability of infringing works on these services must not result in the unavailability of works covered by these exceptions and limitations, such as the quotation exception. The CJEU has also repeatedly stated that the right to property is not an inviolable right while, simultaneously, emphasized the role of exceptions and limitations in safeguarding fundamental rights.

Although the DSM Directive, especially article 17, was largely designed to respond to several injustices that the authors were facing in the digital age, the EU clearly isn't about to disregard the rights and interests of the users either. On the contrary, based on the history of CJEU case law, it is relatively safe to assume that whenever a case concerning an exception or limitation presents the opportunity to widen its scope and strengthen its purpose, the CJEU often takes an approving stance, unless the interpretation would prejudice the author's rights and interests to an unreasonable extent. The smooth functioning of the internal market in the digital age no doubt favors freedom of expression, arts and information. Thus, if the rights and interests of the author aren't severely harmed as a result, the court is likely to adopt the interpretation that supports this objective, just as it has done so far. Therefore, in addition to the quotation exception already being quite versatile, the CJEU has plenty of legislative influence to develop the quotation exception for the purposes of the DSM Directive in the future, provided that the wording of the provision permits it.

Nevertheless, there are certain qualities to the quotation exception that might make its application in spirit of article 17(7) of the DSM Directive troublesome. The requirement for dialogue particularly, as well as the requirements for unalteration and distinguishability associated to it, has garnered plenty of criticism from copyright experts. This requirement raises concerns that it might restrain freedom of expression to an unreasonable extent without proper justification in relation to right to property. On top of that, technological development as well as online content-sharing services have enabled new ways of creation that, while quote from existing works, don't typically concern themselves with unalteration, distinguishability or having a dialogue with the quoted work. This is definitely the case with sound sampling (*Metall Auf Metall*) but can easily apply to many other kinds of works often encountered in these services. Problems might be present with other requirements too, such as indicating the source, including the author's name, unless it turns out impossible. Uncertainty around when one can consider identifying the author ''impossible'' can no doubt stifle with stimulation of creativity and innovation, especially when one takes into account the vastness of these platforms and the circulation of information, arts and expressions therein.

The societal development to the digital age has been fairly rapid – arguably too quick for EU law to keep up as it typically develops at a slow pace. By the time the proposal for the DSM Directive had been presented, online content-sharing services had already become part of everyday life and popular platforms for consuming, distributing, sharing, exploiting,

downloading and uploading user-generated content. This largely unregulated new phenomenon quickly developed its own culture – one with heavy emphasis on freedom of expression, arts and information of users. The unprecedented backlash received by the DSM Directive from experts, activists and ordinary citizens is, therefore, somewhat understandable. Of course, the EU isn't obligated to uphold the kind of culture these online content-sharing services had adopted. In fact, if the right to property is severely being violated in this environment, the EU could be argued to have a duty to intervene. Still, in an attempt to develop a legal framework for copyright for online content-sharing services and to strike a fair balance between different fundamental rights, the EU should consider the objectives of the DSM Directive carefully.

Although the directive indeed aims to maintain a high level of protection for rightholders, it also seeks to secure the functioning of the internal market and to create a framework in which exploitation of works and other subject-matter can take place. It also aims to stimulate innovation, creativity, investment and production of new content in the digital environment. Furthermore, the directive praises online content-sharing services as means of providing wider access to cultural and creative works and offering great opportunities for cultural and creative industries to develop new business models. For reaching these goals, adopting excessively strong author's rights would surely be counterproductive.

At this point, one can only speculate if the CJEU has already done so with the quotation exception. It does then beg the question whether the DSM Directive would've indeed required a new, extended quotation exception, as some of the EU committees had suggested. Demands for more flexibility in the field of copyright exceptions and limitations in EU copyright law are certainly nothing new.[235] In an attempt to rebalance the rights of authors and rightholders in opposition to the rights of users in the mostly unregulated environment of online content-sharing services, one cannot help but wonder if the EU has tipped the scale too strongly on the former side – at least, when it comes to the quotation exception.

---

[235] See. F.ex. *Senftleben* 2010