

Exceptions and limitations to copyright and related rights in the light of the caselaw of the Court of Justice of the European Union

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Abstract

Exceptions and limitations are an integral part of any effective copyright systems, they play a crucial role in striking a fair balance between the interests of the creators and rightholders, on the one hand, and those of the users of the protected works, on the other. The exceptions and limitations serve to secure such fundamental values as freedom of expression and information, freedom of art, science, research and education. Since the exceptions and limitations are not fully harmonised in the European Union, the lack of legal certainty is being cured by the caselaw of the Court of Justice. The role of the Court preliminary rulings in interpreting the relevant legal provisions and providing clarifications as to their application cannot be overemphasised. Moreover, in recent cases the Court of Justice considered the exceptions and limitations to copyright in the light of the European Convention on Human Rights and the settled caselaw of the European Court of Human Rights. Therefore, it is an opportunity for us to observe the growing attention of the Court of Justice to the human rights and fundamental freedoms protected by the European Convention.

Keywords: copyright, exceptions and limitations, European Union, Court of Justice, caselaw

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1. Introduction

Exceptions and limitations are crucial to any copyright system since they ensure such constitutional values as freedom of expression and information, freedom of art, science, research and education, they also pursue the public interest. An effective system of exceptions allows to strike a fair balance between the interests of authors and users of protected works. On the one hand, exceptions and limitations play an important role in ensuring access to information and cultural heritage, on the other hand, they stimulate creativity, as new works often arise from existing works, as in the case of caricature or parody (European Copyright Society, 2015).

As stated in the preamble to Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (Directive 2001/29/EC), a harmonised legal framework on copyright and related rights, through increased legal certainty and while providing for a high level of protection of intellectual property, will foster substantial investment in creativity and innovation. However, Member States should be able to provide, in certain cases, for the exceptions or limitations to exclusive rights, in particular for educational and scientific purposes, in favour of non-profit organizations, such as libraries and archives, for news reporting, citation, for persons with disabilities. physical capabilities, public safety, use in administrative and judicial proceedings (Cопока, 2019, p. 183).

It should be noted that the exceptions and limitations system is not fully harmonised in the European Union. Therefore, some scholars rightly recognize that the goal of a uniform application of the exceptions and limitations has not yet been achieved. In such circumstances, the lack of legal certainty is rectified by the caselaw of the Court of Justice through the development of the EU concept of the exceptions and limitations and interpretation of the relevant provisions of European Union law. Obviously, the authors and rightholders are interested in a comprehensive and harmonised legal framework. This would significantly increase the amount of the legal cross-border online exploitation of their works. On the other hand, users also need a clear, simple and accessible legal framework on the lawful free use of protected works. In other words, harmonisation of the exceptions and limitations serve a two-fold purpose,

namely: first, to ensure legal certainty; second, to allow room of flexibility so that the copyright system could adapt to new circumstances and social needs (European Copyright Society, 2014).

2. General characteristics of the exceptions and limitations

2.1. Mandatory exception under art. 5(1) of the Directive 2001/29/EC

Directive 2001/29/EC provides for two kinds of exceptions: a mandatory exception for temporary acts of reproduction and optional exceptions and limitations to the reproduction right and the right of communication to the public. The purpose of introducing a mandatory exception under art. 5 (1) of the Directive was to allow certain temporary acts of reproduction which are transient or incidental [and] an integral and essential part of a technological process and whose sole purpose is to enable: (a) a transmission in a network between third parties by an intermediary, or (b) a lawful use of a work or other subject-matter to be made, and which have no independent economic significance (Directive 2001/29/EC). A use should be considered lawful where it is authorised by the copyright rightholder or not restricted by law.

Temporary acts of reproduction play an important role in information technology, since the acts of converting works into a digital form and their further exploitation are an integral part of automatic processes. In addition, these acts greatly facilitate internet browsing, otherwise it would be rather difficult to cope with the increasing amount of information and data transmitted online what would result in substantial efficiency decrease of the processes and they would not be able to function properly. The introducing of free temporary reproduction would enable access to information, knowledge and cultural heritage for internet users through "a slight weakening of certain rights of copyright holders" (Троцька, Петренко, 2015, p. 40).

2.2. Optional exceptions under art. 5(2) and art. 5 (3) of the Directive 2001/29/EC

With regard to optional exceptions, art. 5 (2) of the Directive establishes an exhaustive list of exceptions or limitations to the right of reproduction for

private use; use by publicly accessible libraries, educational establishments, museums, archives; reproduction of broadcasts by social institutions pursuing non-commercial purposes, such as hospitals or prisons; ephemeral recordings of works made by broadcasting organisations by means of their own facilities and for their own broadcasts (Directive 2001/29/EC).

Furthermore, art. 5 (3) of the Directive authorizes Member States to provide for exceptions or limitations to the rights of reproduction and communication to the public. The list of exceptions is exhausted and contains fifteen items, including the free use of works for the purpose of illustration for teaching or scientific research; for the benefit of people with a disability; reproduction by the press, communication to the public or making available of published articles on current economic, political or religious topics; quotations for purposes such as criticism or review; for the purposes of public security or to ensure the proper performance or reporting of administrative, parliamentary or judicial proceedings; during religious celebrations or official events organised by a public authority; for the purpose of caricature, parody or pastiche; communication or making available, for the purpose of research or private study, to individual members of the public by dedicated terminals on the premises of the publicly accessible libraries, educational establishments, museums, archives etc (Directive 2001/29/EC).

In certain cases of exceptions and limitations, namely reproductions on paper or any similar medium, effected by the use of any kind of photographic technique; reproductions made by a natural person for private use; reproductions of broadcasts made by social institutions pursuing non-commercial purposes rightholders should receive fair compensation to remunerate them for the use made of their works.

Furthermore, art. 5 (5) of Directive 2001/29/EC provides for a so-called "three-step test", according to which the exceptions and limitations shall only be applied in certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the copyright holders (Directive 2001/29/EC). This rule is borrowed from art. 9 (2) of the Berne Convention for the Protection of Literary and Artistic Works, and establishes the general principle for application of the exceptions. This provision is rather defining the external limits of exceptions

than further narrowing their scope (Cопока, 2019, p. 186).

The Court of Justice issued preliminary rulings on the mandatory exception for temporary acts of reproduction in cases *Infopaq I*, *Infopaq II*, *PRCA v Newspaper Licensing Agency*. What concerns optional exceptions, the Court of Justice ruled on free use for the purposes of public security as well as quotations for purposes such as criticism or review (*Painer, Pelham*), ephemeral recordings of works made by broadcasting organisations by means of their own facilities (*TV2 Danmark v NCB*), for the purpose of parody (*Deckmyn*), communication for the purpose of research or private study, to individual members of the public by dedicated terminals (*TU Darmstadt v Ulmer*), reproduction by the press of published articles on current economic, political or religious topics (*Spiegel, Funke Medien*).

3. Exceptions and limitations as autonomous concept of the European union law

According to the settled caselaw of the Court of Justice the exceptions and limitations are an autonomous concept of the European Union law, so, they should be interpreted autonomously and uniformly. Indeed, the scope for Member States in implementing exceptions is not unlimited, but should be subject to the principle of proportionality and the three-step test under art. 5 (5) of the Directive 2001/29/EC. This approach prevents an uncontrolled expansion of the existing exceptions. However, Member States are not precluded from imposing stricter standards for the application of the optional exceptions. According to the German scholar M. Leistner, such optional catalogue only sets a maximum limit to possible rules on exceptions and limitations, which leaves the Member States at liberty to exercise these options. However, Member States' discretion in transposing the optional exceptions in national law is limited by the principle of autonomous interpretation, and in particular the objective of the Directive to arrive at a coherent application of the exceptions to and limitations on copyright (Leistner, 2014, p. 586).

For instance, in *Padawan* concerning private copying exception the Court of Justice stated that the objective of Directive 2001/29/EC intended to ensure a proper functioning of the internal market requires the elaboration of autonomous concepts of European Union law. The European Union

legislature's aim of achieving the uniform interpretation of Directive calls on the Member States to arrive at a coherent application of the exceptions to and limitations (Padawan, para. 35). In another case *TV2 Danmark v NCB* concerning the ephemeral recordings of works made by broadcasting organisations the Court of Justice stressed that a situation where Member States have introduced an exception into their domestic law, and are free to determine, in an un-harmonised manner, the limits thereof, would be contrary to the objective of the directive, inasmuch as the limits of that exception could vary from one Member State to another and would therefore give rise to potential inconsistencies (TV2, pp. 35-36). Moreover, the Court of Justice concluded in *Deckmyn* that the concept of 'parody' must be regarded as an autonomous concept of EU law and interpreted uniformly throughout the European Union. That conclusion is confirmed by the aim of the Directive itself, which provides for an exhaustive enumeration of exceptions and limitations to the reproduction right and the right of communication to the public, taking account of the different legal traditions in Member States, while ensuring a functioning internal market. Therefore, Member States should arrive at a coherent application of these exceptions and limitations (Deckmyn, pp. 15-16).

4. Member States' discretion in the implementation of exceptions and limitations

The issue of the Member States' discretion in the transposition into national law of a particular exception or limitation was addressed in the most recent rulings of the Court of Justice in the cases *Spiegel* and *Funke Medien*. The Court departed in *Spiegel* from the principle of primacy of EU law, which is an essential feature of the EU legal order, according to which rules of national law, even of a constitutional order, cannot be allowed to undermine the effectiveness of EU law in the territory of that State. On the Court's view, the level of protection of fundamental rights provided for in the Charter of Fundamental Rights of the European Union (the Charter) must be achieved in such a transposition, irrespective of the Member States' discretion. The Court ruled that national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity

and effectiveness of EU law are not thereby compromised (Spiegel, pp. 19-21).

It is clear from the case-law of the Court of Justice that the scope of the Member States' discretion in the transposition into national law of a particular exception or limitation must be determined on a case-by-case basis, in particular, according to the wording of the relevant provision, the degree of the harmonisation of the exceptions and limitations intended by the EU legislature being based on their impact on the smooth functioning of the internal market (Spiegel, pp. 25, 28), (Funke Medien, pp. 40, 43).

According to the Court's position, the Member States' discretion in the implementation of the exceptions and limitations is circumscribed in several regards. The Court imposed four conditions in this connection. First, such discretion must be exercised within the limits imposed by EU law, which means that the Member States are not in every case free to determine, in an unharmonised manner, the parameters governing those exceptions or limitations. They are required to comply with the general principles of EU law, including the principle of proportionality, from which it follows that such measures must be appropriate for attaining their objective and must not go beyond what is necessary to achieve it. Second, the discretion enjoyed by the Member States cannot be used so as to compromise the objectives of the directive that consist in establishing a high level of protection for authors and in ensuring the proper functioning of the internal market. Third, the Member States' discretion is also circumscribed by art. 5(5) of the directive, which makes those exceptions or limitations subject to a three-step test. Fourth, the Member States are bound by the principles enshrined in the Charter. It is therefore for the Member States, in transposing the exceptions and limitations to ensure that they rely on an interpretation of the directive which allows a fair balance to be struck between the various fundamental rights protected by the European Union legal order (Spiegel, pp. 30-38), (Funke Medien, pp. 45-53).

Another issue connected with Member states' discretion was whether a Member State may, in its national law, lay down an exception or limitation, other than those provided for in art. 5 of Directive. The Court of Justice addressed this issue in *Pelham* case. The Court departed from the fact that the list of exceptions and limitations contained in art. 5 of that directive is exhaustive. The fundamental rights now enshrined in the Charter draw

inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international instruments for the protection of human rights to which they are signatories. In that context, in the Court's view, to allow each Member State to derogate from an author's exclusive rights beyond the exceptions and limitations exhaustively set out in art. 5 of that directive, would endanger the effectiveness of the harmonisation of copyright as well as the objective of legal certainty. The requirement of consistency could not be ensured if the Member States were free to provide for such exceptions and limitations beyond those expressly set out in Directive 2001/29/EC since no provision of the Directive envisages the possibility for the scope of such exceptions or limitations to be extended by the Member States. Therefore, the Court ruled that a Member State cannot, in its national law, lay down an exception or limitation other than those provided for in art. 5 of Directive 2001/29/EC (Pelham, pp. 61-64). The Court of Justice reached similar conclusions in *Spiegel* and *Funke Medien* and ruled that the freedom of information and freedom of the press enshrined in art. 11 of the Charter are not capable of justifying a derogation from the author's exclusive rights of reproduction and of communication to the public, beyond the exceptions or limitations provided for in art. 5(2) and (3) of Directive 2001/29/EC (*Spiegel*, pp. 40-49), (*Funke Medien*, pp. 55-64).

5. Requirement of a strict interpretation of the exceptions and limitations

In the first preliminary ruling in *Infopaq* the Court of Justice applied an approach under which exceptions and limitations are a derogation from the general rule namely the requirement of authorisation from the copyright holder for any reproduction of his work; so, they must be interpreted strictly. The Court of Justice specifically stated that according to settled case-law, the provisions of a directive which derogate from a general principle established by that directive must be interpreted strictly. This holds true for the exemption provided for in art. 5 (1) of Directive 2001/29/EC, which is a derogation from the general principle. Moreover, the exemption must be interpreted in the light of article 5 (5) of Directive 2001/29/EC, under which that exemption is to be applied only 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. Finally, the exception must also be interpreted in the light of the need for legal certainty for authors with regard to the protection of their works (Infopaq, pp. 56-59).

The Court further stated in *FAPL* that derogations from the principle of free movement can be allowed only to the extent to which they are justified for the purpose of safeguarding the intellectual property rights. It is clear from the case-law that the conditions of the application of an exception must be interpreted strictly, because art. 5(1) of the Directive is a derogation from the general rule established by that directive (*FAPL*, pp. 106, 162). The requirement of a strict interpretation of the exceptions and limitations was reiterated in most subsequent cases, particularly in *Spiegel* and *Funke Medien*.

6. Criteria of effectiveness of the exceptions and observance of their purpose

In subsequent caselaw, the principle of a strict interpretation of the exceptions and limitations originally formulated by the Court of Justice was supplemented by the criteria of their effectiveness and observance of their purpose, as well as the principle of proportionality.

The origins of this concept can be found in *FAPL*, the Court of Justice stated specifically that exceptions must allow and ensure the development and operation of new technologies and safeguard a fair balance between the rights and interests of rightholders, on the one hand, and of users of protected works who wish to avail themselves of those new technologies, on the other. The Court stressed that the interpretation of the exception should enable its effectiveness and observance of its purpose (*FAPL*, pp. 163, 164).

In the next case *Painer* concerning the quotations exception for purposes such as criticism or review the Court of Justice reaffirmed the need for a strict interpretation. Nevertheless, the Court emphasised that interpretation of those conditions must also enable the effectiveness of the exception to be safeguarded and its purpose to be observed. The court clarified that art. 5(3)(d) of Directive 2001/29/EC is intended to strike a fair balance between the right to freedom of expression of users of a work and the reproduction right conferred on authors. That fair balance is struck, in this case, by favouring the exercise of the users'

right to freedom of expression over the interest of the author in authorising reproduction of extracts from his work (Painer, pp. 133-135).

Furthermore, in *Deckmyn* the Court stated again that the concept of parody must enable the effectiveness of the exception to be safeguarded and its purpose to be observed. As regards the objective, the Court referred to the objectives of the directive in general, namely a harmonisation which will help 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 (*Deckmyn*, pp. 23, 25).

7. Developing concepts

The Court of Justice also plays an important role in remedying legal gaps and developing concepts in cases when directive provides for an exception or limitation but does not give its legal definition, particularly in cases of parody and quotations.

7.1. *Concept of parody*

The case *Deckmyn* related to the exception for parody provided for in the art. 5(3)(k) of Directive 2001/29/EC. Since the directive gives no definition at all of the concept of parody, the meaning and scope of that term must, according to the settled case-law of the Court, 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. With regard to the usual meaning of the term ‘parody’ in everyday language, in the Court's view, the essential characteristics of parody are, first, to evoke an existing work while being noticeably different from it, and, secondly, to constitute an expression of humour or mockery. The interpretation of the concept of parody must also enable the effectiveness of this exception to be safeguarded and its purpose to be observed. As it was mentioned above the directive aims to insure a harmonisation which will help to implement the four freedoms of the internal market and which relates to observance of the fundamental principles of law and especially intellectual property, and freedom of expression (obviously, parody is an appropriate way to express an opinion) and the public interest (*Deckmyn*, pp. 19-20, 23-25).

7.2. Concept of quotation

One of the most recent cases considered by the Court of Justice relates to the exception for quotations for purposes such as criticism or review provided for in art. 5(3)(d) of Directive 2001/29/EC. The Court applied the similar reasoning, namely that in the absence of the definition of the term 'quotation' in the Directive 2001/29/EC its meaning and scope must be determined by considering its usual meaning in everyday language, while also taking into account the legislative context in which it occurs and the purposes of the rules of which it is part. As regards the usual meaning of the word 'quotation' in everyday language, the Court stated that the essential characteristics of a quotation are the use, by a user other than the copyright holder, 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, since the user of a protected work wishing to rely on the quotation exception must therefore have the intention of *entering into 'dialogue'* with that work. In particular, where the creator of a new musical work uses a sound sample taken from a phonogram which is recognisable to the ear in that new work, the use of that sample may amount to a 'quotation', on the basis of art. 5(3)(d) of Directive 2001/29/EC read in the light of art. 13 of the Charter, provided that that use has the intention of entering into dialogue with the work from which the sample was taken. Obviously, there can be no such dialogue where it is not possible to identify the work concerned by the quotation at issue. Therefore, the Court ruled that the concept of 'quotations' does not extend to a situation in which it is not possible to identify the work concerned by the quotation (Pelham, pp. 70-74).

8. Balancing fundamental rights

The recent rulings of the Court of Justice demonstrate a tendency to consider exceptions and limitations as "rights" of users of protected works (*Deckmyn, TU Darmstadt v Ulmer, Padawan, Painer*). The very idea of "user rights" as equivalent rights to be protected was recently analysed in the context of the responsibility of Internet service providers, specifically in cases

Promusicae, Scarlet, Sabam, UPC Telekabel, Mc Fadden, Bastei Lübbe.

The Court traditionally emphasises that the right of intellectual property is not inviolable and must not be absolutely protected. In the light of the settled caselaw the protection of the fundamental right to property, which includes the rights to intellectual property, must be balanced against the protection of other fundamental rights. In the context of measures adopted to protect copyright holders, national authorities and courts must strike a fair balance between the protection of copyright and the protection of the fundamental rights of individuals who are affected by such measures, namely that of the freedom to conduct a business pursuant to art. 16 of the Charter. Moreover, such measures may also infringe the fundamental rights of customers, namely their right to protection of their personal data and their freedom to receive or impart information, which are rights safeguarded by art. 8 and art. 11 of the Charter respectively (Scarlet, pp. 43-46).

In *Promusicae* the Court of Justice assumed that the fundamental right to property, which includes copyright, and the fundamental right to effective judicial protection as well as the respect for private life constitute general principles of Community law recognised in particular by the Charter. Art. 7 of the Charter substantially reproduces art. 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms which guarantees the right to respect for private life, and art. 8 of the Charter expressly proclaims the right to protection of personal data. Once again, the Court underlined the importance of reconciling the requirements of the protection of different fundamental rights, namely the right to respect for private life, on the one hand, and the rights to protection of property and to an effective remedy, on the other (*Promusicae*, pp. 62-65).

In the next case *Scarlet* relating to a system for filtering electronic communications to prevent file sharing infringing copyright the Court concluded that in adopting the injunction requiring to install such filtering system, the national court would not be respecting the requirement that a fair balance be struck between the right to intellectual property, on the one hand, and the freedom to conduct business, the right to protection of personal data and the freedom to receive or impart information, on the other (Scarlet, pp. 43-46, 50, 53). The Court came to similar conclusions in *Sabam* concerning the

injunction requiring the hosting service provider to install the information filtering system (Sabam, pp. 41-44, 48, 51).

In *Mc Fadden* the Court of Justice gave an interesting ruling concerning measures securing WLAN connection*. With regard to the password-securing of an internet connection the Court noticed that this measure is capable of restricting both the freedom to conduct a business of the provider supplying the service of access to a communication network and the right to freedom of information of the recipients of that service. However, the Court emphasised that such a measure does not damage the essence of the right to freedom to conduct its business; and does not undermine the essence of the right to freedom of information of the recipients of an internet network access service since it is limited to request a password. Moreover, the measure must be strictly targeted, in the sense that it must serve to bring an end to a third party's infringement of copyright but without thereby affecting the possibility of internet users lawfully accessing information using the provider's services. Failing that, the provider's interference in the freedom of information of those users would be unjustified in the light of the objective pursued. Finally, the Court stressed that such measures taken by the addressee of an injunction must have the effect of preventing unauthorised access to the protected subject matter or, at least, of making it difficult to achieve and of seriously discouraging internet users from accessing works in breach of that fundamental right (Mc Fadden, pp. 81-83, 90-95).

In *Bastei Lübbe* the Court referred to art. 52 (1) of the Charter according to which any limitation on the exercise of the rights and freedoms recognised by the Charter must respect the essence of those rights and freedoms. On the other hand, a measure which results in serious infringement of a right protected by the Charter is to be regarded as not respecting the requirement that such a fair balance be struck between the fundamental rights. If a national law would always make the right to private life prevail over the right to intellectual

¹ Actually, the Court of Justice analysed three measures, namely monitoring all of the information transmitted, terminating the internet connection completely and password-protecting an internet connection. With regard to first two measures the Court ruled that they cannot be regarded as complying with the requirements of ensuring a fair balance between the fundamental rights. With regard to third measure, in the Court's opinion, it is capable of restricting both the freedom to conduct a business of the provider supplying the service of access to a communication network and the right to freedom of information of the recipients of that service. However, such a measure does not damage the essence of these rights

property in infringement proceedings, then this national legislation would make it practically impossible to obtain evidence on an alleged infringement of copyright, and therefore fail to ensure the effective enforcement of intellectual property rights (Bastei Lübbe, pp. 46, 51-52).

9. Increasing attention to the European Convention on Human Rights

As it was mentioned before, the Court of Justice has repeatedly noted that intellectual property right under art. 17 (2) of the Charter is not absolute. The functional nature of intellectual property rights also follows from the Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention), to which the Member States are parties and to which the European Union will, hopefully, soon to accede.

According to art. 52 (3) of the Charter, insofar as the Charter contains rights which correspond to rights guaranteed by the European Convention, the meaning and scope of those rights shall be the same as those laid down by the said Convention. However, this provision shall not prevent Union law providing more extensive protection what logically means that the scope of these right should be the same or more extended as those enshrined in the European Convention.

In contrast to the Court of Justice, the European Court of Human Rights (ECtHR) is targeted at human rights and fundamental freedoms, namely right to respect for private and family life (art. 8), freedom of expression (art. 10), right to an effective remedy (art. 13), so it considers copyright as an exception to these rights. According to the settled caselaw of the ECtHR, the exception to the right to freedom of expression, in particular for the protection of copyright, must be "narrowly interpreted" and "the need for any restrictions must be convincingly proven" (cases *Szél and Others v. Hungary* [2014]; *Wille v. Liechtenstein [GC]* [1999]; *Observer and Guardian v. the United Kingdom* [1991]).

The Court of Justice firstly referred to the European Convention in the context of exceptions and limitations to copyright in *Promusicae*. The Court briefly mentioned that art. 7 of the Charter substantially reproduces art. 8 of the European Convention which guarantees the right to respect for private life.

The recent cases are indicative of the growing attention of the Court of Justice to the European Convention as well as caselaw of the European Court of Human Rights.

In *Pelham* the Court of Justice reiterated that the harmonisation effected by the Directive 2001/29/EC aims to safeguard, in particular in the electronic environment, a fair balance between the interest of the copyright holders and related rights in the protection of their intellectual property rights and the protection of the interests and fundamental rights of users as well as of the public interest. A balance must be struck between that right and other fundamental rights, including freedom of the arts, enshrined in art. 13 of the Charter, which, in so far as it falls within the scope of freedom of expression, enshrined in art. 11 of the Charter and in art. 10 (1) of the European Convention affords the opportunity to take part in the public exchange of cultural, political and social information and ideas of all kinds (see ECtHR, 24 May 1988, *Müller and Others v. Switzerland*, CE:ECHR:1988:0524JUD001073784, § 27, and ECtHR, 8 July 1999, *Karataş v. Turkey*, CE:ECHR:1999:0708JUD002316894, § 49) (*Pelham*, p. 32-34).

Two other cases *Spiegel* and *Funke Medien* relate to the exceptions provided for in art. 5 (3) (c) and (d) of the Directive 2001/29/EC concerning reproduction by the press, communication to the public of published articles on current economic, political or religious topics as well as quotations for purposes such as criticism or review. In both cases the Court of Justice referred to art. 52(3) of the Charter and emphasized that the meaning and scope of the rights provided for in the Charter shall be the same as those laid down by the European Convention.

The Court of Justice also noticed that the exceptions and limitations to copyright closely correlate with rights of users. The Court proceeded from the principle that any derogation from a general rule must be interpreted strictly. Although art. 5 of Directive is expressly entitled 'Exceptions and limitations', it should be noted that those exceptions or limitations do themselves confer rights on the users of works. In addition, that article is specifically intended to ensure a fair balance between, on the one hand, the rights and interests of rightholders, which must themselves be given a broad interpretation and, on the other, the rights and interests of users. It follows that the interpretation of the exceptions and limitations must allow their effectiveness to be safeguarded and their purpose to be observed, since such a requirement is of particular importance where those exceptions and limitations aim to ensure observance of fundamental freedoms. According to the settled caselaw, the protection of

intellectual property is not inviolable and must not be protected as an absolute right. On the other hand, art. 5(3)(c) and (d) is aimed at favouring the exercise of the right to freedom of expression by the users of protected subject matter and to freedom of the press by virtue of art. 11 of the Charter. In so far as the Charter contains rights which correspond to those guaranteed by the European Convention, article 52(3) of the Charter seeks to ensure the necessary consistency between the rights contained in it and the corresponding rights guaranteed by the European Convention, without thereby adversely affecting the autonomy of EU law and that of the Court of Justice. Thus, art. 11 of the Charter contains rights which correspond to those guaranteed by art. 10(1) of the European Convention. In addressing the issue of striking a balance between copyright and the right to freedom of expression the Court of Justice referred to the case-law of the ECtHR, particularly, to the need to take into account the fact that the nature of the 'speech' or information at issue is of particular importance, inter alia in political discourse and discourse concerning matters of the public interest (see, to that effect, ECtHR, 10 January 2013, *Ashby Donald and Others v. France*, CE:ECHR:2013:0110JUD003676908, § 39) (Spiegel, pp. 50, 51, 53-58), (Funke Medien, pp. 65-74).

10. Conclusions

The Directive 2001/29/EC aims to resolve a very complicated and ambitious goal of harmonising exceptions and limitations to copyright and related rights throughout the European Union. However, taking into account a wide variety of such exceptions as well as different legal traditions and approaches of Member States, the system of the exceptions and limitations cannot be deemed as fully harmonised in the European Union. In such circumstances, the lack of legal certainty is being cured by the caselaw of the Court of Justice. It is difficult to overestimate the importance of the Court's activities in interpreting the relevant provisions of European Union law, developing autonomous concepts with the ultimate aim of striking a fair balance between the interests of the creators and rightholders, on the one hand, and those of the users of the protected works, on the other.

From the very first rulings in this field the Court of Justice stressed that exceptions and limitations are an autonomous concept of the European Union

law, so, they should be interpreted autonomously and uniformly. Since the exceptions derogate from the general principle of authorisation of copyright holder to any acts of exploitation of his work, they should be interpreted strictly. The requirement of a strict interpretation of the exceptions and limitations was supplemented in subsequent caselaw by the criteria of their effectiveness and observance of their purpose. Meanwhile, besides this general concept, the Court of Justice developed concepts for those exceptions which lack legal definition and uniform understanding, particularly in cases of parody and quotations.

Furthermore, the recent rulings show a growing attention of the Court of Justice to the European Convention and caselaw of the ECtHR. Based on art. 52 (3) of the Charter, the Court of Justice considers the exceptions and limitations to copyright in the light of human rights and fundamental freedoms protected by the European Convention and its recent rulings reflect the approach of the ECtHR, particularly with regard to the freedom of expression and freedom of press enshrined in art. 10 (1) of the European Convention.

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