

Copyright reforms in the online world from a fundamental rights perspective Jan Oster*

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I. Introduction

The online world has been a major driver for copyright reforms in the EU and elsewhere. The article will first introduce into the fundamental rights framework, thereby focusing on conflicts between intellectual property and freedom of expression, including media freedom (see II.). After that, this contribution will use two examples from the InfoSoc Directive as case studies, inquiring whether a proper balance between competing fundamental rights interests in the online world has been struck (see III.). The article concludes with an outlook on other regulatory frameworks (see IV.).

II. The fundamental and human rights framework

The interpretation and application of European copyright law, as well as the national legislation implementing it, must be measured not only against the EU Charter of Fundamental Rights (EUCFR), but also – and crucially – against the guarantees of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and thus the case law of the European Court of Human Rights (ECtHR or “the Strasbourg Court”). Article 17(2) EUCFR classifies intellectual property, and thus also copyright and related rights, as “property” in terms of fundamental rights.¹ The Charter is thus in line with the case law of the ECtHR, which also considers intellectual property to be part of property within the meaning of

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¹ CJEU, Case C-275/06 [2008] *Promusicae* [62]; Case C-70/10 [2011] *Scarlet Extended* [42]; Case C-314/12 [2014] *UPC Telekabel* [47]; Case C-484/14 [2016] *McFadden* [81].

Article 1 of the First Protocol to the ECHR.² Since, according to the explanations to the Charter, the guarantees provided for in Article 17(1) EUChFR also apply to intellectual property,³ Article 17(2) EUChFR has the same meaning and scope as the right guaranteed in the ECHR, in accordance with Article 52(3) EUChFR, whereby the Charter may not exceed the limitations provided for in the ECHR.⁴

The same applies to freedom of expression, including media freedom, under Article 11 EUChFR. According to the explanations to the Charter, Article 11 EUChFR has the same meaning and scope as the freedom of expression guaranteed by Article 10 ECHR.⁵ Thus, permissible interference with freedom of expression may not exceed the restrictions provided for in Article 10(2) ECHR.⁶ Finally, it should be added that the human rights of the ECHR are in any case part of Union law as general principles pursuant to Article 6(3) TEU.

With regard to the meaning and scope of Article 17(2) EUChFR and Article 11 EUChFR, the ECtHR therefore has the prerogative of interpretation. For the Court of Justice of the European Union (CJEU or "the Luxembourg Court"), this means that the Court should not narrow the scope of protection of these two fundamental rights more than the ECtHR.⁷ Conversely, with regard to the justification of an interference, the CJEU should not recognise any grounds for justification that are not accepted by the ECtHR.

In the cases of *Ashby Donald v. France* and *Neij and Sunde Kolmisoppi v. Sweden*, the ECtHR clarified that a conviction for copyright infringement constitutes an interference with freedom of expression that requires justification.⁸ Copyright and related rights are therefore "rights of others" within the meaning of Article 10(2) of the ECHR. However, neither freedom of expression nor the right to intellectual property protection takes precedence over the other principle *per se*: human rights do not generally provide fixed rules for the resolution of civil law conflicts, but merely provide a framework from which – in a merely indirect horizontal effect⁹ – parameters for a balancing exercise arise.¹⁰ In principle, national legislators have a margin of discretion in this respect, which is particularly wide in the area of so-called commercial speech.¹¹ However, insofar as a statement contributes to a matter of public interest,

² See ECtHR, *Melnichuk v. Ukraine* [2005] Application No. 28743/03; *Anheuser-Busch Inc. v. Portugal* [2007] Application No. 73049/01 [72]; *Ashby Donald and Others v. France* [2013] Application No. 36769/08.

³ Explanations relating to the Charter of Fundamental Rights (2007/C 303/02), OJ C 303/17, p. 23. For the legal significance of the explanations, see Article 52(7) EUChFR.

⁴ Explanations relating to the Charter of Fundamental Rights (2007/C 303/02), OJ C 303/17, p. 23.

⁵ Explanations relating to the Charter of Fundamental Rights (2007/C 303/02), OJ C 303/17, p. 21; CJEU, Case C-345/17 [2019] *Buivids* [65]; Case C-516/17 [2019] *Spiegel Online v. Volker Beck* [57]; Case C-469/17 [2019] *Funke Medien NRW GmbH* [73].

⁶ Explanations relating to the Charter of Fundamental Rights (2007/C 303/02), OJ C 303/17, p. 21.

⁷ See CJEU, Case C-94/00 [2002] *Roquette Frères SA* [29].

⁸ ECHR, *Ashby Donald and Others v. France* [2013] Application No. 36769/08 [36]; *Neij and Sunde Kolmisoppi v. Sweden* [2013] Application No. 40397/12.

⁹ Note that in individual cases, the CJEU has recently recognised a direct third-party effect of the EUChFR: CJEU, *Joined cases C-569/16 and C-570/16* [2018] *Bauer* [87] and *Case C-55/18* [2019] *CCOO* [50 ff.] (both on Article 31(2) EUChFR); *Case C-414/16* [2018] *Egenberger* [77] (on Article 21 EUChFR).

¹⁰ See ECtHR, *von Hannover v. Germany (No. 1)* [2004] Application No. 59320/00 [57]; CJEU, *Joined Cases C-569/16 and C-570/16* [2018] *Bauer* [52 ff.].

¹¹ E.g. ECtHR, *Markt intern Verlag GmbH and Klaus Beermann v. Germany* [1989] Application No. 10572/83; *Hertel v. Switzerland* [1998] Application No. 59/1997/843/1049 [47].

the margin of appreciation granted by Article 10 ECHR and, consequently, Article 11 EUChFR is limited.¹² Here, it must be ensured that the courts reach a conclusion that is compatible with freedom of expression.¹³ Conversely, neither Article 17(2) EUChFR nor the case law of the CJEU suggests that copyright is unrestricted and that its protection must therefore be guaranteed unconditionally.¹⁴ Article 17(1) sentence 3 EUChFR states that the use of property may be regulated by law in so far as is necessary for the general interest. Copyright therefore requires the content and limitations to be determined by state legislation.¹⁵ In doing so, the fundamental right to protection of intellectual property must be weighed against conflicting fundamental rights.¹⁶

In addition, the fundamental right of media freedom requires that the special role of the journalistic media in a democratic society be taken into account in the interpretation and application of copyright law. In terms of fundamental rights theory, the ECtHR, the European legislator and the CJEU conceptualise media freedom as a consequentialist right, not as an intrinsic one.¹⁷ According to the ECtHR, the press and other journalistic media¹⁸ are protected as "public watchdogs"¹⁹ because and insofar as they fulfil a function for democratic society, namely that of reporting on matters of public interest.²⁰ Media freedom as a fundamental right protects both the content of journalistic information and the journalistic media in their research, their editorial activities and the distribution of their publications.²¹ Two of the specific guarantees of media freedom are worth highlighting here: Firstly, media freedom protects the "if" of reporting, i.e. the freedom of journalistic media to decide, according to their own journalistic criteria, what they consider to be in the public interest and thus want to make the subject of their reporting.²² Secondly, it is fundamentally the responsibility of the journalistic media themselves, and not of the legislature or the courts, to decide on the "how" of reporting,

¹² Oster, *Media Freedom as a Fundamental Right*, 2015, p. 153. Fundamentally ECtHR, *Sunday Times v. United Kingdom* (No. 1) [1979] Application No. 6538/74 [66 f.]; see, for example, ECtHR, *Bladet Tromsø and Stensaas v. Norway* [1999] Application No. 21980/93 [59]; *Bergens Tidende and Others v. Norway* [2000] Application No. 26132/95 [49]; *Ashby Donald and Others v. France* [2013] Application No. 36769/08 [39].

¹³ Conversely, in cases involving the publication of private information in which there is no overriding public interest, the courts must conclude that the right to privacy prevails; see ECHR, *von Hannover v. Germany* (No. 1) [2004] Application No. 59320/00.

¹⁴ See CJEU, *Case C-70/10* [2011] *Scarlet Extended* [43]; *Case C-360/10* [2012] *Netlog* [41]; *Case C-314/12* [2014] *UPC Telekabel* [61]; *Case C-476/17* [2019] *Pelham* [33]; *Case C-516/17* [2019] *Spiegel Online v. Volker Beck* [56]; *Case C-469/17* [2019] *Funke Medien NRW GmbH* [72].

¹⁵ See ECtHR, *Anheuser-Busch Inc. v. Portugal* [2007] Application No. 73049/01 [78 ff.].

¹⁶ CJEU, *Case C-275/06* [2008] *Promusicae* [65]; *Case C-70/10* [2011] *Scarlet Extended* [44]; *Case C-476/17* [2019] *Pelham* [34].

¹⁷ Oster, *Media Freedom as a Fundamental Right*, 2015, p. 33.

¹⁸ See ECtHR, *Jersild v. Denmark* [1994] Application No. 15890/89 [31]; *Radio France and Others v. France* [2004] Application No. 53984/00 [33].

¹⁹ Established case law since ECtHR, *Jersild v. Denmark* [1994] Application No. 15890/89 [35]; see, e.g., ECtHR, *Axel Springer AG v. Germany* (No. 1) [2012] Application No. 39954/08 [79].

²⁰ See, e.g., ECtHR, *Axel Springer AG v. Germany* (No. 1) [2012] Application No. 39954/08 [79].

²¹ For details, see Oster, *Media Freedom as a Fundamental Right*, 2015, p. 69 ff. with further references.

²² See, e.g., ECtHR, *Jersild v. Denmark* [1994] Application No. 15890/89 [31]; CJEU, *Case C-73/07* [2008] *Satakunnan Markkinapörssi Oy and Satamedia Oy* [61].

i.e. on the methods and techniques.²³ Any restriction of these guarantees constitutes an interference with media freedom that requires justification.

III. Reporting and the right to quote in the 2001 InfoSoc Directive

By assigning the right of reproduction to the author in Article 2 and the right of communication protected works as well as to make them available to the public to specified holders of such rights in Article 3, the InfoSoc Directive 2001/29/EC²⁴ curtails the corresponding freedom to communicate such content and thus interfere with freedom of expression. Third parties – such as journalistic media – are only permitted to reproduce, publicly communicate and make protected works publicly available under the conditions set out in Article 5(2) and (3) of the InfoSoc Directive. The decisive question is therefore whether Article 5(2) and (3) of the InfoSoc Directive allow for an appropriate balance between Article 17(2) EUChFR, on the one hand, and Article 11 of the Charter, on the other. This depends not least on how the Member States are to transpose these provisions into national law. This will be explained using the example of copyright-privileged reporting on current events pursuant to Article 5(3)(c) Var. 2 and the right to quote in Article 5(3)(d) InfoSoc Directive in the light of the CJEU decisions *Funke Medien* and *Spiegel Online*.

1. *Funke Medien* and *Spiegel Online*

The *Funke Medien* case²⁵ concerned the publication of military situation reports by the German Ministry of Defence, the so-called Afghanistan papers, on the internet portal of a daily newspaper. The Afghanistan papers were declared classified information. Funke Medien wanted to report that the official account of the Federal army's (*Bundeswehr*) foreign missions did not correspond to the actual events on the ground. The German federal government successfully sued Funke Medien for injunctive relief on the grounds of copyright infringement. The subject of the *Spiegel Online* case²⁶ was a manuscript by Green Party politician Volker Beck on criminal law policy in the area of sexual offences against minors. The manuscript was published in an anthology in 1988. By 1993 at the latest, Mr Beck had completely distanced himself from the content of this essay. In 2013, the news website Spiegel Online found the manuscript in archives and presented it to Mr Beck. Mr Beck then published the manuscript on his website with a disclaimer, distancing himself from the content of the article. Spiegel Online also published the manuscript, but without the disclaimer. Spiegel Online thus attempted to prove that, contrary to Mr Beck's account, the editor of the anthology had not altered the central message of his manuscript and that Mr Beck had therefore misled the public for years. Mr Beck also successfully sued for an injunction. In both cases, the CJEU answered several questions referred by the German Federal Court of Justice (BGH or "the Karlsruhe Court") on the interpretation of the InfoSoc Directive.

The cases of *Funke Medien* and *Spiegel Online* are representative of two paradigm shifts in journalism practice and law in the online world. Digitisation and datafication enable the press

²³ See, for example, ECtHR, *Jersild v. Denmark* [1994] Application No. 15890/89 [31]; *Bladet Tromsø and Stensaas v. Norway* [1999] Application No. 21980/93 [63]; *Stoll v. Switzerland* [2007] Application No. 69698/01 [146]; *Swiss Broadcasting Corporation SRG v. Switzerland* [2012] Application No. 34124/06 [64].

²⁴ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L 167/10.

²⁵ CJEU, Case C-469/17 [2019] *Funke Medien NRW GmbH*.

²⁶ CJEU, Case C-516/17 [2019] *Spiegel Online v. Volker Beck*.

to make entire works available to the public unfiltered and not just to report on them in excerpts or quotations in newspapers and broadcasts that are limited in space and time. Technically, this is done by setting a link, by framing or – as was the case with *Funke Medien* and *Spiegel Online* – by publishing a PDF on one's own website. This has opened up new forms of interaction with information recipients. This is accompanied by a second paradigm shift: online archives make it possible to keep information available for a longer period of time than for daily events. In this respect, too, spatial and temporal limitations only play a theoretical role.

2. The system of restrictions under directive law

The exceptions and limitations in Article 5(2) and (3) operate under the following premises: Firstly, their implementation is at the discretion of the Member States ("may").²⁷ Secondly, however, they are listed exhaustively, so that Member States may not create further barriers, even if this serves to protect fundamental rights.²⁸ Thirdly, if Member States introduce an exception or limitation, they must implement its conditions in full.²⁹ And fourthly, the exceptions and limitations serve to ensure a fair balance between the rights and interests of rightholders and users of works.³⁰

Since the InfoSoc Directive thus conclusively regulates the exceptions and limitations, it necessarily follows that the possibility of an interpretation in conformity with fundamental rights must be inherent *in the Directive itself* and cannot be effected by barriers outside the Directive that are only introduced by national legislators or national courts.³¹ However, national authorities and courts can only ensure a balance between the conflicting interests – in this case copyright and media freedom – that is consistent with fundamental rights if the Directive allows for implementation by national legislators that is consistent with fundamental rights and thus enables a corresponding interpretation and application.

3. The descriptive elements of Article 5(3)(c) Var. 2 and (d)

At first glance, Article 5(2) and (3) InfoSoc Directive seems to leave sufficient room for a balancing exercise between copyright and conflicting fundamental rights. Terms such as "justified", "fair practice" and "necessary" have a sufficiently open texture to take on board fundamental rights concerns in a balancing exercise. However, it is argued that the problem does not lie in these open normative but in the binary descriptive terms of Article 5 of the

²⁷ See, for example, CJEU, Case C-467/08 [2010] Padawan [36]; Case C-435/12 [2014] ACI Adam [48]; Case C-201/13 [2014] Deckmyn v. Vandersteen [16].

²⁸ Recital 32, first sentence, of the InfoSoc Directive; CJEU, Case C-301/15 [2016] Soulier and Doke [34]; Case C-161/17 [2018] Renckhoff [16]; Case C-476/17 [2019] Pelham [58]; cf. CJEU, Case C-275/06 [2008] Promusicae [66]; Case C-516/17 [2019] Spiegel Online v. Volker Beck [49]; Case C-469/17 [2019] Funke Medien NRW GmbH [64].

²⁹ See recital 32, sentence 4 of the InfoSoc Directive; CJEU, Case C-467/08 [2010] Padawan [36]; Case C-435/12 [2014] ACI Adam [49]; Case C-201/13 [2014] Deckmyn v. Vandersteen [16]; Case C-516/17 [2019] Spiegel Online v. Volker Beck [33]; Case C-469/17 [2019] Funke Medien NRW GmbH [48].

³⁰ Recital 31 of the InfoSoc Directive; see, for example, CJEU, Case C-435/12 [2014] ACI Adam [53]; Case C-201/13 [2014] Deckmyn v. Vandersteen [26]; Case C-161/17 [2018] Renckhoff [41]; Case C-516/17 [2019] Spiegel Online v. Volker Beck [55]; Case C-469/17 [2019] Funke Medien NRW GmbH [71].

³¹ CJEU, Case C-516/17 [2019] Spiegel Online v. Volker Beck [40 ff.]; Case C-469/17 [2019] Funke Medien NRW GmbH [55 ff.]; Federal Court of Justice, decision of 27 July 2017, I ZR 228/15, GRUR 2017, 1027 [31] – Spiegel Online v. Volker Beck I; Federal Court of Justice, decision of 1 June 2017, I ZR 139/15, ZUM 2017, 753 [42] – Funke Medien NRW GmbH I.

Directive. Requirements such as the "current event" and the "reporting" in Article 5(3)(c) Var. 2 and that of the "quotation" and prior publication in Article 5(3)(d) InfoSoc Directive operate as gatekeepers: if these elements are not fulfilled, the court called upon to decide does not even enter into the balancing exercise in the first place. To be specific: if, for example, the use of a copyright-protected work is found not to be related to a "current event", the court will not be in a position to ask whether the use of that work is "justified by the informatory purpose", and thus conduct the balancing exercise.

Neither the CJEU nor the BGH has answered the question of whether and how these descriptive requirements can be applied in a manner consistent with fundamental rights. However, this is where the central questions of the fundamental rights conformity of the InfoSoc Directive lie.

a) "Reporting on current events"

Article 5(3)(c) Var. 2 of the InfoSoc Directive provides for a limitation on the "use of works or other subject-matter in connection with the reporting of current events, to the extent justified by the informatory purpose and as long as the source, including the author's name, is indicated, unless this turns out to be impossible".³²

aa) "Current events"

The event being reported on must be a "current event". This criterion concerns the question of whether the media are allowed to interfere with copyright at all, i.e. the "if" of the reporting. If the media consider the content of a copyright-protected work to be in the public interest and therefore wish to publish it, they are only permitted to do so under Article 5(3)(c) InfoSoc Directive if this reporting concerns a "current event", otherwise not.

The CJEU succinctly defined a current event as "an event that, at the time at which it is reported, is of informatory interest to the public."³³ In doing so, the CJEU opens up a conceivably broad – and thus certainly media-friendly – interpretation, which, however, is no longer covered by the wording of the Directive. For example, the Cuban Missile Crisis or the first moon landing are events in which the public (still) has an interest in information. However, these events have in common that they are no longer *current*. Yet it is precisely this topicality that the Directive requires. This is also expressed clearly in other language versions: "*Tagesereignis*" (literally "event of the day"; German version), "*événements d'actualité*" (French version) or "*actuele gebeurtenissen*" (Dutch version). The concept of "current events" thus consists of two components: on the one hand, the public's interest in information and, on the other hand, the topicality of the event.³⁴

bb) "Reporting"

Moreover, the dissemination of information by the media must constitute "reporting". This element does not concern the question of *whether* the media are permitted to interfere with

³² Similarly, Article 10(1)(b) of Directive 2006/115/EC on rental right and lending right: "Member States may provide for limitations to the rights referred to in this Chapter in respect of [...] use of short excerpts in connection with the reporting of current events".

³³ CJEU, Case C-516/17 [2019] Spiegel Online v. Volker Beck [67].

³⁴ Von Lewinski/Walter, in: von Lewinski/Walter (eds.), *European Copyright Law – A commentary*, 2010, paras. 11.5.56 and 57; England and Wales Court of Appeal, *Hyde Park Residence v. Yelland* [2001] Ch 143 [55]; House of Lords, *Newspaper Licensing Agency Ltd v. Marks & Spencer plc* [2001] UKHL 38 [19].

copyright at all, but rather *how* they must frame this interference. In *Funke Medien*, the defendant media company had limited itself to posting the military situation reports on the internet in a systematic form and making them available for retrieval. In the opinion of the Federal Court of Justice, this did not constitute "reporting".³⁵ Neither did the defendant itself report on the military situation, nor did it analyse or comment on the description of the military situation by the authors of the reports, thereby making it the subject of reporting on its part. The Federal Court of Justice rejected the defendant's objection that it had posted the situation reports on the internet in order to invite participation and integrate them into a network of journalistic reporting.³⁶

Just as with the term "current event", the CJEU interprets the term "reporting" in a very vague and broad manner. The Court understands "reporting" to mean "providing information on a current event".³⁷ Although the mere announcement of a current event does not constitute reporting on the event, the term "reporting" does not require the user – in this case the journalistic media – to analyse such an event in detail.³⁸ Against this background, the Federal Court of Justice accepted "reporting" in its subsequent decision *Afghanistan Papers II*.³⁹

From the perspective of media freedom, this broad interpretation is to be welcomed. However, as with the term "current event", this broad definition by the CJEU is no longer covered by the literal meaning of the Directive. "Reporting" is more than just "providing" information. Rather, "reporting" is to be understood as the "description" of an event. Here, too, an exemplary comparison with other language versions of the Directive and the CJEU decision is revealing: "*Berichterstattung*" (German language version) is more than just "*providing*" information, and "*rendre compte*" (French language version) is not synonymous with "*apporter*". The Dutch language version is interesting in this respect, in which the CJEU defines "reporting" (*verslaggeving*) as "*het geven van informatie*". The "giving" of information is close to the literal meaning of "reporting" or *verslaggeving*, but is not synonymous with "providing", which in Dutch would be translated as "klaarzetten".

b) Quotations

Article 5(3)(d) of the InfoSoc Directive states that Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 for

"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."

aa) Subject matter

³⁵ Federal Court of Justice, decision of 1 June 2017, I ZR 139/15, ZUM 2017, 753 [20] – Funke Medien NRW GmbH ("Afghanistan papers") I.

³⁶ Federal Court of Justice, decision of 1 June 2017, I ZR 139/15, ZUM 2017, 753 [20] – Funke Medien NRW GmbH ("Afghanistan papers") I.

³⁷ CJEU, Case C-516/17 [2019] Spiegel Online v. Volker Beck [66].

³⁸ CJEU, Case C-516/17 [2019] Spiegel Online v. Volker Beck [66].

³⁹ Federal Court of Justice, decision of 30 April 2020, I ZR 139/15 [32] – Funke Medien NRW GmbH ("Afghanistan papers") II.

The subject matter of the quotation must be a work or other subject-matter that has already been lawfully made available to the public. Similar to the constituent element of "current events" in Article 5(3)(c) InfoSoc Directive, the question here is whether the media are allowed to interfere with copyright at all, i.e. the "if" of the reporting. If the subject matter of the interference is not a work that has already been made legally accessible, the media cannot invoke the right to quote.

Spiegel Online published the plaintiff's original manuscript, which had never been published in this specific form. The 1988 anthology included individual changes to the manuscript, and Volker Beck's own publication on his website in 2013 contained a disclaimer that was not included in Spiegel Online. This raised the question of whether "the work" published by Spiegel Online had already been made available to the public. In its order for reference, the Federal Court of Justice considered the specific form of the work that the author had intended for publication to be decisive.⁴⁰ This would mean that the manuscript published by Spiegel Online is not "the work" within the meaning of Article 5(3)(d) of the InfoSoc Directive.

The CJEU differentiated: With regard to the question of whether the manuscript had already been lawfully made available to the public when the anthology was published in 1988, the Luxembourg Court focused on whether the publisher had the right, by contract or otherwise, to make the editorial changes in question when the manuscript was originally published as an essay in an anthology. If this was not the case, it would have to be assumed that the work, as published in the anthology, had not been lawfully made available to the public due to the lack of consent from the copyright holder.⁴¹ With regard to the disclaimer the CJEU, however, avoided the decisive question. The CJEU recognised without hesitation that the claimant only made the document legally accessible to the public on its website to the extent that it was accompanied by the disclaimers.⁴² However, the CJEU then shifted the question to the criterion of Article 5(3)(d) of the InfoSoc Directive, according to which the "use must be in accordance with fair practice" and "be justified in its scope by the specific purpose".⁴³ In doing so, the Court effectively passed the ball to the national courts, which are responsible for interpreting these criteria in individual cases.

The Afghanistan papers, by contrast, were never made available to the public. For this reason, the right to quote under Article 5(3)(d) of the InfoSoc Directive did not apply in this case. The *Funke Medien* case thus shows that an appropriate balance between the conflicting interests of authors and users cannot be achieved within the framework of the interpretation of the law or directive on the right to quote when it comes to the right of first publication.

bb) "Quotation"

Like the criterion of "reporting" in lit. c), the element of "quotation" in lit. d) concerns the manner, i.e. the "how", of conveying information. This also constitutes a restriction of media freedom, as the media generally decide for themselves on the methods and techniques of

⁴⁰ Federal Court of Justice, decision of 27 July 2017, I ZR 228/15, GRUR 2017, 1027 [63] – Spiegel Online v. Volker Beck I.

⁴¹ CJEU, Case C-516/17 [2019] Spiegel Online v. Volker Beck [92].

⁴² CJEU, Case C-516/17 [2019] Spiegel Online v. Volker Beck [93].

⁴³ CJEU, Case C-516/17 [2019] Spiegel Online v. Volker Beck [94].

journalistic opinion-forming.⁴⁴ The subject of the fifth question referred by the Karlsruhe Court to the CJEU in the *Spiegel Online* case was therefore whether the term "quotation" also covers links to independently accessible files.⁴⁵ The CJEU pointed out that Article 5(3)(d) InfoSoc Directive does not require that the quoted work "be inextricably integrated, by way of insertions or reproductions in footnotes for example, into the subject matter citing it". Instead, "a quotation may thus be made by including a hyperlink to the quoted work."⁴⁶

In the case concerning the Afghanistan papers, however, the Federal Court of Justice denied the existence of a "quotation". Since the defendant had limited itself to posting the military situation reports on the internet and making them available for retrieval, it had not established an internal connection between the third-party writings and its own thoughts.⁴⁷ Unfortunately, the Federal Court of Justice did not refer the question of the internal connection between the quoted work and its use to the European Court of Justice with regard to the Afghanistan papers. However, in the *Pelham* case, which was decided in parallel, the CJEU also recognised the "essential characteristics of a quotation" as the use 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".⁴⁸ The CJEU thus also requires a "direct and close link" between the quoted work and the user's own considerations in order to enable an intellectual debate with the work of another. The use of the quoted work must be merely secondary to the user's own statements.⁴⁹ These statements support the legal opinion of the BGH.

IV. Critical analysis

Funke Medien and *Spiegel Online* demonstrate that copyright law has become a means of controlling information. Copyright law shares this development with data protection law, the latter in the form of the so-called "right to be forgotten".⁵⁰ However, this is not the function of copyright law: copyright law protects *works* that might embody information and ideas, but, unlike data protection law,⁵¹ it does not protect the *information as such*.⁵² It is submitted that

⁴⁴ References under II.

⁴⁵ Federal Court of Justice, decision of 27 July 2017, I ZR 228/15, GRUR 2017, 1027 [50] – *Spiegel Online v. Volker Beck I* (referral question 5).

⁴⁶ CJEU, Case C-516/17 [2019] *Spiegel Online v. Volker Beck* [80].

⁴⁷ Federal Court of Justice, decision of 1 June 2017, I ZR 139/15, ZUM 2017, 753 [26] – *Funke Medien NRW GmbH I*.

⁴⁸ CJEU, Case C-476/17 [2019] *Pelham* [71]; see also CJEU, Case C-516/17 [2019] *Spiegel Online v. Volker Beck* [78].

⁴⁹ CJEU, Case C-516/17 [2019] *Spiegel Online v. Volker Beck* [79].

⁵⁰ See also Article 17 GDPR; CJEU, Case C-131/12 [2014] *Google Spain SL and Google Inc. v. AEPD et al.*

⁵¹ See Article 4(1) GDPR: personal data means "any information relating to an identified or identifiable natural person". The designation as "data protection law" is thus a misnomer; it should rightly be called "information protection law"; see Oster, *International Journal of Law and Information Technology* 29 (2021), 101 (111).

⁵² Art. 2 WIPO Copyright Treaty; Article 9(2) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement); England and Wales Court of Appeal, *Hyde Park Residence v. Yelland* [2001] Ch 143 [55]; Zech, *Journal of Intellectual Property, Information Technology and Electronic Commerce Law*, 6 (2015), 192 (196); Oster, *European and International Media Law*, 2017, p. 371.

the structure of the limitations of Article 5(2) and (3) InfoSoc Directive give cause to a fundamental misconception: the protection of works is being used for the protection of information as such. The following overview should visualise that this is a categorical mistake:

| | Legally protected as/by... | For example: <i>Funke Medien</i> |
|--|--|--|
| Information | Personal "data" (i.e. personal information), trade secrets, state secrets, right to privacy/confidentiality etc. | The military situation in Afghanistan and its assessment by the Defence Ministry |
| Embodiment of the information in a 'work' | Copyright law | The specific Ministry report |
| Physical carrier | Property laws (chattel) | The paper on which the report has been printed; the USB stick on which the file has been saved |

The claimants used their legal position as authors to prohibit publications that they did not like and that they were unable to prevent with the relevant instruments: the right to respect for privacy in *Spiegel Online* and the confidentiality of state secrets in *Funke Medien*. *Spiegel Online* did not use "the work" as published by Volker Beck. And *Funke Medien* was unable to invoke the right to quote because the Afghanistan papers were never made available to the public. However, both outcomes are incompatible with Article 11 of the EUChFR. In both cases, the matter concerned interests for which the sharp sword of copyright law is unsuitable, and which instead require careful balancing of the parameters of the ECtHR.

Only the journalistic media decide, according to their own journalistic criteria, what they consider to be in the public interest and thus want to make the subject of their reporting. This is at the core of media freedom. Instead of copyright law, which only allows a weighing of goods and interests *if* there is a "current event" or *if* there has been a prior publication of the cited work, it is more appropriate to balance the criteria that the Strasbourg Court has established for alleged violations of personal rights or state secrets, respectively.⁵³ Whether the subject matter of such reporting is a "current" event is then only one factor among several to be weighed up, but not a binary prerequisite for a balancing decision.⁵⁴ Moreover, the ECtHR has ruled that internet archives are also protected by Article 10 of the ECHR.⁵⁵ They make a

⁵³ On private information see, e.g., ECtHR, *Axel Springer AG v. Germany* (No. 1) [2012] Application No. 39954/08 [89–95]; *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* [2017] Application No. 931/13 [165], *Kaçki v. Poland* [2017] Application No. 10947/11 [49]; *Faludy-Kovács v. Hungary* [2018] Application No. 20487/13 [28]; on state secrets see, e.g., ECtHR, *Weber v. Switzerland* [1990] Application No. 11034/84 [51]; *Vereniging Weekblad Bluf! v. Netherlands* [1995] Application No. 16616/90 [45]; *Observer and Guardian v. United Kingdom* [1991] Application No. 13585/88 [69]; *Dammann v. Switzerland* [2006] Application No. 77551/01 [53]; Council of Europe, Parliamentary Assembly, Resolution 1551 (2007): Fair trial issues in criminal cases concerning espionage or divulging state secrets.

⁵⁴ See, for example, ECtHR, *Observer and Guardian v. United Kingdom* [1991] Application No. 13585/88 [60]; House of Lords, *Reynolds v. Times Newspapers* [2001] 2 AC 127 (205).

⁵⁵ ECHR, *Times Newspapers Ltd v. United Kingdom* (Nos. 1 and 2) [2009] Application Nos. 3002/03 and 23676/03 [27]; *Węgrzynowski and Smolczewski v. Poland* [2013] Application No. 33846/07 [59].

"significant contribution" to the preservation and accessibility of news and information and constitute

"an important source for education and historical research, particularly as they are readily accessible to the public and are generally free. While the primary function of the press in a democracy is to act as a 'public watchdog', it has a valuable secondary role in maintaining and making available to the public archives containing news which has previously been reported."⁵⁶

In the same vein, the CJEU emphasised the importance of hyperlinks for the exchange of opinions and information on the internet and thus for Article 11 EUChFR.⁵⁷

Volker Beck was concerned exclusively with the control of personal information. However, according to the differentiated weighing criteria of the ECtHR⁵⁸ on the conflict between Article 10 and Article 8 ECHR, this interest would have to take a back seat to media freedom in this case. The publication of the manuscript contributed to a matter of great public interest. As a politician and former member of the Bundestag, Volker Beck was a public figure who had to tolerate observation and criticism.⁵⁹ His behaviour also gave no reason to assume – at least until his retirement from the Bundestag – that he wanted to withdraw from public debate and retreat into private life.⁶⁰ Furthermore, Spiegel Online did not obtain the manuscript by unlawful means, and the impact on Volker Beck's private life is not so serious that publication should have been refrained from.⁶¹ Finally, freedom of the media includes the freedom to decide on the form of reporting and thus to communicate information without a disclaimer.⁶² This includes Spiegel Online's assessment that disclaimers prevent readers from approaching the text impartially and forming their own opinion.⁶³ Personal rights do, in principle, protect *whether* someone wants to be perceived publicly. However, anyone who enters the public eye has no right to determine *how* they want to be perceived beyond the protection of their honour.

⁵⁶ ECtHR, *Węgrzynowski and Smolczewski v. Poland* [2013] Application No. 33846/07 [59]; see also *Times Newspapers Ltd v. the United Kingdom* (Nos. 1 and 2) [2009] Application Nos. 3002/03 and 23676/03 [45]; *Fuchsmann v. Germany* [2017] Application No. 71233/13 [39].

⁵⁷ CJEU, *Case C-160/15* [2016] *GS Media* [45]; *Case C-161/17* [2018] *Renckhoff* [40]; see also CJEU, *Case C-516/17* [2019] *Spiegel Online v. Volker Beck* [81].

⁵⁸ ECtHR, *Axel Springer AG v. Germany* (No. 1) [2012] Application No. 39954/08 [89–95]; reiterated and further developed, for example, in *Niskasaari and Otavamedia Oy v. Finland* [2015] Application No. 32297/10 [49]; *Verlagsgruppe Handelsblatt GmbH & Co. KG v. Germany* [2016] Application No. 52205/16 [23]; *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary* [2016] Application No. 22947/13 [68]; *Standard Verlagsgesellschaft mbH v. Austria* [2017] Application Nos. 19068/13 and 73322/13 [58]; *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* [2017] Application No. 931/13 [165]; on the applicability of these principles in European data protection law, see CJEU, *Case C-345/17* [2019] *Buivids* [66].

⁵⁹ See, for example, ECtHR, *Lingens v. Austria* [1986] Application No. 9815/82; *Oberschlick v. Austria* (No. 1) [1991] Application No. 11662/85 [59].

⁶⁰ See, for example, ECtHR, *MGN Ltd v. United Kingdom* [2011] Application No. 39401/04 [147].

⁶¹ See ECtHR, *Karakó v. Hungary* [2009] Application No. 39311/05 [23].

⁶² See BGH, decision of 27 July 2017, I ZR 228/15, GRUR 2017, 1027 [32] – *Beck v. Spiegel Online I*; BGH, decision of 30 April 2020, I ZR 228/15 [59] – *Spiegel Online v. Volker Beck II*.

⁶³ See Federal Court of Justice, decision of 27 July 2017, I ZR 228/15, GRUR 2017, 1027 [20] – *Spiegel Online v. Volker Beck I*.

In the *Funke Medien* case, the copyright interest was even weaker. There were already considerable doubts as to whether the European concept of a work was fulfilled at all.⁶⁴ Furthermore, the Federal Republic of Germany had no interest in the non-publication of the reports based on personality rights or economic interests, as are the rationales for copyright protection, but rather an interest in confidentiality of alleged state secrets. However, as has been highlighted before, copyright law does not protect information as such, even if it is subject to confidentiality.⁶⁵ By contrast, access to government information of public interest is one of the most important sources of investigative journalism.⁶⁶ The decision in favour of freedom of information is not only reflected in European primary and secondary law with the codification of unconditional rights of access to information against EU institutions.⁶⁷ After initial hesitation⁶⁸, the ECtHR also recognises at least a limited right of access to government information.⁶⁹ Similar to *Spiegel Online*, in the *Funke Medien* the application of the ECtHR's balancing standards, in this case between state secrecy interests and media freedom, would also have been called for. The ECtHR has developed a comprehensive and differentiated set of criteria for this in its case law, starting with the *Spycatcher* decisions and continuing with more recent case law on the protection of whistleblowers.⁷⁰ Measured against these standards, *Funke*

⁶⁴ See CJEU, Case C-469/17 [2019] *Funke Medien NRW GmbH* [23 f.].

⁶⁵ England and Wales Court of Appeal, *Hyde Park Residence v. Yelland* [2001] Ch 143 [55]; Zech, *Journal of Intellectual Property, Information Technology and Electronic Commerce Law*, 6 (2015), 192 (196).

⁶⁶ See only Barendt, *Freedom of Speech*, 2nd ed. 2005, p. 110; Goldberg, *Communications Law* 14 (2009), 50; Oswald, *International Review of Law, Computers & Technology* 26 (2012), 245; Recital 2 of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L 145/43.

⁶⁷ Art. 42 EUChFR, Article 15(3) TFEU; Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L 145/43; Decision of the European Central Bank of 4 March 2004 on public access to European Central Bank documents (ECB/2004/3) (2004/258/EC), OJ L 80/42; Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC, OJ L 41/26; Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the re-use of public sector information, OJ L 345/90.

⁶⁸ See ECtHR, *Leander v. Sweden* [1987] Application No. 9248/81 [74]; *Matky v. Czech Republic* [2006] Application No. 19101/03, p. 10.

⁶⁹ See also Council of Europe, Committee of Ministers, Convention on Access to Official Documents of 27 November 2008; Recommendation No. R (81) 19 on access to information held by public authorities; Recommendation No. R (91) 10 on the communication to third parties of personal data held by public bodies; Recommendation No. R (97) 18 concerning the protection of personal data collected and processed for statistical purposes; Recommendation No. R (2000) 13 on a European policy on access to archives; Recommendation Rec(2002)2 on access to official documents; ECHR, *Társaság a Szabadságjogokért v. Hungary* [2009] Application No. 37374/05 [38]; Youth Initiative for Human Rights v. Serbia [2013] Application No. 48135/06 [26]; *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung eines wirtschaftlich gesunden land- und forstwirtschaftlichen Grundbesitzes v. Austria* [2013] Application No. 39534/07 [41]; *Magyar Helsinki Bizottság v. Hungary* [2016] Application No. 18030/11 [197].

⁷⁰ Fundamentally ECtHR, *Observer and Guardian v. United Kingdom* [1991] Application No. 13585/88 and *Sunday Times v. United Kingdom (No. 2)* [1991] Application No. 13166/87; see also *Hadjianastassiou v. Greece* [1992] Application No. 12945/87; *Vereniging Weekblad Bluf! v. the Netherlands* [1995] Application No. 16616/90; *Radio Twist A.S. v. Slovakia* [2006] Application No. 62202/00; *Dammann v. Switzerland* [2006] Application No. 77551/01; *Stoll v. Switzerland* [2007] Application No. 69698/01; *Guja v. Moldova* [2008] Application No. 14277/04; *Kayasu v. Turkey (No. 1)* [2008] Application Nos. 64119/00 and 76292/01; *Marchenko v. Ukraine* [2009] Application No. 4063/04; *Kudeshkina v. Russia* [2009] Application No. 29492/05; *Pasko v. Russia* [2009] Application No. 69519/01; *Sosinowska v. Poland* [2011] Application No.

Medien was entitled to publish the Afghanistan papers: the documents were of considerable public interest,⁷¹ Funke Medien did not obtain them by illegal means,⁷² and the German government has not explained how their publication affects security-sensitive matters,⁷³ as it ultimately preferred to use the argument of copyright over that of secrecy interests.

Article 5(3)(d) of the InfoSoc Directive is not suitable for addressing the actual problem of the Afghanistan papers case, namely that neither the Federal Republic of Germany was concerned with protecting a copyright-protected personality or exploitation interest, nor was Funke Medien concerned with exploiting third-party services free of charge. As in *Spiegel Online*, the actual point of contention was the control of information. Copyright law proves to be unsuitable for addressing these constellations.

V. Outlook

In cases where there is no economic interest in exploitation, but instead a privacy or interest or an interest in confidentiality, a balancing exercise is required in each individual case according to the relevant criteria of the ECtHR. The binary descriptive requirements of the exceptions and limitations of Article 5(2) and (3) InfoSoc Directive do not allow for such a balancing exercise. This article discussed this using the example of lit. c) Var. 2 and d) of paragraph 3; however, the findings obtained here can be applied to other exceptions and limitations, insofar as these provide for conditions that must be met before the weighing of interests can take place.⁷⁴ There are methodological concerns about an expansive interpretation of the limitations; for example, the criteria of the "current" nature of the event as a prerequisite for the right to report on events or the prior availability of the work as a prerequisite for the right to quote cannot simply be ignored. European copyright law does not provide for a balancing of interests independent of the prerequisites of these regulations, such as a public interest defence under English copyright law or a fair use defence under US law.

If an infringement of copyright does not consist in the consumption of works or participation in cultural life, but in an act of providing information on matters of public interest, copyright regulations must be interpreted in accordance with fundamental rights. Copyright law requires a freedom of expression privilege. Article 85 GDPR could serve as a model.

10247/09; *Heinisch v. Germany* [2011] Application No. 28274/08; *Bucur and Toma v. Romania* [2013] Application No. 40238/02. For details, see Oster, *Media Freedom as a Fundamental Right*, 2015, p. 203 ff.

⁷¹ See the US Supreme Court's decision on the Pentagon Papers: *New York Times Co. v. United States*, 403 U.S. 713 (1971).

⁷² See ECtHR, *Stoll v. Switzerland* [2007] Application No. 69698/01 [140].

⁷³ For details, see Oster, *Media Freedom as a Fundamental Right*, 2015, p. 203 ff.

⁷⁴ For example, the requirements of "current economic, political or religious topics" in lit. c) Var. 1 or those of "caricature, parody or pastiche" in lit. k) (see CJEU, *Case C-201/13* [2014] *Deckmyn/Vandersteen* [20 ff.]).