

## AG Szpunar on copyright's relation to fundamental rights: one step forward and two steps back?

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**Abstract:** During the last three months AG Szpunar has delivered an Opinion in three pending references for a preliminary ruling to the CJEU (C-469/17 *Afghanistan Papers*, C-476/17 *Metall auf Metall* and C-516/17 *Spiegel Online*). All three cases touch upon the relationship between copyright and fundamental rights. On multiple occasions in the past, the CJEU has indicated that the interpretation and application of copyright must be such as to strike a “fair balance of rights and interests”. However, reference to this fair balance has rarely been accompanied by a coherent analysis explaining how this balance is or should be struck. These references provide an opportunity to clarify the potential influence of fundamental rights on (EU) copyright.

As to the interpretation of copyright, these references pose questions about the scope of the reproduction right, the quotation exception, and the exception for use in connection with reporting of current events, in particular in light of fundamental rights. Relying mostly on textual arguments, the AG suggests a very broad interpretation of the reproduction right of phonogram producers and a narrow interpretation of the exceptions in question. On the whole, his approach is unconvincing and, more importantly, largely ignores the undeniable negative impact it would have on the fundamental rights of others.

Two out of three references also raise the thorny issue of the possibility that fundamental rights act as external constraints on copyright. The AG does recognize that an unfettered enforcement of copyright may in some cases lead to a disproportionate interference with fundamental rights, although he emphasizes that the legislature has certain margin of discretion in striking a balance. Ultimately, however, he does not develop a coherent framework that enables a satisfactory demarcation of the borders of that discretion. By maintaining that the judge may deviate from the balance struck by the legislature only in “exceptional cases” or when the essence of a right is violated, the AG suggests a one-sided standard resulting in an excessive degree of restraint.

### 1 Introduction

In the summer of 2017 the German Federal Supreme Court (BGH) sent three references for a preliminary ruling to Luxembourg that may shine (new) light on the relationship between EU copyright and fundamental rights.<sup>1</sup> In *Afghanistan Papers* the question is whether the German

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<sup>1</sup> This topic has received considerable attention over the years. For some recent (English language) contributions see, e.g., Stijn van Deursen & Thom Snijders, ‘The Court of Justice at the Crossroads: Clarifying the Role for Fundamental Rights in the EU Copyright Framework’ (2018) 49 IIC 1080, Christophe Geiger, “‘Fair Use’ through Fundamental Rights: When Freedom of Artistic Expression allows Creative Appropriations and Opens up Statutory Copyright Limitations’ (Center for International Intellectual Property Studies Research Paper No. 2018-09), <https://ssrn.com/abstract=3256899>, Jane C. Ginsburg & André Lucas, ‘Copyright, Freedom of Expression and Free Access to Information (Comparative Study of American and European Law)’ (2016-3) 249 RIDA 4, Jonathan Griffiths, ‘Taking power tools to the acquis – The Court of Justice, the Charter of Fundamental Rights and European Union Copyright Law’ (Queen Mary University of London, School of Law Legal Studies Research Paper No. 266/2017), <https://ssrn.com/abstract=3084060>, Elena Izyumenko, ‘The Freedom of Expression Contours of Copyright in the Digital Era: A European Perspective’ (2016) 19 The Journal of World Intellectual Property 115, Bernd Justin Jütte, ‘The beginning of a (happy?) relationship: copyright and freedom of expression in Europe’ (2016) 38 EIPR 11, Tuomas Mylly, ‘The constitutionalization of the European legal order: Impact of human rights on intellectual property in the EU’, in: Christophe Geiger (ed.), *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar 2015, hereinafter: Geiger 2015), p. 103–131, Peter Oliver & Christopher Stothers, ‘Intellectual Property under the Charter: Are the Court’s Scales properly Calibrated?’ (2017) 54 CMLR 517, Alexander Peukert, ‘The fundamental right to (intellectual

**Daniël Jongmsma: AG Szpunar on copyright's relation to fundamental rights: one step forward and two steps back?**

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State may enforce copyright in confidential military reports to prevent their being communicated to the public, in this case on a newspaper website.<sup>2</sup> In *Metall auf Metall* the question is whether the “sampling” of two seconds of a phonogram, used in the allegedly infringing song by looping that fragment (albeit slowed down by 5%), infringes the rights of the phonogram producer.<sup>3</sup> Finally, in *Spiegel Online* the question is whether a press organization infringes copyright when it makes an article written by a national politician available to the public on its website without consent, in order to substantiate the allegation made in a publication on that same website that the politician in question has misled the public.<sup>4</sup> All cases raise (obvious) fundamental rights concerns. *Afghanistan Papers* and *Spiegel Online* relate to the freedom of the press and freedom of information and *Metall auf Metall* touches on the freedom of the arts.

The relationship between copyright and fundamental rights (the “fair balance of rights and interests”) has been addressed on several occasions by the Court of Justice of the European Union. In *Promusicae* the CJEU made clear that Member States must transpose EU law (and interpret the transposing national law) in a manner that strikes a fair balance.<sup>5</sup> In *Deckmyn* the Court added that the application of (in that case) the parody exception must strike a fair balance.<sup>6</sup> On other occasions, fundamental rights arguments have even (partly) determined the scope of exclusive rights<sup>7</sup> and of limitations and exceptions<sup>8</sup>. Finally, in several disputes between right holders and internet access and service providers the Court assessed the availability of specific remedies by asking whether they would strike a fair balance between the various fundamental rights at stake.<sup>9</sup>

However, the CJEU’s approach has arguably not always been fully coherent. Striking a fair balance between various normative arguments, including fundamental rights and the general interest, means searching for an optimal or proportional relationship between those arguments. Without delving too deeply into the topic, this requires that a particular measure restricting a fundamental right in an effort to further a different fundamental right (or the general interest) is at least (i) suitable to achieve its aim and (ii) does not restrict the fundamental right

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property and the discretion of the legislature’, in: Geiger 2015, p. 132–148 and Dirk Voorhoof, ‘Freedom of expression and the right to information: Implications for copyright’, in: Geiger 2015, p. 331–353.

<sup>2</sup> Case C-469/17.

<sup>3</sup> Case C-476/17.

<sup>4</sup> Case C-516/17.

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

<sup>6</sup> Case C-201/13 *Deckmyn and Vrijheidsfonds* ECLI:EU:C:2014:2132, para 34.

<sup>7</sup> Case C-160/15 *GS Media* ECLI:EU:C:2016:644, para 44ff and Case C-161/17 *Renckhoff* ECLI:EU:C:2018:634, para 41.

<sup>8</sup> Case C-145/10 *Painer* ECLI:EU:C:2011:798, paras 134–136; Case C-510/10 *DR and TV2 Danmark* ECLI:EU:C:2012:244, para 57; and Case C-117/13 *TU Darmstadt v Eugen Ulmer* ECLI:EU:C:2014:2196, para 31. Cf. also Joined Cases C-403/08 and C-429/08 *Football Association Premier League and Others* ECLI:EU:C:2011:631, para 164 and Case C-360/13 *Public Relations Consultants Association* ECLI:EU:C:2014:1195, para 24.

<sup>9</sup> Case C-70/10 *Scarlet Extended v SABAM* ECLI:EU:C:2011:771, paras 43–50; Case C-360/10 *SABAM v Netlog* ECLI:EU:C:2012:85, paras 41c–48; Case C-461/10 *Bonnier Audio and Others* ECLI:EU:C:2012:219, paras 58–60; Case C-314/12 *UPC Telekabel Wien* ECLI:EU:C:2014:192, para 45ff; Case C-484/14 *Mc Fadden* ECLI:EU:C:2016:689, para 87ff; and Case C-147/17 *Bastei Lübbe* ECLI:EU:C:2018:841, para 43ff. Cf. also Case C-580/13 *Coty Germany* ECLI:EU:C:2015:485, para 33ff.

**Daniël Jongma: AG Szpunar on copyright's relation to fundamental rights: one step forward and two steps back?**

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further than necessary to achieve its aim. Moreover, one must also consider (iii) whether the benefits gained by fulfilling the purpose pursued are proportional (*stricto sensu*, or: balanced) to the costs to the fundamental right.<sup>10</sup> In some cases a court may itself attempt to strike an optimal balance, while on other occasions it will merely review the balance struck by a different institution, such as the legislature, leaving that institution a certain margin of discretion.<sup>11</sup> This type of reasoning requires at the very least a clear identification of which normative arguments are balanced and, in particular with regard to the third step, the determination of the relative weight of both arguments. Unfortunately, in the CJEU's case law these elements are not always clearly present. Sometimes they are wholly absent. In those cases the Court simply concludes that a particular outcome conflicts with a fair balance.<sup>12</sup> Other times the analysis is one-sided, merely stating the intensity of interference with a particular right without explicating why this outweighs the countervailing normative argument.<sup>13</sup>

These references provide the CJEU with an excellent opportunity to develop a more coherent and transparent approach to the concept of fair balance. In essence, the referring court asks about the relation between copyright and fundamental rights in two separate contexts. First, the BGH asks a number of questions concerning the scope of the reproduction right for phonogram producers, the quotation exception and the exception for use in connection with reporting of current events, in particular in light of fundamental rights. Second, the BGH asks whether fundamental rights can act as a limitation to copyright beyond the limitations and exceptions explicitly enumerated in copyright law, specifically the InfoSoc Directive<sup>14, 15</sup>

Advocate General Szpunar has now delivered his opinion in all three cases.<sup>16</sup> Although an improvement in some respects, his opinions unfortunately do not address the interface between copyright and fundamental rights in a consistent manner. In this analysis, I look at the role the AG sees for fundamental rights in delineating the scope of copyright and try to explain in which ways his approach falls short. I first discuss his proposed interpretation of the reproduction right (Section 2) and of the exceptions at issue (Section 3) and then his view on the question to what extent fundamental rights can act as external constraints on copyright (Section 4).

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<sup>10</sup> See, e.g., Cf. Robert Alexy, *A Theory of Constitutional Rights* (Oxford University Press 2002), p. 66–69, Aharon Barak, *Proportionality. Constitutional Rights and their Limitations* (Cambridge University Press 2012), in particular chapters 10–12 and Jan-R Sieckmann, *The Logic of Autonomy. Law, Morality and Autonomous Reasoning* (Hart Publishing 2012), p. 85ff.

<sup>11</sup> Cf. Julian Rivers, 'Proportionality and variable intensity of review' (2006) 65 CLJ 174 and idem, 'Proportionality, Discretion and the Second Law of Balancing, in: George Pavlakos (ed.), *Law, Rights and Discourse. The Legal Philosophy of Robert Alexy* (Hart Publishing 2007), p. 167–188.

<sup>12</sup> E.g. *Ulmer* (*supra*, n 8), para 31.

<sup>13</sup> E.g. *Scarlet Extended* (*supra*, n 9), para 48, *SABAM v Netlog* (*supra*, n 9), para 46 and *McFadden* (*supra*, n 9), para 98.

<sup>14</sup> 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 (InfoSoc), OJ No. L 167 of 22 June 2001, p. 10.

<sup>15</sup> One question posed by the BGH in all three references will not be discussed in this contribution, that is whether the InfoSoc Directive allows any latitude in terms of implementation of the limitations and exceptions in national law (question 1 in both *Afghanistan Papers* and *Spiegel Online* and question 5 in *Metall auf Metall*). The question is, due to its general nature, also not elaborately discussed by the AG.

<sup>16</sup> Case C-469/17 *Funke Medien (Afghanistan Papers)* ECLI:EU:C:2018:870; Case C-476/17 *Pelham and Others (Metall auf Metall)* ECLI:EU:C:2018:1002; and Case C-516/17 *Spiegel Online* ECLI:EU:C:2019:16.

## **2 The scope of the reproduction right for phonogram producers (*Metall auf Metall*)**

In *Metall auf Metall* the referring court asks whether the copying of “very short audio snatches” from a phonogram constitutes a reproduction within the meaning of InfoSoc Directive (question 1).<sup>17</sup> Furthermore, the BGH enquires whether EU law permits national law to maintain a provision which limits the rights of the author, and by analogy those of the phonogram producer, by permitting the “free use” of a work by creating a new and independent work, typically one in which the original characteristics of the underlying work fade away (question 3).<sup>18</sup>

Article 2 of the InfoSoc Directive requires Member States to “provide for the exclusive right to authorize or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, *in whole or in part*: ... (c) for phonogram producers, of their phonograms” (my emphasis). The AG proposes a strictly textual interpretation of this provision. Since Article 2 extends to the reproduction “in part” *tout court*, any copying, however short, from a phonogram infringes the exclusive right of the phonogram producer. The AG rejected the teleological argument that, because the right granted to phonogram producers aims to guarantee “satisfactory returns” on the “considerable” investment needed for the production of phonograms,<sup>19</sup> protection should be limited to substantial parts which reflect this investment. According to him, such a *de minimis* threshold cannot be accepted because a phonogram is (a) protected “on account of the fixation itself”, that is to say any fixation is protected, (b) it would engender a danger of leading to differences in national case law, and (c) it would limit protection to acts of piracy.<sup>20</sup>

The AG also rejected a number of systemic arguments. The AG dismissed an analogy with the Database Directive, which in principle only protects against the extraction of “the whole or a substantial part”. Instead, he argues that, *a contrario*, the lack of an explicit reference in the InfoSoc Directive to protection of “substantial parts” implies that protection should include any part.<sup>21</sup> The AG also rejects an interpretation in conformity with the WIPO Performances and Phonograms Treaty (WPPT), which does not set a threshold for infringement. Instead, the AG relied on the WIPO *Guide to the Copyright and Related Rights Treaties*, which refers to the report of the Diplomatic Conference for the Rome Convention,

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<sup>17</sup> Similarly, the BGH asks in the same reference (question 2) whether the phonogram incorporating the samples constitutes a copy within the meaning of Art. 9 Rental and Lending Rights Directive, which harmonizes the distribution right for related right holders. The AG considers that it does not, arguing that the distribution right granted to phonogram producers intends to protect them solely against piracy, i.e. against the unauthorized distribution of phonograms which incorporate “all of a substantial part of the sounds of a protected phonogram”. This leads to a discordance between the scope of the reproduction right, as suggested by the AG, and that of the distribution right, as discussed below. See the Opinion in *Metall auf Metall*, paras 41–49.

<sup>18</sup> Next to this so-called external distance (*äußerer Abstand*), the BGH has recognized that a free use may also exist if the new work maintains a sufficient internal distance (*innerer Abstand*) to the underlying work, even though the original characteristics are still prominently present in the new work. The latter type of free use, which includes for instance parody, is not at issue here. For a recent example, see Federal Supreme Court, 28 July 2016, Case No. I ZR 9/15, GRUR (2016), p. 1157 – *Auf fett getrimmt*.

<sup>19</sup> Cf. recital 10 in the preamble to the InfoSoc Directive.

<sup>20</sup> AG in *Metall auf Metall*, paras 28–33.

<sup>21</sup> *Ibid.*, paras 37–38.

**Daniël Jongma: AG Szpunar on copyright's relation to fundamental rights: one step forward and two steps back?**

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where it is noted that the right of reproduction “is to be understood as including rights against partial reproduction of a phonogram”.<sup>22</sup> According to the AG Article 11 of the WPPT should be interpreted in the same way, which in his opinion means protection should cover any part.

Having concluded that Article 2 of the InfoSoc Directive confers a right to authorize or prohibit the reproduction of any part, it was a small step to for the AG to find that Member States are not permitted to maintain a provision which allows a free use of a phonogram in a new and independent work unless the use falls within the scope of one of the explicitly permitted limitations and exceptions in Article 5 of the InfoSoc Directive. One may wonder whether the AG should not have more thoroughly considered the question of whether there are intrinsic limitations to the reproduction right. After all, such a limitation is recognized in most continental copyright systems. The fact that it cannot be explicitly found in the InfoSoc Directive is not surprising, as that Directive was arguably never intended to cover adaptations in the first place.<sup>23</sup>

The approach to the interpretation of (the limits of) the reproduction right by the Advocate General is not convincing. The AG relies heavily on the text and alleged intention of the legislature, which in turn seems itself largely inferred from the wording of the provision. However, neither appears to me to demand an interpretation to the effect that *any copying* of a phonogram results in a reproduction “in part”.

First, it is questionable that the wording really implies that the right *must* cover “any reproduction”. There is no principal reason why reproduction “in part” cannot be understood as reproduction of a substantial part. The reproduction right granted to the author does not cover the reproduction of just any “part” of his work, only a part which includes elements that are the author’s own intellectual creation. Although the AG is right that this limitation in regard of the rights of authors is “the result of the definition of the work”,<sup>24</sup> there is no reason why the purpose underlying the right granted to phonogram producers cannot similarly affect how the phrase “in part” should be understood.

Second, the argument that a restriction of the scope of protection against the reproduction of the whole or substantial parts of the phonogram should be rejected is also unconvincing insofar as it relies on the legislative choice to protect against “any reproduction”. To me it seems far from clear that the legislature intended to give such broad protection to the effect of prohibiting the common infringement test that requires substantiality. One is hard-pressed to find any explicit considerations to that effect in the legislative history. One could point to the general intention to grant a “high level of protection” and to define rights broadly,<sup>25</sup> but this by itself does not preclude an infringement test that looks for substantiality. On the

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<sup>22</sup> *Ibid.*, para 39.

<sup>23</sup> Cf., with further references, P. Bernt Hugenholtz & Martin R.F. Senftleben, ‘Fair Use in Europe. In Search of Flexibilities’ (Amsterdam, November 2011), <https://www.ssrn.com/abstract=1959554>, p. 26. See also Matthias Leistner, ‘Europe’s Copyright Law Decade: Recent Case Law of the European Court of Justice and Policy Perspectives’ (2014) 51 CMLR 559, 566, suggesting that “[i]nvariably, the harmonization of copyright subject matter will have to bring about the development of a doctrine of free creative use or a functional equivalent which might possibly be embodied in a respectively flexible interpretation of the exclusive economic rights”.

<sup>24</sup> AG in *Metall auf Metall*, para 29.

<sup>25</sup> Recitals 9 and 21 in the preamble to the InfoSoc Directive.

**Daniël Jongma: AG Szpunar on copyright's relation to fundamental rights: one step forward and two steps back?**

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contrary, one could argue that the high level of protection is intimately connected to the purpose of incentivizing creation and that protection is only justified as long as it maintains a rational connection to this underlying purpose.

Even if one sees in the wording and intention an indication for an interpretation to the effect of bringing sampling within the scope of the right, one has to admit these arguments are hardly definitive. Purposive arguments should therefore not have been so easily rejected. More importantly, the potential interference created by such an interpretation with the fundamental right to artistic freedom should be considered.

Instead, for the AG the (constructed) legislative intention trumped all: “it does not seem logical to me to call that choice [to give producers an exclusive right to authorize or prohibit *any* reproduction] into question on the grounds that that [sic] such a right does not satisfy the objective pursued”.<sup>26</sup> This fully ignores the fundamental rights dimension. The fact that a particular legislative act that interferes with a fundamental right is not suitable for attaining its purpose, is a main reason for considering that interference disproportionate.

Even if it is likely that a protection of phonogram producers beyond the mere protection against piracy, by enabling those producers to obtain revenue from licensing even the smallest parts, *does* contribute to the objective of guaranteeing “satisfactory returns” on the investment made, it must be asked whether such an increased level of protection stands in a proportional relation to the burdens imposed on others. In fact, it was on these grounds that the German Federal Constitutional Court (BVerfG), which handed down a judgment in this case in 2016, rejected as unconstitutional an interpretation of the German Copyright Act which did not permit the sampling in question. The Court considered that the provision granting the reproduction right to phonogram producers, the provision granting a right to “free use” and the quotation exception all leave room for an interpretation in favour of the freedom of art.<sup>27</sup> In those circumstances the interpretation and application of the law “must give preference to an interpretation that corresponds to the values enshrined in the constitution”.<sup>28</sup> In other words, using the CJEU’s terminology, the courts must rely on an interpretation of the law that maintains a fair balance of the rights and interests of the phonogram producers and those of users. In this regard, the BVerfG essentially considered that interpreting the law in a way that would prohibit sampling would create a “considerable infringement” of the freedom of art because it would permit right holders to refuse permission and therefore prevent creation of new works of art.<sup>29</sup> The Court pointed out that the independent re-creation of the sample cannot substitute for the use of the sample because that use “is an essential element of an experimentally synthesising creative process”.<sup>30</sup> By contrast, permitting sampling would only

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<sup>26</sup> AG in *Metall auf Metall*, para 33.

<sup>27</sup> German Federal Constitutional Court, 31 May 2016, 1 BvR 1585/13 – *Metall auf Metall*, translation published in 48 IIC 343, paras 77 & 110. It should be noted that § 85(1) UrhG, which creates the right for phonogram producers, does not explicitly stipulate that the exclusive reproduction right also applies to reproductions “in part”. In my opinion, this additional stipulation in Art. 2 InfoSoc Directive does not mean that that provision does not leave room for such an interpretation.

<sup>28</sup> BVerfG in *Metall auf Metall* (*supra*, n 27), para 82.

<sup>29</sup> *Ibid.*, paras 96–98 & 107.

<sup>30</sup> *Ibid.*, para 99.

**Daniël Jongmsma: AG Szpunar on copyright's relation to fundamental rights: one step forward and two steps back?**

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create a “slight encroachment” of the right of phonogram producers if there is no risk of decline in sales. In that case, the right holder only misses out on a licensing possibility, but this does not result in “considerable economic harm”. Moreover, the legislative purpose behind the right granted to phonogram producers was to protect them against piracy, not to enable them to guarantee them licensing revenues for the use of samples.<sup>31</sup> Given this state of affairs, the BVerfG concluded that the law should be interpreted in a manner permitting sampling.

The AG did discuss the reasoning of the BVerfG, but only separately, after having considered how the reproduction right (and the quotation exception) should in his opinion be interpreted. Essentially, the AG asked whether the legislative choice constituted a disproportional interference with the freedom of arts. He treated this as a matter of judicial review, in which the judiciary should show deference and restraint, noting that “fundamental rights play a different role: a sort of *ultima ratio* which cannot justify departing from the wording of the relevant provisions except in cases of gross violation of the essence of a fundamental right”.<sup>32</sup> I strongly disagree with the AG that this case calls for such a high degree of restraint. Ultimately, this difference of opinion finds its origin in the argument that the wording of the provision is unambiguous. Generally, it is true that, the clearer wording and intention, the stronger must be the argument to deviate from that wording and intention. However, wording and intention are hardly unambiguous in case of the reproduction right, as already argued, and equally so in case of the quotation exception, as will be explained in the following section. One could even go so far as to argue that in this case the wording is neutral, permitting both an interpretation extending to *all* parts or to *substantial* parts. The current situation therefore does not call for a deferential standard of review, but for an approach that seeks to find an interpretation that optimizes both the freedom of arts and the purpose of guaranteeing a return on the investment of phonogram producers similar to the approach of the BVerfG.<sup>33</sup> Even if one read in the text a presumption that the right covers *all* parts, the standard applied by the AG (gross violation of the essence) would appear incorrect. In that case the question is simply whether the systemic fundamental rights argument is capable of outweighing the textual argument and/or the argument from intention. This is essentially a matter of balancing a substantive fundamental rights argument with the formal principles of legal certainty and democratic decision-making, the principles requiring adherence to text and legislative intention.<sup>34</sup> Requiring a gross violation of the essence of the fundamental right to exist would only be correct if one were to consider that an interpretation contrary to the textual presumption would at least create a serious or even very serious interference with those formal principles. The case for such a severe interference with these formal principles seems very difficult, if not impossible.

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<sup>31</sup> *Ibid.* paras 101–104.

<sup>32</sup> AG in *Metall auf Metall*, para 98.

<sup>33</sup> On the use of proportionality analysis to both review legislation and to determine “optimal” outcomes, e.g., Rivers 2007 (*supra*, n 11), p. 170–177.

<sup>34</sup> On balancing in legal interpretation see, e.g., Eveline T. Feteris, ‘The Rational Reconstruction of Weighing and Balancing on the Basis of Teleological-Evaluative Considerations in the Justification of Judicial Decisions’ (2008) 21 *Ratio Juris* 481 and Joost Huysmans, ‘The role of formal principles in legal reasoning’ (2015), <https://core.ac.uk/download/pdf/34640145.pdf>.

**Daniël Jongsma: AG Szpunar on copyright's relation to fundamental rights: one step forward and two steps back?**

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Nevertheless, even though the AG's approach grants very broad protection to phonograms, this is not necessarily problematic. Although a more limited interpretation of the reproduction right has the benefit for the user of increasing the initial burden of proof of the claimant,<sup>35</sup> an "absolutist" conception of exclusive rights can be mitigated by an interpretation of limitations and exceptions which *does* take appropriate account of the (fundamental rights) interests of individual users and of the public in general. Unfortunately, fundamental rights arguments did not resonate with the AG in this regard either.

### **3 The interpretation of limitations and exceptions (*Metall auf Metall* and *Spiegel Online*)**

AG Szpunar also considered a number of questions concerning the scope of the quotation exception and a question concerning the interpretation of the exception for use in connection with the reporting of current events. In *Metall auf Metall* the BGH essentially asks whether sampling is *prima facie* covered by the quotation exception (question 4). In *Spiegel Online* the BGH asks whether the quotation exception can apply to the making available of an entire work as a pdf file by means of a hyperlink (question 5), when a work has a work been "lawfully made available to the public" within the meaning of the quotation exception (question 6), and about the conditions for applicability of the exception for use in connection with the reporting of current events (question 4).

The answers by the Advocate General are similarly inflexible as the interpretation of the reproduction right in *Metall auf Metall*.

#### *3.1 The quotation exception*

Article 5(3)(d) of the InfoSoc Directive permits the introduction of a limitation or exceptions 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".

In *Metall auf Metall* the AG considered that the quotation exception may apply to all categories of works, but subsequently severely limited the scope of the exception. He inferred from the illustrative enumeration "for purposes such as criticism or review" a requirement for the quotation to enter into a dialogue or in some way interact with the quoted work. From this first requirement, he deduced a second, that is the quoted element must be "unaltered and distinguishable".<sup>36</sup>

In *Spiegel Online*, concerning the question about quotation using a hyperlink, the AG considered that there is in principle no reason to exclude citing a work by means of linking to that work, nor citing a whole work, from the scope of the exception. However, he then went on to suggest that the quotation may not enter into competition with the original to the extent that

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<sup>35</sup> Bently et al., '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*' (2019), [https://europeancopyrightsocietydotorg.files.wordpress.com/2019/01/ecs-opinion-metall-auf-metall\\_final.pdf](https://europeancopyrightsocietydotorg.files.wordpress.com/2019/01/ecs-opinion-metall-auf-metall_final.pdf), para 2.7.

<sup>36</sup> AG in *Metall auf Metall*, paras 62–65.

**Daniël Jongmsma: AG Szpunar on copyright's relation to fundamental rights: one step forward and two steps back?**

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the reader would no longer need to consult the original. In the case of literary works, making such a work available in its entirety would always result in the user no longer needing to consult the original, meaning quoting an entire literary work should be principally excluded from the scope of the quotation exception.<sup>37</sup>

As regards the question when a work has been made available to the public, the AG considered that this is the case when the work has been made available with the author's consent or pursuant to a compulsory licence.<sup>38</sup>

The latter conclusion does not seem very controversial, although it is not impossible to imagine the existence of other ways in which the work may have been "lawfully made available".<sup>39</sup> Otherwise, like his interpretation of the exclusive right for phonogram producers, the AG's interpretation of the quotation right is not free from criticism. Again, he relies heavily on textual arguments, ignores the fundamental rights dimension, and reads requirements into the wording that arguably are not there.

First, the textual argument that reads a requirement to enter into a dialogue with the quoted work into the phrase "for purposes such as criticism and review" seems very weak to me. Although such a requirement is not against the wording per se, such an interpretation in favour of the author greatly reduces the potential scope of the exception and reduces its effectiveness in safeguarding the right to freedom of expression, the *raison d'être* of the exception as also explicitly recognized by the CJEU in *Painer*.<sup>40</sup> Such a restrictive interpretation of this ambiguous wording cannot be justified in light of the right to freedom of expression. A restrictive interpretation will seriously hamper freedom of expression while a more permissive interpretation will by itself not seriously affect the rights of authors. This is so, because even with a broader initial scope, the use in question will still need to meet the necessity and fair practice requirements,<sup>41</sup> meaning the interests of the author can be sufficiently safeguarded even if quotation is permitted for a wider variety of purposes. In *Painer*, the CJEU was therefore correct to reject the requirement that a quotation be made as part of a work itself protected by copyright, emphasizing that such a requirement appeared "irrelevant" considering the exception's purpose of "favouring the exercise of the users' right to freedom of expression".<sup>42</sup> A more permissive interpretation is also in conformity with mandatory quotation exception in Article 10(1) of the Berne Convention, to which the EU must adhere as a signatory to the TRIPS Agreement and the WIPO Copyright Treaty. Article 10(1) only requires that the use is limited to the extent justified by the purpose. It does not limit the application of the

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<sup>37</sup> AG in *Spiegel Online*, paras 39–52.

<sup>38</sup> *Ibid.*, paras 53–58.

<sup>39</sup> For example, in the well-known Dutch *Scientology* case the question was whether the fact that the quoted work was publicly available in the library of a district court in California, having been submitted there in legal proceedings, meant that they had been lawfully made available. The Court of Appeals had considered that it did not, but on appeal to the Supreme Court the AG considered, in a lengthy opinion, that it did (see Opinion of AG Verkeade of 16 December 2005, ECLI:NL:PHR:2005:AT2056, paras 5.21–5.27 and 5.63–5.65). The appeal was revoked before the Supreme Court handed down a decision.

<sup>40</sup> *Painer* (*supra*, n 8), para 134.

<sup>41</sup> Art. 5(3)(d) only permits use that is "in accordance with fair practice, and to the extent required by the specific purpose [i.e. necessary]".

<sup>42</sup> *Painer* (*supra*, n 8), paras 135–136.

**Daniël Jongsma: AG Szpunar on copyright's relation to fundamental rights: one step forward and two steps back?**

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exception to certain purposes only.<sup>43</sup> The systemic arguments based on international law and fundamental rights thus – arguably – far outweigh the relatively weak textual argument.

Second, one cannot read in the quotation exception an exclusion by definition of the quotation of an entire literary work. In *Deckmyn* the CJEU was unequivocal in its rejection of various conditions for the applicability of the parody exception which “emerge[d] neither from the usual meaning of ‘parody’ in every day language nor from the wording of that provision”.<sup>44</sup> To me, it does not appear that the wording of Article 5(3)(d) of the InfoSoc Directive excludes from its scope quotation of an entire literary work. One might argue it is contained in the element of “fair practice”. But while it is true that the (undue) harm caused by quoting the entire work is something that must be taken into account when determining whether the quotation is made in accordance with fair practice, I disagree with the AG insofar as he means that quoting an entire literary work will *always* be contrary to fair practice. I do not believe that this balancing exercise will always result in an outcome favourable to the author. For example, in cases in which the right holder uses economic rights solely for the purpose of suppressing information which is of vital interest to democratic debate, and in which he or she has no exploitative interest, quoting an entire literary work may not be contrary to fair practice.<sup>45</sup> The same may be true for the quotation of a short poem in the context of the review of a larger bundle in which it was published. Finally, I also do not believe quoting an entire literary work will always be contrary to the three-step test for conflicting with the normal exploitation of the work.<sup>46</sup> This will depend if there really is a conflict with the *normal* exploitation and this, as I just argued, may not always be the case.

Like the requirement that a quotation enter into a dialogue with the quoted work, the exclusion by definition of the quotation of an entire literary work is not necessary to safeguard the interests of the author, while it may have detrimental effects for the right to freedom of expression. The same is true, finally, of an interpretation that requires the quotation to be unaltered and distinguishable, which similarly cannot be derived from the wording of the provision. In fact, the everyday meaning of that concept requires neither that there is any kind of dialogue nor that the quotation is unaltered. As to the former, everyone will understand the phrase “To be, or not to be, that is the question” as a *quotation* of Shakespeare’s Hamlet, whether an interaction follows or not. As to the latter, in the arts it is common to refer to the (re-)use of elements from a prior creation as *quotation*, whether they stand out as foreign elements or not.<sup>47</sup>

If the interpretation of exceptions is to strike a fair balance between the rights and interests of authors and users, one should not introduce restrictive requirements for their

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<sup>43</sup> On the mandatory and flexible nature of Art. 10(1) Berne, see Lionel Bently and Tanya Aplin, ‘Displacing the Dominance of the Three-Step Test: The Role of Global, Mandatory Fair Use’ (Legal Studies Research Paper Series, University of Cambridge, Paper No. 33/2018), [https://papers.ssrn.com/abstract\\_id=3119056](https://papers.ssrn.com/abstract_id=3119056).

<sup>44</sup> *Deckmyn* (*supra*, n 6), para 24.

<sup>45</sup> This is essentially the case of *Afghanistan Papers*, discussed below, although in that case the quotation exception is not applicable because the works are unpublished.

<sup>46</sup> As argued by the AG in *Spiegel Online*, para 50.

<sup>47</sup> Cf. Bently & Aplin 2018 (*supra*, n 43), p. 18 and European Copyright Society, paras 4.5–4.7.

**Daniël Jongsma: AG Szpunar on copyright's relation to fundamental rights: one step forward and two steps back?**

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application that do not unambiguously follow from the wording of the provision and which are not necessary to safeguard the legitimate interests of authors. On the contrary, in those cases the CJEU should ask what the fair balance of rights and interests demands and determine whether the (wording of the) provision in question can accommodate such an interpretation. In particular, a restrictive interpretation of the quotation exception is unnecessary to safeguard the interests of authors and other right holders, due to the requirements of necessity and fair practice.

*3.2 Use in connection with reporting of current events*

Article 5(3)(c) of the InfoSoc Directive permits the introduction of a limitation or exception for “use of works or other subject-matter in connection with the reporting of current events, to the extent justified by the informatory purpose and as long as the source, including the author's name, is indicated, unless this turns out to be impossible”. The BGH asked whether national law may add the requirement that it cannot be reasonably expected from the user to seek permission. The AG argues that this requirement is implicit, basing himself on the historical *ratio legis*, and that it can be read in the wording “to the extent justified by the informatory purpose”.<sup>48</sup> Nevertheless, in this instance the AG’s approach does not appear overly restrictive. He considers, for instance, that both a lack of time to seek authorization and the right of the public to be informed may justify application of the exception.<sup>49</sup> In other words, whether it is “reasonable” for the user to seek permission should not just be based on practical considerations, but also on normative ones.

However, the AG considers that the exception does not apply to a situation like the one in the case at issue. He suggests that an interpretation in conformity with Article 10*bis*(2) of the Berne Convention must lead to the conclusion that the exception does not apply if it requires reading (part of) a work. Article 10*bis*(2) does refer to “works seen or heard in the course of the event” and it does appear that in *Spiegel Online* the works made available were not “seen or heard in the course of the event”. Instead, the “event” is the confrontation of the author with his original work and his subsequent response. On an interpretation in conformity with Berne, the AG therefore appears to be right to suggest that the publication of an entire literary work by means of a hyperlink in order to illustrate a particular argument, falls outside the scope of the provision.<sup>50</sup>

Such an interpretation does limit the freedom of the press and freedom of information, but this would not have been very problematic, had the AG taken account of those freedoms in the course of the interpretation of the quotation exception.

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<sup>48</sup> AG in *Spiegel Online*, paras 27–29.

<sup>49</sup> *Ibid.*, para 28.

<sup>50</sup> Although it can be argued that the EU may draw the boundaries of the exception wider than those of the Berne provision on which they are based, as long as those boundaries conform to the three-step test.

#### **4 Fundamental rights as external limitations (*Afghanistan Papers*, *Metall auf Metall* and *Spiegel Online*)**

The question whether fundamental rights can act as external constraints on copyright has been tirelessly debated.<sup>51</sup> In its 2013 decisions *Neij and Sunde Kolmisoppi* and *Ashby Donald* the European Court of Human Rights acknowledged that (the enforcement of) copyright interferes, in principle, with the right to freedom of expression as guaranteed by Article 10 of the European Convention on Human Rights and that for this interference to be lawful it must be “necessary in a democratic society”.<sup>52</sup> With these references the BGH has offered the CJEU the opportunity to clarify the relationship between the exhaustive enumeration of limitations and exceptions in the InfoSoc Directive and the EU Charter, by asking whether the right to freedom of information or the freedom of the media as guaranteed by the EU Charter can justify limitations or exceptions to exclusive rights beyond the limitations and exceptions provided for in the InfoSoc Directive (question 3 in both *Afghanistan Papers* and *Spiegel Online*). The BGH also asks, in general, how the fundamental rights of the EU Charter must be taken into account when determining the scope of exclusive rights and of limitations and exceptions (question 2 in both *Afghanistan Papers* and *Spiegel Online* and question 6 in *Metall auf Metall*). The AG decided to treat these issues together, predominantly as asking whether the fundamental rights concerned can act as additional constraints on exclusive rights. As already has been illustrated in the previous sections, it appears that as far as the AG is concerned, there is little to no role for fundamental rights in the context of interpretation of exclusive rights and of limitations and exceptions. The question is whether the same is true as regards the external dimension, discussed here.

In his first of the three Opinions, in *Afghanistan Papers*, the AG does reach the conclusion that the right holder in question should not be able to rely on copyright in the circumstances of the case. However, *Afghanistan Papers* presents an unusual set of circumstances. As the AG himself notes, the right holder is the State of Germany, the nature of the documents in which copyright is claimed is highly informative, and the German State does not seek to enforce copyright to protect any exploitative interest, but rather the confidentiality of the information contained in the documents.<sup>53</sup> More specifically, the case concerns the publication of confidential German military status reports on a newspaper website, which the

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<sup>51</sup> For some paradigmatic contributions, see Estelle Derclaye, ‘Intellectual Property Rights and Human Rights: Coinciding and Cooperating’, in: Paul L.C. Torremans (ed.), *Intellectual Property and Human Rights. Enhanced Edition of Copyright and Human Rights* (Wolters Kluwer 2008), p. 133–160, Christophe Geiger, ‘Fundamental rights, a safeguard for the coherence of intellectual property law?’ (2004) 35 IIC 268, Christophe Geiger & Elena Izyumenko, ‘Copyright on the human rights’ trial: redefining the boundaries of exclusivity through freedom of expression’ (2014) 45 IIC 316, Tuomas Mylly, ‘Intellectual Property and Fundamental Rights: Do They Interoperate?’, in: Niklas Bruun (ed.), *Intellectual Property Beyond Rights* (WSOY 2005), p. 185–230, Ansgar Ohly, ‘European Fundamental Rights and Intellectual Property’, in: Ansgar Ohly & Justine Pila (eds.), *The Europeanization of Intellectual Property Law. Towards a European Methodology* (Oxford University Press 2013), p. 145–164. See also the publications cited, *supra*, n 1.

<sup>52</sup> Decision of the European Court of Human Rights (Fifth Section), case of *Fredrik Neij and Peter Sunde Kolmisoppi (The Pirate Bay) v. Sweden*, Appl. no. 40397/12 of 19 February 2013 and Decision of the European Court of Human Rights (Fifth Section), case of *Ashby Donald and others v. France*, Appl. no. 36769/08 of 10 January 2013.

<sup>53</sup> AG in *Afghanistan Papers*, para 32. Notably, the AG suggests the question may be inadmissible because the preliminary question of whether the documents in question are protected by copyright in the first place, that is whether they are original, has not been sufficiently considered in the national proceedings. In fact, he questions the originality of the documents.

**Daniël Jongma: AG Szpunar on copyright's relation to fundamental rights: one step forward and two steps back?**

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German State attempts to halt by enforcing copyright. These characteristics greatly impact the AG's analysis.

Nevertheless, the AG's analysis in *Afghanistan Papers* is highly methodical, something the approach by the CJEU has oftentimes not been.<sup>54</sup> The AG starts by considering that the publication of confidential documents falls within the scope of the right to freedom of expression and that the enforcement of copyright by the German State interferes with that right.<sup>55</sup> Second, he asks whether that interference serves a legitimate purpose. Article 52(1) of the EU Charter permits interferences with Charter rights solely if they "meet objectives of the general interest" or "to protect the rights and freedoms of others". As to the former, the AG considers that even though the ultimate purpose of the German State may be to safeguard the confidentiality of the documents in question – potentially an objective of the general interest – it is relying on copyright's economic rights to do so, which rights are not at all granted for that purpose.<sup>56</sup> As to the latter, the AG considers that the interference with freedom of expression in this case also does not serve the protection of "rights and freedoms of others". First of all, a legitimate purpose cannot be found in the protection of the fundamental right to property, because the German State is not a beneficiary of fundamental rights protection.<sup>57</sup> Second of all, even if "rights of others" is understood more broadly as also including civil ownership rights, such rights, when held by the State, cannot justify the interference with fundamental rights because it would result in "the destruction of those fundamental rights".<sup>58</sup> Whatever one thinks of the latter argument – one could argue that the peaceful enjoyment by state entities of their property ultimately serves the general interest, it leads the AG to conclude that the interference with freedom of expression caused by the enforcement of copyright by the German State does not pursue a legitimate purpose.

The AG's analysis does not end there. In the alternative, the AG argues that even if one considered the purpose pursued by copyright enforcement legitimate in this case, the interference with freedom of expression cannot be justified for a lack of necessity. After all, Article 52(1) of the EU Charter requires that an interference with a Charter right be "necessary". In this regard the AG identifies two objectives of copyright, neither of which is served by the German State's enforcement action. First, enforcement does not serve protection of moral rights, if only because the German State is not the author.<sup>59</sup> Second, enforcement does not serve the objective of enabling economic exploitation, since the sole objective of the German State was the protection of the confidentiality of (certain information in) the documents in question. In other words, the interference with freedom of expression would be disproportionate because

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<sup>54</sup> See also the analysis by Christophe Geiger and Elena Izyumenko, 'Freedom of Expression as an External Limitation to Copyright Law in the EU: The Advocate General of the CJEU shows the Way' (Center for International Intellectual Property Studies Research Paper No. 2018-12), [https://papers.ssrn.com/abstract\\_id=3293735](https://papers.ssrn.com/abstract_id=3293735).

<sup>55</sup> AG in *Afghanistan Papers*, para 45.

<sup>56</sup> *Ibid.*, paras 48–49. Cf. also para 61.

<sup>57</sup> *Ibid.*, para 53.

<sup>58</sup> *Ibid.*, para 55.

<sup>59</sup> *Ibid.*, para 59.

**Daniël Jongma: AG Szpunar on copyright's relation to fundamental rights: one step forward and two steps back?**

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the enforcement of copyright in this case would be unsuitable for attaining any of the objectives pursued by copyright.<sup>60</sup>

*Spiegel Online* concerns a similar issue as *Afghanistan Papers*: the attempt by the right holder to prevent dissemination of a particular work, although in this case the reason is that the author wants to distance himself from the opinion expressed by him in those works while in the latter the reason is the protection of confidentiality of information in those documents. The author in question in *Spiegel Online* is Volker Beck, member of the German federal parliament from 1994 until 2017. In 1988 he published an article as part of a book, from which he has distanced himself since at least 1993, in particular due to alleged changes made by the book's editor to the original manuscript. In 2013 this manuscript surfaced. The online news medium Spiegel published an article alleging that Beck had misled the public by arguing that the published article substantially deviated from the manuscript. At the same time, Spiegel made both the manuscript and the published article available on its website.

The AG proceeds from the notion that the legislature has already struck a balance between the various conflicting rights and interests and that permitting fundamental rights such as freedom of expression to act as an external limitation is tantamount to introducing into EU law a fair use provision, completely undermining the harmonization of copyright.<sup>61</sup> Denying fundamental rights protection in the name of harmonization seems foolish: harmonization ought not by definition trump the protection of fundamental rights. The comparison to fair use is inaccurate. A fair use determination permits the judge to determine the optimal choice between right holder control and free use. The judge is in control of the content of the exception. By contrast, the question whether the balance as struck by the legislature creates a disproportionate interference with a fundamental right is one of review, in which courts can and must show appropriate restraint and deference.

Despite the AG's principled rejection of a fundamental rights-based limitation, the AG does, later on in his Opinion, allow for a possibility that fundamental rights prevail over copyright, as he essentially already admitted in *Afghanistan Papers*.<sup>62</sup> He sees no room for this in *Spiegel Online*, however, emphasizing the differences with *Afghanistan Papers*. He stresses that in this case the right holder is a natural person, for whom copyright is the most important means of protecting his creative work.<sup>63</sup> The AG considers that freedom of the press cannot derogate from copyright protection in this case, essentially because there is no overriding public interest demanding the publication of the article which Spiegel made available without consent. The AG points out in this regard that the author himself has acted "completely transparently" by making the article and manuscript available on his own website and that the Spiegel website could have contained a hyperlink to that article.<sup>64</sup>

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<sup>60</sup> *Ibid.*, para 61.

<sup>61</sup> AG in *Spiegel Online*, paras 62–63.

<sup>62</sup> See, to that effect, *ibid.*, paras 71 & 74. The AG appears to justify this apparent contradiction by suggesting that, in *Afghanistan Papers*, the application of the right to freedom of expression leads to an *exclusion* of copyright protection instead of an external *exception*. Cf. Geiger and Izyumenko 2018 (*supra*, n 54), p. 11–13.

<sup>63</sup> AG in *Spiegel Online*, paras 69–70.

<sup>64</sup> *Ibid.*, paras 71–74.

**Daniël Jongma: AG Szpunar on copyright's relation to fundamental rights: one step forward and two steps back?**

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Overall, the analysis by the AG is convoluted, lacking the conceptual clarity found in *Afghanistan Papers*. This hurts the persuasiveness of his analysis and its utility for use in future cases. He largely skips over the determinative issues in *Afghanistan Papers*, proper purpose and suitability (or “necessity”), even though also in this case one could question the suitability of enforcement to attain the purposes underlying exclusive economic rights. Strictly applying his reasoning in *Afghanistan Papers*, one could argue the enforcement is similarly not aimed at protecting the author’s exploitative interest. The AG appears to soften his stance from *Afghanistan Papers* by considering that “an effective exploitation” is not a condition for the successful enjoyment of copyright protection.<sup>65</sup> Moreover, he emphasizes the fact the author in this case is a natural person, not a state.<sup>66</sup> This is not per se convincing, because, natural person or state entity, the objective of copyright he himself identified in *Afghanistan Papers* remains the same. The real reason why enforcement is a suitable course of action is, in my opinion, that by virtue of the rights to property and to an effective remedy the author has, in principle, the right to protection of his (exclusive) rights by means of enforcement.<sup>67</sup> Enforcement by means of an injunction is automatically suitable to achieve this purpose. It is likely also necessary in that no alternative means exist that protect this enjoyment to the same extent while interfering less with the freedom of the press. The question then is whether the enforcement is proportionate *stricto sensu*.

The court should show restraint in its determination of proportionality *stricto sensu*, considering that the refusal to grant remedies to the right holder *de facto* limits his rights beyond the system of limitations and exceptions provided for by the legislature.<sup>68</sup> The question is therefore not whether the balance struck by the legislature is optimal, but whether it is acceptable. As briefly discussed in Section 2, the AG formulated such a standard in *Metall auf Metall*: the legislative choice can only be questioned “in cases of gross violation of the essence of a fundamental right”.<sup>69</sup> In *Spiegel* the AG moderates this standard slightly, considering a simple “violation” instead of a “gross violation” of the essence sufficient for judicial intervention in the legislative balance.<sup>70</sup> Either way, such standards seem to me unjustifiably one-sided by ignoring the extent to which the measure scrutinized contributes to the purposes pursued. A better standard may perhaps be found in the case law by the CJEU for the evaluation of measures involving political, economic or social policy choices. The question is whether the

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<sup>65</sup> *Ibid.*, para 76.

<sup>66</sup> *Ibid.*, para 70 in conjunction with para 78.

<sup>67</sup> This can serve as distinguishing factor between this case and *Afghanistan Papers*, if one accepts the AG’s argument in the latter that the German State’s copyright ownership is not reinforced by fundamental rights protection.

<sup>68</sup> An interesting question is whether the refusal to enforce the exclusive rights of a right holder by means of an injunction would constitute a deprivation of property or a regulation of its use, which are only possible “by law” (see Art. 17(1) EU Charter). Arguably, the legal basis can be found in the fundamental rights obligations owed by the state to other persons. Alternatively, one could argue that there is no interference with the right to property to begin with, merely with the right to an effective remedy. Either way, I do not believe a judicial refusal to enforce in the particular circumstances of the case would constitute a *de facto* “deprivation” for which the right holder must receive fair compensation, as the right holder is not otherwise hindered in transferring, licensing or enforcing his or her rights.

<sup>69</sup> AG in *Metall auf Metall*, para 98.

<sup>70</sup> AG in *Spiegel Online*, para 621.

**Daniël Jongma: AG Szpunar on copyright's relation to fundamental rights: one step forward and two steps back?**

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choice is “manifestly inappropriate”, given the information available.<sup>71</sup> Translated to the assessment of the proportionality of copyright enforcement, one then should ask whether the enforcement of the author’s rights, as limited by copyright law itself, leads to a manifestly inappropriate outcome given the specific circumstances of the case.<sup>72</sup>

In the case of *Spiegel Online* one could argue that enforcement does not lead to a manifestly inappropriate encroachment on the freedom of the press nor of the freedom of information. The interference with the freedom of the press and of information appears rather light. As already noted, the AG himself points out that Spiegel, instead of uploading the article without consent to its website, could also have included a hyperlink to the same article available on the author’s website.<sup>73</sup> The degree to which enforcement protects the right holder’s interests appears of at least equal magnitude, by permitting the author to control the way the public accesses his work, that is on his own website, allowing him to make unequivocally clear that he distances himself from the opinion expressed therein.<sup>74</sup> The AG reaches the same conclusion, which seems appropriate whatever standard of review is applied. Nevertheless, a more comprehensive analysis of the proportionality question would arguably have had greater persuasive power and would have given the AG the opportunity to provide a clearer conceptual framework that can also be applied in future cases.<sup>75</sup>

Finally, I briefly return to *Metall auf Metall*. The AG reformulated the question posed by the BGH as asking about the “possible primacy of the freedom of the arts over the exclusive [sic] right of reproduction of phonogram producers”, even though the referring court strictly speaking asked solely about the influence of fundamental rights on the scope of exclusive rights and limitations and exceptions. As noted in Section 2, the AG concluded that he sees no reason to go against the choice (as he sees it) made by the legislature. Like in *Spiegel Online*, there is no comprehensive proportionality analysis, although there is some semblance of proportionality *stricto sensu*. In essence, the AG appears to conclude that there is no real interference with the freedom of the arts, because the musicians can obtain a license, which is a “normal market constraint”. This ignores that right holders may refuse to license, an essential consideration in the argumentation of the BVerfG. On the other hand, he deems it “fair” that phonogram producers obtain remuneration for use of samples, although he does not explain why. Even though one could agree with the conclusion as a matter of review of a clear legislative choice, the question is whether this should be a question of review at all. As I suggested in Sections 2 and 3, I believe this is not the case precisely because the wording of both the reproduction right and the quotation exception is not unequivocal. Either way, the standard of review proposed by

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<sup>71</sup> E.g. Case C-58/08 *Vodafone and Others* ECLI:EU:C:2010:321, para 52.

<sup>72</sup> This may be different where the Member State in question has chosen not to transpose a particular limitation or exception within whose scope the use might have fallen. In that case, a stricter standard may be warranted. Cf. Griffiths 2017 (*supra*, n 1), p. 13–14, Martin Husovec, ‘Intellectual Property Rights and Integration by Conflict: The Past, Present and Future’ (2016) 18 *Cambridge Yearbook of European Legal Studies* 239, 260 and Voorhoof 2015 (*supra*, n 1), p. 351, all suggesting that certain “optional” limitations and exception in Art. 5 InfoSoc Directive may be mandatory if national law is to strike a fair balance.

<sup>73</sup> AG in *Spiegel Online*, para 74.

<sup>74</sup> As the AG remarks on a final note (para 79), Art. 10(1) EU Charter includes the right to change belief.

<sup>75</sup> Although I emphasize that this should arguably not be a question of review, but of optimization, within the context of application of the quotation exception, although the outcome may not be any different.

**Daniël Jongma: AG Szpunar on copyright's relation to fundamental rights: one step forward and two steps back?**

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the AG (“(gross) violation of the essence”) appears to suggest a too large degree of restraint. Moreover, the AG’s suggestion that a reasoning similar to that of the BVerfG, interpreting a certain provision of copyright law itself flexibly, is impossible because EU copyright law has no free use provision, is beside the point. Even if one denies the existence of a free use doctrine in EU copyright law, fundamental rights could have, and in my opinion *should* have, been taken into consideration in the course of the interpretation of the reproduction right and/or the quotation exception. In fact, the BVerfG never explicitly held that sampling should be permitted under the header of free use. On the contrary, it suggested that alternatively the reproduction right or the quotation exception could be interpreted in a manner that would permit sampling.<sup>76</sup> In my opinion, the AG strongly undervalues the law creating function of the CJEU. The question of whether sampling is permitted by copyright law is, as the law currently stands, as much subject to choices to be made by the CJEU in this case as it is to choices made previously by the legislature.

## 5 Conclusions

In his first of three Opinions, in *Afghanistan Papers*, AG Szpunar coherently breaks down the conflict between (the enforcement of) copyright and the freedom of the press and of information, explaining why the German State cannot rely on its copyright in the circumstances of the case. Unfortunately, that coherency largely disappears in his two other Opinions.

With regard to the interpretation of norms of copyright, it appears he sees no role at all for fundamental rights arguments. He suggests interpretations of both the reproduction right and the two exceptions under consideration that severely limit fundamental rights such as the freedom of the press and the right to freedom of expression, including the freedom of the arts. However, he heavily relies on textual arguments which, in my opinion, are not strong enough to support his conclusions, in particular not in light of the restrictive effects of those conclusions on fundamental freedoms.

The decisions in *Metall auf Metall* and *Spiegel Online* will shape the ability of follow-on creators and press publishers to build on and use copyright protected works. Due to the equivocal wording, the CJEU has a certain measure of discretion to strike balance and thus decide how much control right holders will be able to exercise and which uses should remain free. The CJEU cannot ignore the fundamental rights dimension in this regard. It must ask whether the detriment caused to fundamental rights by a certain interpretation is proportional to the benefits gained to the purpose pursued by copyright legislation. From this perspective, a restrictive interpretation of the quotation exception seems particularly difficult to defend. While a broader interpretation of what constitutes a quotation within the meaning of the exception will enable a greater variety of uses to come within its *prima facie* scope, the fact that those uses may not go further than “to the extent required by the specific purpose” and must be “in accordance with fair practice” will prevent undue harm to right holders. By contrast, a narrow

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<sup>76</sup> BVerfG in *Metall auf Metall* (*supra*, n 27), para 110.

interpretation will have a considerable impact on fundamental rights, while barely offering greater protection to right holders than ensured by the necessity and fair practice assessments.

With regard to the potential of fundamental rights to act as external constraints, the AG unfortunately did not further develop the approach outlined in *Afghanistan Papers*. On the one hand, he appears averse to the idea of any potential restrictive effect of fundamental rights, while on the other hand, he does seem to admit there may be circumstances where also a private party should not be allowed to rely on their copyright. Unfortunately, the latter realization did not lead the AG to the creation of a clear analytical framework that can be used in future cases. Hopefully, the CJEU will seize the opportunity to offer some much-needed clarity.