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Copyright and Freedom of Expression in  
Sweden and the European Union  
The Conflict Between Two Fundamental Rights in the Information  
Society

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# Summary

Copyright and the right to freedom of expression both constitute fundamental rights in the European Union (EU) and should be protected accordingly. But what is the closer relationship, *de jure* and *de facto*, between these two legal regimes in the information society? This is one of three questions examined in this thesis. The presentation gives at hand that, traditionally, the notion has been that copyright accommodates or even promotes freedom of expression and that the two rights are compatible. However, it is also demonstrated that the two rights inherit a built-in legal conflict and that copyright inevitably imposes a restriction on freedom of expression.

It is illustrated that the conflict-oriented perspective has gained a great deal of attention recently as the friction between the two regimes has increased significantly. More specifically, the scope of copyright protection has become wider and stronger in recent time, while, at the same time, new web technology has made it much more common that people exercise their right to freedom of expression and information in a way that involves material protected by copyright. It is therefore concluded that the intersection between copyright and freedom of expression presents a potential *de jure* conflict, which *de facto* concerns a broad circle of people.

The second question addressed in this thesis is therefore one of enhanced significance, namely whether the constitutional right to freedom of expression can be successfully invoked as an “external” defense argument in a case where the contested action cannot be subsumed under any of the exemptions existing “internally” within copyright law. The presentation gives at hand that, thus far, Swedish courts have for various reasons abstained from applying such solutions. However, the direct applicability of international and supranational human rights instruments in domestic courts may have altered the legal situation.

Interestingly, not only the incorporation into national law of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR) but also the enactment of a legally binding *Charter of Fundamental Rights for the European Union* (EU Charter) sheds new light on the issues at hand. To the extent clashes between copyright and freedom of expression occur within the scope of EU law, the question of whether a conflict can be solved by application of fundamental rights is no longer only a matter of whether higher-ranking national constitutional provisions should affect the application of domestic copyright rules, but also a question of whether a judicial review on

the conformity of EU secondary law with EU primary law should be undertaken. It is therefore worth noting that the Court of Justice of the European Union (ECJ) in three recent landmark cases has held that national courts are required to strike a fair balance between the protection of copyright and the protection of other rights enshrined in the EU Charter, such as the right to freedom of expression, when applying national provisions stemming from EU Copyright Directives. These cases are thoroughly analyzed in this thesis.

Thirdly, some consequences associated with the application of constitutional rights in copyright infringement cases are outlined. Arguments are presented as for why an increased application should be welcomed. However, it is simultaneously recognized that, for various reasons, the constitutional tool should be applied with caution.

# Sammanfattning

Upphovsrätt och rätten till yttrandefrihet faller båda in under kategorin fundamentala rättigheter inom den Europeiska unionen (EU) och de förtjänar att åtnjuta skydd därefter. Men vad är det närmare rättsliga och faktiska förhållandet mellan dessa båda rättigheter i dagens informationssamhälle? Detta är en av tre frågor som skärskådas i uppsatsen. Presentationen ger vid handen att den traditionella uppfattningen har varit att upphovsrätt ackommoderar eller till och med främjar yttrandefrihet och att det råder kompatibilitet rättigheterna emellan. Men uppsatsen visar också att det finns en inbyggd rättslig konflikt mellan rättigheterna och att upphovsrätt ofrånkomligen utgör en begränsning av yttrandefriheten.

Framställningen visar vidare att det konfliktorienterade perspektivet har rönt betydligt mer uppmärksamhet på senare tid. Anledningen till detta är att friktionen mellan de båda rättigheterna har ökat väsentligt. Närmare bestämt har omfattningen av det upphovsrättsliga skyddet utökats på både bredden och djupet på senare tid, samtidigt som framväxten av ny nätbaserad teknologi har gjort det vanligare att personer utövar sin yttrandefrihet på ett sätt som involverar material skyddat av upphovsrätt. Det går därför att sluta sig till uppfattningen att gränssnittet mellan upphovsrätt och yttrandefrihet *de jure* innefattar en potentiell konflikt, vilken *de facto* påverkar en bred krets av personer.

Mot den bakgrunden blir nästa fråga som behandlas i uppsatsen särskilt intressant, nämligen huruvida konstitutionella bestämmelser om yttrandefrihet kan åberopas som ett ”externt” försvarsargument i rättsprocesser där den omstridda handlingen inte kan subsumeras under något av de undantag som återfinns ”internt” inom upphovsrätten. Utredningen ger vid handen att svenska domstolar hittills av olika anledningar har avstått från att tillämpa sådana lösningar. Men framställningen visar samtidigt att den direkta tillämpligheten i nationella domstolar av internationella och överstatliga instrument till säkerställande av grundläggande fri- och rättigheter kan ha förändrat rättsläget något.

Intressant nog har inte bara inkorporeringen av den *Europeiska konventionen om skydd för de mänskliga rättigheterna och de grundläggande friheterna* (ECHR) utan också ikraftträdandet av den juridiskt bindande *Europeiska unionens stadga om de grundläggande rättigheterna* (EU Charter) kastat nytt ljus på den aktuella problematiken. I den utsträckning en konflikt mellan upphovsrätt och yttrandefrihet faller inom ramen för EU-rätten hamnar nämligen frågan

huruvida en lösning kan ske genom tillämpning av fundamentala rättigheter i ett annat läge. Problematiken gäller då inte endast huruvida nationella grundlagsregler ska låtas påverka tillämpningen av inhemsk lag av lägre rang, utan också om en domstol ska föränledas att pröva förenligheten mellan unionens primär- och sekundärrätt. Noterbart är därför att Europeiska unionens domstol (ECJ) i tre färskta avgöranden har fastslagit att det åligger nationella domstolar att åstadkomma en skälilig avvägning mellan intresset av att skydda upphovsrätt och intresset av att skydda andra rättigheter upptagna i EU-stadgan, såsom rätten till yttrandefrihet, när de tillämpar nationella bestämmelser som härrör ur EU-rättsliga direktiv. Dessa tre avgöranden analyseras grundligt i uppsatsen.

För det tredje utreds vilka konsekvenser tillämpningen av konstitutionella rättigheter i mål om upphovsrättsintrång medför. Flera argument till stöd för en ökad tillämpning framförs. Samtidigt framhålls att sådana externa lösningar är förenade med vissa negativa konsekvenser och att det konstitutionella verktyget därför bör användas med försiktighet.

# Preface

This thesis marks the end of my many years of academic studies. Throughout the years, I have met many fascinating and inspiring people from all across the world when studying and practicing in Lund, Karlstad, Washington D.C., Singapore and New York. Thanks to all of you.

Next, I want to thank my supervisor, professor Peter Westberg, for his valuable feedback and guiding advice in regard of this thesis.

I also want to extend my gratitude to my dear friend Ms. Laura Gillen at the Brookings Institution in Washington D.C., who has been kind enough to edit this text. A special thank you also goes out to Mr. Wolfgang Ranke who has contributed with translation work.

Lund in January 2013,  
*David Henningson*

# Abbreviations

AG	Advocate General
ECHR	The European Convention for the Protection of Human Rights and Fundamental Freedoms
ECJ	The Court of Justice of the European Union
ECtHR	The European Court of Human Rights
EU	The European Union
EU Charter	Charter of Fundamental Rights for the European Union
FEA	Freedom of Expression Act
FPA	Freedom of the Press Act
GF	The Government Form
ICESCR	The International Covenant on Economic, Social and Cultural Rights
ISP	Internet Service Provider
OECD	The Organisation for Economic Co-operation and Development
SCA	The Swedish Copyright Act
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UDHR	The Universal Declaration of Human Rights
UGC	User-generated content
UK	United Kingdom

# 1 Introduction

## 1.1 Background, purpose and question formulations

There are several subjects that I have enjoyed in particular during my law school studies: international law and human rights, civil law in general and intellectual property law in particular, EU law and civil procedural law. And although it has not necessarily been an end in itself to combine aspects from all these various fields of law into one thesis, the subject matter of this study actually offers the possibility to do so. The purpose of this thesis is namely to examine the relationship between copyright and freedom of expression in the European Union, a subject that raises a number of interesting questions.

The primary aim, however, is to examine to what extent constitutional provisions on freedom of expression can have an impact on the outcome in cases concerning copyright infringement. Also, focus will be on activities that occur in the online environment where the friction between the two legal regimes is most present. The subject matter is highly topical since the legal landscape has been somewhat redrawn in recent time, while, simultaneously; the factual circumstances under which potential conflicts may arise have undergone significant changes. Moreover, the ECJ has recently laid down three landmark rulings on the relationship between copyright and other fundamental rights. It is therefore interesting to evaluate how the issues at hand are addressed within the context of EU law.

The following question formulations present the basis for the presentation and analysis below:

- i) What is the relationship, *de jure* and *de facto*, between copyright and freedom of expression in the information society?
- ii) Can the constitutional right to freedom of expression successfully be invoked as a defense in copyright infringement cases?
- iii) What are the consequences of applying, or not applying, the constitutional right to freedom of expression in copyright infringement cases?

## 1.2 Two hypothetical examples

Two hypothetical cases can provide a backdrop to the discussion. They both actualize interesting questions on the relationship between copyright and freedom of expression in the information society and we will return to them at the very end of this thesis.

First, imagine a case in which the management company “A”, which *inter alia* represents music composers, authors and photographers, has sued “B”, a company that runs a popular website that allows users to create personal profiles containing blogs, vlogs, podcasts *et cetera* and thus share information such as text excerpts, pictures, music and videos with each other.

A has identified that the users commonly use works in its repertoire as parts of the content that they upload and share with each other. A argues that B contributes to large-scale copyright infringement and that the Court should issue a permanent injunction that in practice requires B to install a system that monitors users whom have been identified as copyright-infringers in the past, and which filters out copyright-protected content that is not allowed to be published without A’s consent. A has agreed to bear half of the costs associated with installment and service of the system.

B on the other hand argues that “Our website empowers ordinary citizens with the tools to create, assemble and share various forms of information. The content being shared can constitute a wide range of expressions; from trivial self-expression to artistic expression, citizen journalism and political commentary. Although it can be debated to what extent all of these expressions are protected by constitutional provisions regulating freedom of expression, it is fair to say that considerable portions of them certainly are. Consequently, our website has in a way made freedom of expression more “free” as it has enabled citizens to impart and receive information on an unprecedented scale. The sought injunction would in fact constitute a censorship mechanism that puts these expressions to quite. Thus, the Court should decide not to grant the requested injunction.”

In the second hypothetical case, an ordinary citizen comes across a video that shows some senior politicians making statements that manifestly expresses reprehensible beliefs. The person posts a large portion of the video on her blog and comments on the content. The film gains vast attention and sparks off a vivid debate of political significance. However, the person who took the film with his mobile phone, and whom sympathizes with the politicians on the film, sues the person whom published the clip for copyright infringement. During

the legal proceeding, it becomes clear that none of the exceptions existing within copyright law are applicable. However, the publisher argues that the video clip was of huge public interest and invokes the constitutional right to freedom of expression in her defense.

### 1.3 Method and material

This study is conducted with a traditional legal method. Accordingly, relevant legislation, *travaux préparatoires*, case law and legal doctrine have been examined.

In recent time, central aspects of copyright law have been harmonized within the EU, not least through the adoption of the Copyright Directive<sup>1</sup> and the Sanctions Directive<sup>2</sup>. Also, the EU has recently enacted a legally binding EU Charter. Naturally then, the focal point of this study is EU law. However, since copyright law has fallen within the scope of EU law only recently, since it has solely been harmonized but not yet unified, and since in the end it is up to national courts to apply the relevant provisions discussed in this thesis, a study of domestic law and cases must also be undertaken in order to provide a complete overview of the legal landscape.<sup>3</sup> In this thesis, Swedish law will be the main object of study in this regard. As we shall see, this dual perspective also enables a deeper analysis of the impacts of EU law on the issues at hand. And as for instruments regulating fundamental rights, it must also be noted that Europe today has a pluralistic system for protection of such rights and that the ECHR also must be considered as an important complement to the EU Charter and the Swedish Constitution (below, consequences of this pluralistic legal order will be further elaborated upon).

Case law from some other EU Member States will also be presented with the sole aim to provide a more comprehensive overview of the relationship between copyright and freedom of expression. With the same intent, legislation in some Western countries outside of the European Union will also be touched upon, albeit very briefly. However, it deserves to be emphasized that it is not part of the purpose of this thesis to provide a thorough comparative study between legislation or case law from different countries. This is important to note not least because the states at hand represent different legal traditions and a fully-fledged comparison therefore would require an in-depth analysis of the

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<sup>1</sup> Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society.

<sup>2</sup> Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights.

<sup>3</sup> It may be appropriate to point out that “EU law”, of course, ultimately is an integral part of “domestic law”.

impacts of a system of civil law versus a system of common law on the issues at hand.

## 1.4 Delimitations

The purpose of this thesis is to examine the applicability of the constitutional right to freedom of expression in cases where an action cannot be subsumed under an exception existing within copyright law. Therefore, it falls outside the scope of the topic to thoroughly evaluate to what extent lawmakers considered freedom of expression aspects when framing the rights and exceptions present within the current copyright system. Moreover, individual copyright provisions will only be presented to the extent it is fruitful to the present discussion. Also, the fact that this thesis focuses on confirmed infringements makes it irrelevant to discuss freedom of expression aspects related to measures for preserving evidence.

An issue closely related to the one at hand is the relationship between copyright and freedom of the press. The latter is however not the focus of this thesis. Rather, attention is targeted on the potential conflict between copyright and freedom of expression in the online environment where the infringer is more likely to be an ‘ordinary citizen’ rather than a traditional media corporation. However the second hypothetical case above does to some extent constitute what could be labeled as ‘citizen journalism’ and the distinction between freedom of expression and freedom of the press can indeed be somewhat blurry. But again, the aim is not to focus on freedom of the press matters as such. Another related issue is the potential conflict between copyright and Chapter 2 in the Swedish *Freedom of the Press Act* (FPA), which regulates public access to documents. However, this relationship also falls outside the scope of this thesis.<sup>4</sup>

Another consequence stemming from the fact that focus is put on activities occurring online is that it is difficult to avoid questions related to the liability of Internet intermediaries. As we shall see, a copyright-holder’s best chance to get to grips with large-scale infringements on the web is often to launch a proceeding against the operator of the service that facilitates the infringements. Accordingly, such issues will inevitably be a by-product of the discussion on the relationship between copyright and freedom of expression. However, it is of course beyond the purpose of this thesis to examine the scope of liability of these intermediaries as such.

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<sup>4</sup> See instead Maunsbach & Wennersten p. 53-56.

Lastly, it may be noted that fundamental rights aspects arguably should be given particular weight in interim procedures, such as when a court decides on whether or not to grant a temporary injunction against an alleged copyright infringement. This is because these cases require the judges to make decisions based on less exactitude and on a more limited decision basis.<sup>5</sup> However, due to the limited scope provided for, there will be no discussion on such particular issues in this thesis.

## 1.5 Disposition

At the outset, two general topics of relevance to this thesis will be outlined, namely the phenomenon of constitutional pluralism within Europe and the potential horizontal effect of fundamental rights in private disputes. These initial remarks aim at facilitating the understanding of the following presentation. Thereafter, the frameworks regulating copyright and freedom of expression respectively will be presented, after which an introduction to the relationship between these two rights will be given. The latter outline aims at presenting different views on the questions at hand that can be valuable to keep in mind when we then proceed to scrutinize case law from Sweden, some other EU Member States and from the ECJ. Also in this section, we will examine whether the legislators in Brussels, Strasbourg and Stockholm have opened up for the possibility to apply the constitutional right to freedom of expression in copyright cases when adopting copyright law. Next, we will have a look at the on-going policy discussion in Europe that provide food for thoughts *de lege ferenda*, but which also presents some interesting perspectives on the pros and cons attached to application or non-application of fundamental rights already existing in human rights instruments. Finally, a concluding analysis will be laid down in which the question formulations are addressed.

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<sup>5</sup> See Westberg (2004) from p. 307.

# 2 Copyright and Freedom of Expression

## 2.1 The legal framework

### 2.1.1 Constitutional pluralism

The citizens of Europe enjoy protection of their fundamental rights<sup>6</sup> under various international (both universal and regional), supranational and national legal instruments. On the international level, the *Universal Declaration of Human Rights (UDHR)*, proclaimed by the United Nations General Assembly in 1948, is the most prominent example. UDHR is however not a legally binding document (although some argue that it has gained status as international customary law), but it is complemented by, as far as instruments of relevance for the subject of this thesis are concerned, the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*.

Another international, albeit regional rather than universal, instrument in the field of human rights is the ECHR. The ECHR was drafted by the Council of Europe in the aftermath of World War II and is arguably the world's most successful piece of international legislation for the protection of human rights.<sup>7</sup> Rights contained in the ECHR can be invoked directly before the national courts in signatory states (all EU Member States have signed the convention). National judicial decisions are also subject to review by the European Court of Human Rights (ECtHR) in Strasbourg.<sup>8</sup> Since the buck stops at the desks of the judges of the ECtHR as far as interpretation and protection of human rights go, the ECtHR may be seen as a leading player when it comes to the definition of human rights in Europe.<sup>9</sup>

In contrast to the Council of Europe and the European Court of Human Rights, the EU was not founded as a human rights organization. In fact, the original European Community Treaties contained no provisions on human

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<sup>6</sup> Concerning the definition of the term "fundamental rights", Torres Pérez notes that rights might be regarded as fundamental if they are acknowledged as such by respective legal systems but that the term generally implies that the rights in question are "*hierarchically supreme norms, judicially protected against encroachment by public authorities, including the legislator*". For comments on the term through a Swedish perspective, see Lauer & Colombi Ciacchi p. 659.

<sup>7</sup> Janis et al. p. 3.

<sup>8</sup> Hugenholtz (2001) p. 5.

<sup>9</sup> Torres Pérez p. 27.

rights and in an early judgment, the ECJ declined to recognize that the EU legal order contained a system for protection of fundamental rights (the High Authority, the Commission's predecessor, was not empowered to take into consideration principles of national constitutional law).<sup>10</sup> Throughout the years however, the ECJ has developed a potent system for protection of human rights consisting of "general principles of EC law". These principles are based on the ECHR and fundamental rights that are common to the constitutional traditions of the Member States.<sup>11</sup> However, even though these sources are still parts of the EU's human rights framework (and the EU is bound to accede to the ECHR<sup>12</sup>), the main source nowadays is the EU Charter, a "bill of rights" that became legally binding with the entry into force of the Lisbon Treaty on 1 December 2009. The EU Charter enjoys the same legal value as the Treaties.<sup>13</sup>

The provisions of the EU Charter are primarily addressed to the organs of the union, but they also apply to the Member States when they are "implementing Union law".<sup>14</sup> Thus, judges in national courts are bound to apply provisions contained in the EU Charter whenever union law comes into play and they are therefore no longer able to neglect this important source of law.<sup>15</sup> Fundamental rights protected by the EU are, *inter alia*, binding on national courts when they apply national provisions that stem from EU directives.<sup>16</sup> Since the EU Charter is supreme in relation to provisions in EU secondary law, cases can arise in national courts in which a party argues that national provisions are incompatible with rights stipulated in the EU Charter and thus should be declared invalid or should be interpreted in a manner that is in conformity with the EU Charter.<sup>17</sup> In these cases, the national courts may and sometimes must ask the ECJ for a preliminary ruling.<sup>18</sup>

Furthermore, fundamental rights are protected by the national constitutions of EU Member States. Consequently, several overlapping sources of human right provisions may be applicable in a case involving EU law. Although it would go beyond the scope of this thesis to thoroughly elaborate on issues related to this phenomena of pluralistic human rights protection, the further discussion will benefit from a few remarks in this regard. First, the ECJ has stated that it considers the EU Charter as the "principal basis" in terms of human right

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<sup>10</sup> Case 1/58 *Stork*.

<sup>11</sup> TEU article 6 (3).

<sup>12</sup> TEU article 6(2).

<sup>13</sup> TEU article 6 (1).

<sup>14</sup> EU Charter article 51 (1)

<sup>15</sup> Bazzocchi p. 75.

<sup>16</sup> See for example Case C-442/00 *Caballero*.

<sup>17</sup> Melin, p. 905-906.

<sup>18</sup> TFEU article 267.

provisions that the EU courts will ensure to protect.<sup>19</sup> Second, the ECJ has declared that union law is superior even to provisions in national constitutions.<sup>20</sup> Third, if the EU Charter enshrines rights that correspond to rights guaranteed by the ECHR, the meaning and scope of those rights shall be the same as those laid down by the ECHR (the union is, however, free to provide more extensive protection).<sup>21</sup> The case law of the ECtHR is therefore of great relevance when interpreting the scope of rights contained in the EU Charter. Fourth, when enforcing fundamental rights, the ECJ must also take into consideration the specificities of national constitutions.<sup>22</sup> Fifth, although international instruments are rarely invoked<sup>23</sup>, it shall be noted that the ECJ has also declared that it draws inspiration “*from guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories*”.<sup>24</sup>

Accordingly, provisions in the EU Charter will be the starting point in the discussion on fundamental rights below, with the ECHR and the case law of the ECtHR as valuable complementing sources. Specificities in the Swedish constitution will also be briefly touched upon, as will international instruments other than ECHR when and if it adds value to the discussion. When ‘constitutional rights’ is used as a general term, reference is made to all relevant and applicable fundamental rights (notwithstanding the fact that the EU lawmaker deliberately decided against using the term ‘constitution’ when naming the EU Charter!).

## 2.1.2 Horizontal effects of constitutional rights

Another general issue of relevance is to what extent constitutional rights, *inter alia* the right to freedom of expression, have ‘horizontal effects’. A fundamental right is understood to have a horizontal effect when it has an impact on the relationship between private subjects, i.e. relationships regulated by private law.<sup>25</sup> In other words, the question is whether a fundamental right cannot only be invoked by an individual in a process against the state (‘vertical effect’), but also against another private, ‘third’, party.<sup>26</sup>

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<sup>19</sup> Discussion document of the ECJ (2010).

<sup>20</sup> Case 11/70 *Internationale Handelsgesellschaft*.

<sup>21</sup> EU Charter, Article 53.

<sup>22</sup> Di Federico p. 29.

<sup>23</sup> Craig & De Búrca p. 362.

<sup>24</sup> See e.g. joined cases C-20/00 and C-64/00, *Booker Aquaculture Ltd, Hydro Seafood GSP Ltd and the Scottish Ministers*.

<sup>25</sup> Ferreira et al. p. 8.

<sup>26</sup> Lauer & Colombi Ciacchi p. 667.

In Sweden, the legislator has yet to clearly recognize such horizontal effects of fundamental rights.<sup>27</sup> And in correspondence, an examination of case law shows that defense arguments related to fundamental rights are seldom successful in private disputes. A ruling by the Swedish Supreme Court from 1971 presents a clear-cut example.<sup>28</sup> Through a counterclaim, the organizer of a horserace (a private company) had filed for an injunction that would, if granted, ban a horseracing magazine from being sold at or in proximity to the stadium where the race took place. When considering the publisher's defense to this claim, the Court categorically rejected application of freedom of expression provisions in the Swedish Constitution (the *Freedom of the Press Act*, FPA). And although fundamental-right values have been given a somewhat stronger standing in a few other private disputes,<sup>29</sup> the general understanding is that the Swedish courts traditionally have been reluctant to apply fundamental rights in private disputes.<sup>30</sup>

However, as already mentioned, domestic courts in Europe also have to consider supranational and international instruments on fundamental rights. Therefore it must also be examined whether there are doctrines as to whether rights enshrined in these instruments can be applied horizontally. As for the ECHR, there is a seemingly broad consensus behind the notion that the Convention is applicable also on relations between individuals and, indeed, many domestic courts in Europe have applied the ECHR horizontally.<sup>31</sup> Accordingly, it has been held that with the incorporation of the ECHR into Swedish law, it became more apparent to the Swedish legislator and judges that fundamental rights could be applied horizontally.<sup>32</sup> The *travaux préparatoire* of the incorporation act through which Sweden incorporated the ECHR seems to suggest that Convention rights can be applied when solving disputes between private parties, although it does not refer explicitly to the concept of 'horizontal effect'.<sup>33</sup> As a result, provisions in the ECHR have been applied in

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<sup>27</sup> Lauer & Colombi Ciacchi p. 669.

<sup>28</sup> NJA 1971 p. 571.

<sup>29</sup> For an example, see NJA 1996 p. 495 in which the Supreme Court of Sweden considered a party's right to public access (Swe: allemansrätt) in its reasoning, although ultimately not ruling in favor of that party.

<sup>30</sup> Lauer and & Colombi Ciacchi p. 669 & Westberg (2004) p. 316. See also Westberg's *Privaträttsliga kontrakt och regeringsformen* (1992), in which he points out that in the *travaux préparatoire* of the Government Form (GF), a clear distinction is made between relationships between the state and a private subject on the one hand and relations between two private subjects on the other. Westberg is however criticizing this perception, arguing that it stands in contrast to the wording of the Government Form. Moreover, Westberg argues that private rights ultimately must, by necessity, be enforced by the State via its courts and that it reasonably does not matter to a private subject whether his fundamental rights are violated by the State or a private entity.

<sup>31</sup> Geiger (2009) p. 29 and 33-34.

<sup>32</sup> Lauer & Colombi Ciacchi p. 695.

<sup>33</sup> See SOU 1993:40 Part B p. 107 and comments by Lauer & Colombi Ciacchi on p. 672.

cases between private parties also in Sweden.<sup>34</sup> However, the great majority of cases in which references have been made to the ECHR have involved vertical effects of fundamental rights.<sup>35</sup>

When it comes to horizontal effects of EU law, it should be recognized that this phenomenon has, traditionally, first and foremost concerned the fundamental freedoms (the free movement of people, goods, services and capital) upon which the single market is based, and the guarantees of equal treatment. Horizontal effects of fundamental rights is however somewhat more of a novelty, notwithstanding the fact that such rights, as we have seen, have played an important role within the EU legal order for a considerable time.<sup>36</sup> Against that backdrop, it has been speculated in as to whether the enactment of the EU Charter would further increase the applicability in private disputes of not only equal treatment provisions but also other fundamental rights, not least because rights acknowledged by the Union simply have become more apparent to judges and litigators alike.<sup>37</sup>

We have seen above that the EU Charter primarily applies to the institutions and organs of the Union and that it applies to Member States only when they implement EU law. According to ECJ case law, this means that the obligation to respect rights enshrined in the EU Charter is only binding on the Member States when they act ‘within the scope of Union law’.<sup>38</sup> This is a rather ambiguous concept and it is therefore hard to draw any lucid conclusions regarding the applicability in horizontal proceedings from that doctrine as such.<sup>39</sup> However, although it is not expressed in Article 51 (1) of the EU Charter that the rights have effects also on relationships between subjects acting in a private capacity, case law from the ECJ shows that the EU Charter already has been applied in private proceedings.<sup>40</sup> This has been held to suggest that the ECJ is interpreting rights enshrined in the Charter similarly to Treaty provisions that have a horizontal effect, or at least finds Charter provisions so persuasive in private disputes that the distinction becomes non-existent.<sup>41</sup>

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<sup>34</sup> See for example the decision laid down by the Labor Court in AD 1998 no. 17.

<sup>35</sup> Lauer & Colombi Ciacchi p. 686-687.

<sup>36</sup> Lauer & Colombi Ciacchi p. 10.

<sup>37</sup> See Groussot et al. p. 24 whom predict that so will likely be the case. See also Melin p. 906.

<sup>38</sup> Explanations Relating to the Charter of the of Fundamental Rights (2007/C 303/02).

Explanation on Article 51 — Field of application.

<sup>39</sup> Groussot et al. p. 1 and pp. 24.

<sup>40</sup> See for example C-555/07 *Küçükdeveci*, C-400/10 *Detiček*, C-70/10 *Scarlet Extended* and C-360/10 *Netlog*.

<sup>41</sup> Blackstock under the headline ”Title VII – General Provisions Governing the Interpretation and Application of the Charter”.

## 2.1.3 Copyright

### 2.1.3.1 Its raison d'être and the constitutional basis

Copyright consists of an economic right, simply put a right to copy and distribute a work, and a moral right, which gives the author a personal right to decide how a work shall be used. Traditionally, main focus has been put on the former right in Anglo-Saxon countries, whereas copyright rather has its origin as a *droit d'auteur* in Continental Europe.<sup>42</sup> Protection of copyright serves several purposes. For example, copyright promotes intellectual creativity and encourages authors to make their works public since they are assured that their right to the work will remain protected. Moreover, copyright serves a distinct moral purpose since it guarantees that the author's name is mentioned when the work is used and that the work will not be exposed in a manner that offends the originator. And lastly, it can be mentioned that copyright law ensures protection of the considerable investments that commonly are required in order to make productions within the area of media and culture.<sup>43</sup>

It follows from the EU Charter that copyright and other intellectual property rights are considered 'fundamental' by the Union. More specifically, Article 17 (2) of the EU Charter states that "*intellectual property shall be protected*". Article 52, which is a general provision that regulates the scope of rights guaranteed by the EU Charter, accompanies the somewhat definite proclamation in Article 17 (2). Article 52 (1) stipulates that any limitation on the exercise of the rights and freedoms enshrined in the EU Charter must be "provided for by law and respect the essence of those rights and freedoms". Also, it stems from the principle of proportionality that "*limitations may be made only if they are necessary and genuinely meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others*". In contrast to the EU Charter, the ECHR does not explicitly acknowledge copyright as a basic human right. However, it is widely considered that the fundamental basis for the protection of copyright can be construed from the "property-clause" in Article 1 of the First Protocol to the ECHR (an economic right) as well as from Article 8 of the ECHR, which protects private life or family life (a moral right).<sup>44</sup>

Similar to the ECHR, there is only an implicit constitutional ground for the protection of copyright in most of the national constitutions in Europe.<sup>45</sup> The Swedish constitution, however, distinguishes itself as one of the few in Europe

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<sup>42</sup> Olsson p. 32.

<sup>43</sup> Olsson p. 38-39.

<sup>44</sup> Geiger (2009), p. 32-33 and Rosén, *Copyright and freedom of expression in Sweden*, p. 360.

<sup>45</sup> Hugenholtz (2001), p. 4.

that expressly refers to copyright (or rather authors' rights).<sup>46</sup> Accordingly, it has been stated that no other EU Member State demonstrates a stronger constitutional support for copyright than does Sweden.<sup>47</sup> Article 16 in Chapter 2 of the GF stipulates, "*Authors, artists and photographers shall own the rights to their works according to norms stated in statutory law*". Such norms are found in the *Copyright Act* (SCA).

The UDHR and the ICESCR also deserve to be mentioned since these instruments contain language that seemingly aims at striking a balance between the rights of copyright-holders and other stakeholders' right to freedom of expression. First, according to Article 27 (1) of the UDHR, "*Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits*". This may be interpreted as a right to enjoy artistic results and to be informed and some have also concluded that the wordings declare a freedom of creativity.<sup>48</sup> At the same time, Paragraph 2 in the same Article announces that "*Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.*" It has been stated that read all together, these instruments (Article 15 of ICESCR contains nearly identical language) support a flexible approach as countries are left with plenty of room to manoeuvre as long as creators are guaranteed a fair remuneration for their efforts.<sup>49</sup>

### 2.1.3.2 EU secondary law

The EU lacks exclusive competence within the field of copyright and other intellectual property rights. However, the Union has for two decades harmonized certain aspects of copyright law through a series of directives in order to strengthen the single market, and the new *Treaty on the Functioning of the European Union* (TFEU) declare specific competence for unification within the sphere of intellectual property.<sup>50</sup> Two directives of relevance for the present discussion are the Copyright Directive and the Sanctions Directive.

The Copyright Directive was adopted in 2001 with the aim to facilitate the expansion of the information society in Europe and to enhance the

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<sup>46</sup> Geiger (2009), p. 34 and Rosén, *Freedom of expression in lineage with authors' rights*, p. 5. Rosén states that the Swedish Constitution is the only one in Europe referring explicitly to copyright, whereas Geiger mentions a few more examples.

<sup>47</sup> Rosén, *Copyright and freedom of expression in Sweden*, p. 365.

<sup>48</sup> Rosén, *Copyright and freedom of expression in Sweden*, p. 357-358.

<sup>49</sup> Geiger (2009), p. 31-32.

<sup>50</sup> Article 118 of the TFEU.

implementation of the four freedoms of the internal market.<sup>51</sup> The Copyright Directive harmonizes copyright law by *inter alia* requiring all EU Member States to guarantee various subjects with the exclusive rights to reproduce or distribute their works, or to communicate them to the public by wire or wireless communication.<sup>52</sup> The communication right *inter alia* includes the right to make available to the public works in such a manner that members of the public may access them from a place and at a time individually chosen by them.<sup>53</sup> A typical example of “making available to the public”, to note, is the practicing of publishing a work on a website.<sup>54</sup> Furthermore, the exclusive right to making available to the public has been granted not only to authors but also to *inter alia* film producers (so called neighboring rights).<sup>55</sup> Associated with these rights are exceptions and limitations outlined in Article 5 of the Copyright Directive, which, according to Recitals 32, constitute an exhaustive enumeration of permissible restrictions. However, since copyright law is harmonized but not yet unified in the EU, limitations vary between EU Member States.

However, a copyright would not mean much if there were no sanction mechanisms attached to it. Lucky for right-holders, the Sanctions Directive provides several means by which copyright may be enforced. Perhaps of most relevance to the present discussion is that the Directive stipulates that judicial authorities may issue an injunction aimed at prohibiting the continuation of a confirmed infringement or an interlocutory injunction targeted against an alleged infringer. Such injunctions may be subject to a recurring penalty payment in order to ensure compliance.<sup>56</sup> The Member States shall also ensure that injunctions may be issued against intermediaries whose services are used by third parties for activities constituting infringement.<sup>57</sup> This may be seen against the backdrop of paragraph 59 of the preamble to the Copyright Directive, which states that services of intermediaries may be increasingly used by third parties for infringing activities in the information society. It also concludes that the intermediaries are often best suited to bring an end to such infringements.

Although it shall be noted that it is up to the EU Member States to decide the procedures and conditions for permanent or temporary injunctions<sup>58</sup>, EU law

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<sup>51</sup> Recitals 1-3 of the Copyright Directive.

<sup>52</sup> Article 3-5 of the Copyright Directive.

<sup>53</sup> Article 3 (1) of the Copyright Directive.

<sup>54</sup> Proposition 2004/05:110 Upphovsrätten i informationssamhället – genomförande av direktiv 2001/29/EG, m.m. p. 45.

<sup>55</sup> Article 3 (2) of the Copyright Directive.

<sup>56</sup> Articles 9 and 11 of the Copyright Directive.

<sup>57</sup> Article 11 of the Sanctions Directive and Article 8 of the Copyright Directive.

<sup>58</sup> Headdon p. 139.

requires that measures, remedies and procedures are effective, proportionate and dissuasive.<sup>59</sup> In Sweden, the legal basis for injunctions is found in Article 53 b of the SCA. Also worth noting is that the Swedish *travaux préparatoires*, case law and doctrine prescribes a balance of interests prerequisite for injunctive relief.<sup>60</sup>

## 2.1.4 Freedom of Expression

As Helfer and Austin have pointed out, freedom of expression is such a vast and complex topic that it is impossible to briefly summarize its rationales. However, its most enduring *raison d'être* is probably that it simply provides a “marketplace of ideas”, the importance of which has perhaps best been described by John Stuart Mill whom in his work *On Liberty* stated that “*since the general or prevailing opinion on any subject is rarely or never the whole truth, it is only by the collision of adverse opinions that the remainder of the truth had any chance of being supplied*”.<sup>61</sup> Furthermore, Angelopoulos has argued that freedom of expression is an essential ingredient in the democratic process, that it fosters finding of the truth and that it promotes self-actualization, and that these rationales are so strong that the right enjoys an elevated position in the fundamental rights framework.<sup>62</sup>

Article 11 (1) of the EU Charter declares that, “*Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers*”. ECHR contains identical language in its Article 10 (1). It shall be noted that the texts explicitly state that the right to freedom of information is embedded in the right to freedom of expression. Indeed, in the absence of freedom of information, freedom of expression would be void of meaning.<sup>63</sup> Moreover, the right to freedom of information may arguably not only encompass the right to receive and impart information, but also the right to seek information.<sup>64</sup>

It follows from ECtHR case law that the protection offered in Article 10 of the ECHR shall be interpreted in a broad manner.<sup>65</sup> Moreover, the ECtHR has

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<sup>59</sup> Article 3 (2) of the Sanctions Directive and article 8 (1) of the Copyright Directive.

<sup>60</sup> See for example proposition 2008/09:67 and Sandfeld Jacobsen p. 172.

<sup>61</sup> Helfer & Austin p. 222-223 and Mill p. 98.

<sup>62</sup> Angelopoulos p. 329.

<sup>63</sup> Angelopoulos p. 330.

<sup>64</sup> See Akester p. 32, who argues that Article 10 of the ECHR must be interpreted in the light of its precursor, Article 19 of the ICCPR, which comprises the right to “seek” information and ideas.

<sup>65</sup> Hugenholtz (2001), p. 5.

concluded that the contours of the right vary with each generation.<sup>66</sup> And whereas protection of political speech is perhaps what first comes to mind, the Strasbourg Court has made clear that artistic expressions also fall within the scope of article 10 (this is also in line with the aforementioned provisions in the UDHR and the ICESCR).<sup>67</sup> Information of commercial nature is also protected according to the Court, however not to the same degree as political speech.<sup>68</sup>

As for the scope of the right, it is once again Article 51 (1) of the EU Charter that sets out the prerequisites for permissible limitations, as that particular provision applies to all rights enshrined in the EU Charter (for a closer look on the requirements, see above). Moreover, the fact that freedom of expression is not an absolute right is clearly manifested in Article 10 (2) of ECHR. The provision stipulates that the right may be subject to limitations that: i) are prescribed by law, ii) protect at least one specified legitimate purpose such as the right of others and iii) are necessary in a democratic society. Case law from the ECtHR demonstrates that a restriction will fulfill the third requisite only if it answers to a pressing social need and is proportionate.<sup>69</sup> Signatory states have been granted by the ECtHR a “margin of appreciation” when interpreting to what extent a limitation is necessary in a democratic society. However, this latitude varies on a case-by-case basis. Not surprisingly, the margin is narrower when dealing with political speech.<sup>70</sup>

As further regards the national level, it may be noted that few European countries provide a scope of protection as broad as the one outlined in Article 10 of the ECHR. But as was also the case in respect of copyright, Sweden is one exception.<sup>71</sup> The Swedish legal order presents a strong and twofold constitutional protection for freedom of expression. First, Chapter 2 Article 1 of the GF provides a broadly worded protection for freedom of expression in general. Secondly, expressions in certain forms or via particular media techniques are protected through two special constitutions, namely the FPA and the *Freedom of Expression Act* (FEA).

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<sup>66</sup> Akester p. 32.

<sup>67</sup> See *Müller and Others v. Switzerland*, para 27.

<sup>68</sup> Hugenholtz (2001), p. 5.

<sup>69</sup> Sandfeld Jacobsen & Salung Petersen p. 178.

<sup>70</sup> Hugenholtz (2001), p. 5-6.

<sup>71</sup> Rosén in *Copyright and freedom of expression in Sweden*, p. 365-366 and Hugenholtz (2001), p. 6.

## 2.2 The relationship between copyright and freedom of expression

### 2.2.1 Conflict or compatibility?

There are somewhat different views on the relationship between copyright and freedom of expression represented in the legal discussion. On the one hand, there has traditionally been a perception that copyright accommodates freedom of expression, that the two disciplines are compatible with each other and that copyright not reasonably can be regarded as an impediment to freedom of expression and freedom of information.<sup>72</sup> The main argument here is that, due to the idea/expression dichotomy present in copyright law, copyright does not restrict information or ideas as such and thus not freedom of expression.<sup>73</sup>

Moreover, copyright may be seen as something that promotes and strengthens freedom of expression since it encourages speech by providing incentives to creators and to those investing in the dissemination of creative works.<sup>74</sup> In other words, copyright and freedom of expression may be seen as sharing the same genesis and the same goal, as copyright too originates from the aspiration to assure free circulation of ideas in society, as well as to safeguard the public's right to information.<sup>75</sup> Notably, in *Harper & Row*<sup>76</sup>, the United States Supreme Court expressed support for this perspective by stating that copyright is “*the engine of free speech*”, concluding that there is no conflict between copyright and freedom of expression.

On the other hand, many find it hard to ignore that copyright does indeed impose a restriction on speech and that there is in fact a legal conflict between the two rights. As we saw examining Article 11 of the EU Charter, the right to freedom of expression warrants “*the freedom to hold opinions and to receive and impart information and ideas*”. Assuming that all copyrights include at least some information and ideas, the risk for potential clashes between the two rights becomes apparent.<sup>77</sup> In other words, it seems inevitable that a copyright-holder's exclusive right to certain expressions will prevent other people from expressing themselves the same way.<sup>78</sup> In contrast to the cited holding in

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<sup>72</sup> See for example Olsson p. 43.

<sup>73</sup> See e.g. Hugenholtz (2001), p. 6 and Sims p. 492 whom present this argument, however not supporting it.

<sup>74</sup> Helfer & Austin p. 222.

<sup>75</sup> Geiger (2007) p. 30-32.

<sup>76</sup> *Harper & Row, Publishers v. Nation Enterprises*.

<sup>77</sup> Hugenholtz (2001) p. 1.

<sup>78</sup> Rosén *Freedom of expression in lineage with authors' rights* p. 1. See also Angelopoulos s. 328.

*Harper & Row*, this view was illuminated in a more recent case, *Ashdown*<sup>79</sup>, in which a British judge stated, “Copyright is antithetical to freedom of expression. It prevents all, save the owner of the copyright, from expressing information in the form of the literary work protected by the copyright.”

In recent time, the more conflict-oriented perspective has gained a great deal of attention among legal commentators.<sup>80</sup> One reason for this is the steady proliferation and strengthening of copyright (and other intellectual property rights) that we have seen over the last decades.<sup>81</sup> Some have even gone so far as to suggest that a paradigm shift has occurred in copyright law as the scope of protection has expanded to a point where it almost extends to information as such, and new *sue generis* and neighboring rights have been adopted to the detriment of the public domain.<sup>82</sup> Burrell has pointed out that restrictions on freedom of expression, including the right to access information, might be the most controversial consequence of a stronger copyright system. Furthermore, he has pointed out that the fact that nearly all textual or visual material now is clothed in copyright leads to an order where anyone who attempts to support an argument with a photograph or an excerpt from a text will have to either bring himself under one of the exemptions or pay the right-holder a license fee.<sup>83</sup>

At the same time, means by which people can exercise freedom of expression in forms that potentially violate copyright law have largely expanded. Through the development of what is commonly referred to as the web 2.0<sup>84</sup>, ordinary citizens have been empowered with the tools to easily share so called user-generated content (UGC). Although there is no consensus as to the definition of ‘UGC’, it has been held that it stands for material made publicly available via the Internet that reflects a considerable amount of creative effort, and that is produced outside the sphere of professional routines and practices.<sup>85</sup> In accordance with that definition, UGC can take the form of texts (i.e. blogs, encyclopedias, articles), images, audio or video.<sup>86</sup> Moreover, UGC can be

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<sup>79</sup> *Ashdown v. Telegraph Group Ltd.* (2001).

<sup>80</sup> E.g. Angelopoulos, Burrell, Geiger, Hugenholtz and Sims.

<sup>81</sup> Hugenholtz (2001), p. 1, 6.

<sup>82</sup> Geiger (2007), p. 33-34.

<sup>83</sup> Burrell p. 377.

<sup>84</sup> Although there is no consensus on the definition of the buzzword “web 2.0”, a few suggestions may be picked out from the legal doctrine. In his article *Opting out of the Internet in the United States and the European Union: Copyright, Safe Harbors, and International Law*, on pages 336-337, Travis defines the term web 2.0 as “*diverse Internet-based services... distinguished by their somewhat richer multimedia content and higher degree of interactivity and user control...*” Chik acknowledges on p. 244 that the characteristics of “web 2.0” are many but that they include: i) “*the development of internet-based applications that are more user-centric in design*” and ii) “*increasing engagement in user collaboration; and the encouragement of both original and derivative UGC*”.

<sup>85</sup> OECD’s report *Participative Web: User-Generated Content*.

<sup>86</sup> Chik p. 249.

divided into two groups, where one contains pure UGC meaning that the user produced all of the content, and where the other encompasses “remixed” or “mashup” UGC meaning that the user has mixed his or her own material with the content from other(s).<sup>87</sup>

These UGC technologies may be labeled as “conversational media” in that they facilitate the publishing of one’s own material as well as comments on other user’s content.<sup>88</sup> And in respect to freedom of expression, UGC plays an immensely important role as it allows ordinary people to exchange ideas on an unprecedented scale as everyone can be a publisher, radio network, TV-station, movie producer, newspaper, and record label, all in one.<sup>89</sup> Indeed, the Organisation for Economic Co-operation and Development (OECD) has concluded in a report that the web 2.0 provides “...an open platform enriching the diversity of opinions...various political and societal debates, the free flow of information and freedom of expression”.<sup>90</sup>

The flip side, however, is that many users publish works created by other authors and thus violate copyright. It has even been held that copyright infringement has become the norm on UGC websites as users frequently post the complete works or excerpts from works of others without paying sufficient regard to copyright laws. This is of course troublesome for right-holders since UGC platforms allow users to step out of the private sphere and enter into the public domain. Another factor that is contributing to the problems for right-holders is the difficulty to effectively monitor and police these activities and identify infringing content providers.<sup>91</sup>

## **2.2.2 Internal or external solutions to potential conflicts?**

Another question is whether conflicts, if and when acknowledged, should be solved “internally” within the copyright framework, or if “external” constitutional provisions on freedom of expression can successfully be invoked in cases regarding copyright infringement. This issue is very much related to the aforementioned discussion on whether copyright and freedom of expression are at all at odds with each other. For example, it may be noted that

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<sup>87</sup> Lee p. 1506.

<sup>88</sup> Helberger et al. p. 7.

<sup>89</sup> Lee p. 1501, 1504.

<sup>90</sup> OECD p. 90.

<sup>91</sup> Scerri & George p. 5-6, 8 and Helberger et al. p. 3, 20.

the idea/expression dichotomy sometimes is referred to when the "internalized" solution is described.<sup>92</sup> Furthermore, Birnhack has introduced the terms 'mechanical internalization' and 'substantive internalization' to point out that the internal relationship may be looked at in respect of the mechanics that copyright law provides (such as the idea/expression dichotomy and exceptions to exclusive rights), but also in relation to the theories that underpins the copyright regime (according to Birnhack, this substantive internalization is illustrated in *Harper & Row*).<sup>93</sup>

However, the sole purpose of using terms such as 'internal/external solutions' and 'internal/external tools' is of course to simplify the discussion at hand. In the following presentation, the different solutions will be considered as something that becomes relevant when the analysis has reached the point where a potential *conflict* between two *expressions* has been identified and the question is whether the situation shall be solved strictly by application of civil law, meaning that an act is punishable if none of the exceptions existing within copyright law are applicable, or if constitutional provisions can be allowed to affect the outcome.

Proponents of the former solution claim that the legislator has already struck an appropriate balance between copyright and freedom of expression when drafting copyright law, in particular through the various exemptions to the exclusive rights. More specifically, several of those exceptions have purposes more or less connected to freedom of expression values (the quotation right, exceptions for parodies/travesties, news reporting and the principle of public access *et cetera*).<sup>94</sup> And as Rosén has noted, such limitations and exceptions tend to be explicit, exhaustive and interpreted narrowly in Europe.<sup>95</sup> Also, we might recall from above that fundamental rights are not necessarily applicable in private disputes.

But then again, more recently European scholars have started to acknowledge the independent relevance of the constitutional right to freedom of expression.<sup>96</sup> The argument goes that the conflict between copyright and human rights in the information society might have escalated to the point where copyright's internal safeguards no longer provide sufficient means by which to ensure a balance.<sup>97</sup> For example, Hugenholtz has pointed out that

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<sup>92</sup> See for example Hugenholtz (2001), p. 6.

<sup>93</sup> Birnhack p. 26-28.

<sup>94</sup> Hugenholtz (2001) p. 6, Rosén in *Freedom of expression in lineage with authors' rights*, p. 2 and Levin p. 209-210.

<sup>95</sup> Rosén in *Freedom of expression in lineage with authors' rights* p. 2.

<sup>96</sup> See for example Angelopoulos, Birnhack, Geiger (2009) and Hugenholtz (2001) who in note 46 on p. 7 provides further references.

<sup>97</sup> Angelopoulos p. 333.

constitutional provisions on freedom of expression may serve as a “lifebuoy for bona fide users drowning in a sea of intellectual property”.<sup>98</sup> At the end of this chapter, we will return to these arguments when the on-going policy discussion is examined.

## 2.2.3 Has the potential ‘external’ conflict been addressed in legislation and case law?

### 2.2.3.1 Considerations in relevant legislation

At the outset, it shall be noted that the EU legal framework does not provide much guidance on issues in the intersection between copyright and European human rights law.<sup>99</sup> For example, the document that contains explanations relating to the EU Charter does not provide any such detailed clarifications.<sup>100</sup> However, the recitals of more recent directives on intellectual property include more and more references to fundamental rights values. This is by no means irrelevant, as the recitals have influence on the interpretation of directives.<sup>101</sup>

The Copyright Directive was initiated a couple of years prior to the new millennium, therefore there is no surprise that it, although addressing needs emerging in the information society, does not specifically address the sort of conflict between copyright and freedom of expression that now occurs on large scale on the web 2.0. However, the Directive states in Recitals 3 that the proposed harmonization would help to promote the implementation of the four freedoms of the internal market “*and relates to compliance with the fundamental principles of law and especially of property, including intellectual property, and freedom of expression and the public interest*”. Also, Recitals 31 stipulates that a fair balance of rights and interests must be safeguarded between various right-holders as well as between right-holders and “*users of protected subject-matter*”.

Recitals 2 of the Sanctions Directive also contain general language that addresses the need to keep some sort of balance between different interests. The Recitals first declares that the protection afforded by intellectual property law shall allow the creator to derive legitimate profits from the creation, before acknowledging that the law should “*allow the widest possible dissemination of works, ideas and new know-how*” and that it should not impede *inter alia* freedom of expression and the free movement of information. Also, Recitals 32 states that

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<sup>98</sup> Hugenholtz (2001), p. 1.

<sup>99</sup> Sandfeld Jacobsen & Salung Petersen p. 178.

<sup>100</sup> Explanations relating to the Charter of Fundamental Rights (2007/C 303/02).

<sup>101</sup> Geiger (2006), p. 387.

the Directive “*respects the fundamental rights and observes the principles recognized in particular by the Charter of Fundamental Rights of the European Union*” (although it specifically refers only to the protection of intellectual property under Article 17(2) of the Charter).

Furthermore, it is not least when considering questions on freedom on the Internet and when framing the proper liability of intermediaries that the European legislator has commented on fundamental right aspects of copyright law. It is stated in Recitals 9 of the E-commerce Directive<sup>102</sup> that “*free movement of information society services can in many cases be a specific reflection in Community law of a more general principle, namely freedom of expression as enshrined in Article 10(1) of the ECHR*” and that the Directive is not intended to have affect on national fundamental rules and principles in relation to freedom of expression. Furthermore, Recitals 46 of the Directive declares that a provider of an information society service that becomes aware of illegal activities shall act expeditiously to remove or to disable access to the information concerned, but that the removal or disabling of access “*has to be undertaken in the observance of the principle of freedom of expression...*”

As for the Swedish Constitution, it may be noted that copyright is explicitly exempt from the FPA and the FEA.<sup>103</sup> The simple reason for this, according to the *travaux préparatoire*, is that copyright adheres to private law and that the FPA and the FEA do not regulate the relation between private parties.<sup>104</sup> Moreover, a governmental study group has stated that the protection of copyright is an example of such interests that can legitimize a limitation to freedom of expression in accordance with Chapter 2 Article 13 of the GF.<sup>105</sup> It may also be noted that Chapter 11 Article 14 of the GF in the past stipulated that Swedish courts should only set aside statutory law that conflicted with provisions in the constitution if the conflict was manifest. This is worth remembering when we later examine Swedish case law. However, it shall also be noted that this “manifest requisite” was abolished in 2010.

National lawmakers also have to take into account European standards of human rights when implementing directives, as well as rights afforded by national constitutions to the extent directives leave room for such considerations.<sup>106</sup> Hence, it may be noted that the Swedish government made a

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<sup>102</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market.

<sup>103</sup> FPA Chapter 1 Article 8 and FEA Chapter 1 Article 12, which refers to said provision in the FPA.

<sup>104</sup> SOU 1947:60 p. 217.

<sup>105</sup> SOU 1975:75 p. 204. See also Ds 2005:54 p. 11.

<sup>106</sup> Geiger (2006), p. 388.

few comments on freedom of expression aspects when transposing the Sanctions Directive into Swedish law, namely in respect of the compatibility between injunctions and the constitutional ban on censorship.<sup>107</sup> More precisely, such aspects were evaluated in relation to interlocutory injunctions and injunctions targeted against attempted infringement or preparation to commit infringement.

The Swedish government concluded that the proposed rules were aimed at stopping *actions* that constituted infringement, not to prevent the actual content as such of the medias involved.<sup>108</sup> In principle then, the ban on censorship regulated in FPA and FEA did not hinder the proposed legislation. Furthermore, the government stated that, if the issuance of an injunction would indeed come into conflict with the ban in a specific case, the judiciary would have to take into consideration the balance of interests prerequisite, which is, according to general principles of Swedish law, applicable when a Court decides on whether to grant an injunctive relief. However, the government anticipated that the rule of proportionality would mainly be accentuated in respect of interlocutory injunctions, and further stated that it could not be applied in a manner that conflicted with the overall aim to present right-holders with effective means to stop a continuing infringement.<sup>109</sup>

### 2.2.3.2 Case law from Sweden

In *Swedish Flag*<sup>110</sup>, the Supreme Court of Sweden ruled for the first time on the relationship between copyright and freedom of expression. A Swedish hymn had been recorded without the original composers' consent and with new lyrics that criticized the war in Vietnam. The defendant argued that the Court should interpret the parody/travesty exemption liberally on such political criticism. The Court, however, held that copyright protects private interests and that the copyright-holder should not have to suffer from a limitation of his rights due to a political controversy he was not a part of.

In a later case, *Manifesto*<sup>111</sup>, the Court elaborated more thoroughly on the status of freedom of expression defenses in copyright cases. This case concerned a

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<sup>107</sup> Proposition 2008/09:67 Civilrättsliga sanktioner på immaterialrättens område – genomförande av direktiv 2004/48/EG. It may be noted that freedom of expression values also were evaluated in respect of measures for preserving evidence. However, as noted above, such issues fall outside the scope of this thesis and they are therefore not touched upon.

<sup>108</sup> Proposition 2008/09:67 p. 192.

<sup>109</sup> Proposition 2008/09:67 p. 193.

<sup>110</sup> NJA 1975 p. 679.

<sup>111</sup> NJA 1985 p. 893.

not yet published manifesto that outlined the future objective of the Gothenburg City Theater. At the outset, the Court found that the interest of the copyright-holder was relatively weak in the case at hand, whilst the reasons to uphold freedom of expression were rather strong. The question then was if the Court could rule in favor of the defendant even though the committed act did not fall under any of the exemptions in the SCA. As for the constitutional right to freedom of expression, the Court reasoned that these provisions were only addressed to the legislator, but that they nevertheless were 'illustrative' in the case at hand. However, the Court concluded that the legislator had already considered freedom of expression aspects when drafting the law, and that it was up to the politicians to impose any further limitations. However, the Court did simultaneously acknowledge that freedom of expression interests could, but only in rare cases, be of such profound nature that the Court would have to apply Chapter 24 Article 4 of the Penal Code (which regulates acts committed out of necessity) to declare non-punishment.

The most recent case in which the Swedish Supreme Court laid down a ruling on the nexus between copyright and freedom of expression is *Mein Kampf*.<sup>112</sup> Here the Court underlined once again that the Swedish Parliament had already struck an appropriate balance between the two interests. In addition, it is interesting to note that the case was decided after the incorporation of the ECHR into Swedish law. The Court acknowledged that the legal situation had somewhat changed after the incorporation of the ECHR and that the Convention possibly provided more room for freedom of expression considerations. More specifically, the Court reasoned that the Convention might provide legislative support for a ruling in which an infringement is declared non-punishable due to overruling freedom of expression aspects. However, the fact that the work at hand was of historic interest and was hard to get a hold of was not sufficient.

Nor has, knowingly, a defense based on freedom of expression been successful in any district court or court of appeal. The case *Church of Scientology*<sup>113</sup>, in which a person had published texts belonging to the Church of Scientology online and handed in copies of the works to various authorities, is perhaps worth mentioning since the defendant in this case invoked Article 10 of the ECHR arguing that the Court should decide against awarding compensation for damages. According to the defendant, the publishing of the texts aimed at making it possible for the public to form a view about the Church. However, the Svea Court of Appeal paid scant attention to the argument and solely held that the argument did not "lead to any different conclusion".

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<sup>112</sup> NJA 1998 p. 838.

<sup>113</sup> Case T 1096-98.

### 2.2.3.3 Case law from some other EU Member States

A brief look at case law from some other EU Member States depicts a somewhat fragmented picture in terms of how the judiciaries in Europe have dealt with freedom of expression aspects in copyright cases. At the one hand, there are decisions in which the supreme courts categorically have refused to pay regard to defenses based on freedom of expression.<sup>114</sup> On the other hand, there are at least some more recent cases in which European courts have been pursued by arguments related to freedom of expression and where constitutional provisions have been used, more or less, as an external tool.

One such approach used by European courts faced with the conflict has been to interpret rights and limitations in conformity with constitutional provisions.<sup>115</sup> *Germania 3*<sup>116</sup>, laid down by the Federal Constitutional Court of Germany, provides an instructive example. In this case, a play included extensive unauthorized material from another play. The Court concluded *prima facie* that the requisites contained in the quotation exemption were not fulfilled. However, the Court then decided to apply the right to quote in the light of a provision in the German Constitution that safeguards freedom of artistic expression. This provided for a liberal interpretation of the quoting right which then encompassed the artistic comment.

In a few other cases, courts have gone as far as to override copyright law. One such example is *Medienprofessor* decided by the Supreme Court of Austria.<sup>117</sup> In this case, a professor had published several news articles on his website with the aim to demonstrate that a large-scale media campaign had been launched against him. More specifically, 16 Articles had been published in their entirety and the Court found that the quotation right was not applicable. However, the Supreme Court of Austria noted that the professor had exercised his freedom of expression and information in accordance with Article 10 of ECHR. The Court concluded that the content of the articles could be adequately addressed only if they were published in their entirety and that freedom of expression prevailed over copyright in the present case.

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<sup>114</sup> For a presentation of cases in which European courts have refused to apply constitutional provisions on freedom of expression in copyright cases, see Geiger (2009) p. 44.

<sup>115</sup> Hugenholz & Senftleben p. 11.

<sup>116</sup> *Germania 3 Gespenster am toten Mann*, Federal Constitutional Court 29 June 2000.

<sup>117</sup> *Medienprofessor*, the Supreme Court of Austria, 12 June 2001, 33 IIC 994 (2002).

Lastly, *Asbdown*, a British case already mentioned above, highlights that a court may also accommodate freedom of expression interests by deciding against imposing a certain sanction. The alleged infringer, Sunday Telegraph, had published politically sensitive minutes taken by the leader of the British Liberal Democrats during a secret meeting with then Prime Minister Tony Blair. The Court of Appeal stated that rare circumstances could arise in which the right to freedom of expression comes into conflict with copyright, notwithstanding the express exemptions under the British Copyright Act. In these cases, the Court was bound to apply the copyright law in a way that accommodated the right to freedom of expression. The Court's solution was not to apply any of the existing exemptions liberally or to create an external exemption, but to decide against granting an injunction. However, since the Court had not set aside substantive law as such and the action therefore still constituted an infringement, the copyright-holder was instead entitled to damages.<sup>118</sup>

#### 2.2.3.4 The ECJ provides further guidance

Although ECtHR case law presents an extensive amount of freedom of expression precedents, the Court has, knowingly, not yet ruled on the potential conflict between freedom of expression and copyright. However, the ECJ has in some recent landmark cases considered the relationship between different fundamental rights in relation to protection of intellectual property on the Internet.

First, in *Promusicae*<sup>119</sup>, the ECJ clearly stated that the right to property under EU law, including intellectual property, is not an absolute right. The case involved Promusicae, an organization of publishers and producers of musical and audiovisual recordings, that brought a suit against Telefónica, which *inter alia* provided Internet access services to Internet users. The dispute between the two parties arose out of Telefónica's refusal to disclose to Promusicae personal data belonging to Internet users. The Spanish court decided to refer to the ECJ questions on how to interpret the E-commerce Directive, the Copyright Directive, the Sanctions Directive and directives regulating data protection.

Although the case concerned data protection (and by extension the fundamental right to privacy) and not freedom of expression, the ECJ's ruling is of relevance when appraising the relationship between copyright and other

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<sup>118</sup> For further case comments, see Sims from p. 491, Angelopoulos from p. 341 and Rosén in *Freedom of Expression in lineage with author's rights* p. 9.

<sup>119</sup> Case C-275/06 Promusicae.

fundamental rights in general. In essence, the ECJ held that a fair balance needs to be struck between the various fundamental rights protected by EU law and that the courts of Member States must interpret their national law in a manner that is consistent with not only relevant directives but also fundamental rights and other general principles of Community law, such as the principle of proportionality.<sup>120</sup>

Then, in November 2011 and February 2012, the ECJ laid down two rulings that provide further guidance in respect of EU law and the enforcement of copyrights on the Internet. The two cases, *Scarlet Extended*<sup>121</sup> and *Netlog*<sup>122</sup>, provide striking similarities in that they both feature a Belgian management company named SABAM seeking injunctions against intermediaries operating on the web. A difference between the two cases, however, is that in *Scarlet Extended*, a case initiated already in 2004, the sought injunction was targeted at an Internet service provider (ISP), whereas in the *Netlog* case, initiated in 2009, actions were brought against a social media network.

The second case deserves some further review as it provides similarities with the first hypothetical example presented above. According to Netlog's own website, the service provides users with the means to create personal profiles featuring "...blog, pictures, videos, events, playlists and much more to share with your friends. It is thus the ultimate tool to connect and communicate with your social network."<sup>123</sup> SABAM, representing authors, composers and publishers of musical and audiovisual works, claimed that the network enabled users to make works in its repertoire available to the public in such a way that other users of the network could have access to them without SABAM's consent and without Netlog paying it any fee.

In both cases, the sought injunctions would, in practice, impose on the defendants a general obligation to monitor communications on their networks. Moreover, in both cases the defendants would have to install filtering systems that would: i) be in use for an unlimited time, ii) constitute a preventive measure, iii) be paid for exclusively by themselves, iv) be targeted at all the traffic to the site and v) apply indiscriminately to everyone using the internet service or the social media network respectively. Given the factual and legal similarities between the two cases, the ECJ more or less copied its reasoning from *Scarlet Extended* when it a few months later laid down its preliminary ruling in *Netlog*.

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<sup>120</sup> Case C-275/06 Promusicae, paragraph 68.

<sup>121</sup> C-70/10 Scarlet Extended.

<sup>122</sup> C-360/10 Netlog.

<sup>123</sup> <http://sv.netlog.com/go/about>.

In both cases, the Court recalled that copyright-holders have a right under the Sanctions Directive and the Copyright Directive to apply for an injunction against intermediaries whose services are being used by third parties to infringe their rights (*inter alia* ISPs or operators of online social networking platforms). Next in *Scarlet Extended*, the Court referred to *L'Oréal*<sup>124</sup>, reminding that intermediaries may seek such measures not only to bring to an end infringements already committed, but also to prevent further infringements. Lastly, the Court, again referring to *L'Oréal*, stated that the rules for the operation of the injunctions (i.e. procedures to be followed and conditions to be met) were a matter for national law. However, such national rules, and their application by national courts, had to observe the limitations imposed by relevant directives and "*the sources of law to which those directives refer*".<sup>125</sup>

After presenting the legal background, the ECJ went on to conclude that Article 15 (1) of the E-commerce Directive prohibits measures that requires of an intermediary provider to carry out general monitoring of information that it stores on its network or that is transmitted onto its network. Furthermore, the ECJ stated that general monitoring obligations would not be compatible with Article 3 of the Sanctions Directive, which declares that measures based on provisions in the Directive should be fair and proportionate and not excessively costly.<sup>126</sup>

But more importantly, the ECJ also stated that national courts must take into account requirements that stem from the protection of the applicable fundamental rights. The ECJ noted that the injunctions had been sought with the aim to ensure protection of copyright, and that the right to intellectual property is safeguarded by Article 17 (2) of the EU Charter. However, the Court also acknowledged that there is "*...nothing whatsoever in the wording of that provision or in the Court's case-law to suggest that that right is inviolable and must for that reason be absolutely protected.*" Referring to *Promusicae*, the ECJ once again confirmed that the fundamental right to property, including intellectual property, must be balanced against the protection of other fundamental rights.<sup>127</sup>

More specifically, the preliminary rulings confirm that a fair balance must be struck between the protection of intellectual property on the one hand, and fundamental rights of "*individuals who are affected by such measures*" on the other. The ECJ held that in the present cases, the fundamental right to intellectual property had to be balanced against the fundamental freedom to conduct

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<sup>124</sup> C-324/09 *L'Oréal*.

<sup>125</sup> C-70/10 *Scarlet Extended* paragraphs 30-33 and C-360/10 *Netlog* paragraphs 28-31.

<sup>126</sup> C-70/10 *Scarlet Extended* paragraphs 35-40 and C-360/10 *Netlog* paragraphs 33-38.

<sup>127</sup> C-70/10 *Scarlet Extended* paragraphs 41-44 and C-360/10 *Netlog* paragraphs 39-42.

business that the operators enjoyed. But moreover, the ECJ declared that the filtering system might also infringe the fundamental rights of the people whom are using these services. Accordingly, the Court invoked Articles 8 and 11 of the EU Charter and held that copyright-protection also had to be balanced against the users' right to protection of personal data and their freedom to receive or impart information.<sup>128</sup>

Concerning freedom of expression and freedom of information, the ECJ stated that the sought injunction “...*could potentially undermine freedom of information since that system might not distinguish adequately between unlawful content and lawful content, with the result that its introduction could lead to the blocking of lawful communications. Indeed, it is not contested that the reply to the question whether a transmission is lawful also depends on the application of statutory exceptions to copyright which vary from one Member State to another. Moreover, in some Member States certain works fall within the public domain or can be posted online free of charge by the authors concerned.*”<sup>129</sup>

In conclusion, the ECJ ruled that in adopting the injunctions sought, the national court would not respect the requirement to strike a fair balance between conflicting fundamental rights. Hence, the answers to the referred questions were that the relevant Directives (the E-commerce Directive, the Copyright Directive, the Sanctions Directive and two directives regulating data protection) read together, and interpreted in the light of the requirements stemming from the applicable fundamental rights, precluded imposition of the contested injunction.<sup>130</sup>

## **2.3 So a balance needs to be struck – but now what?**

### **2.3.1 Comments on recent ECJ case law**

It is telling that the ECJ's landmark cases on the relationship between intellectual property rights and other fundamental rights on the Internet have concerned measures targeted at intermediaries and not actual infringers. This demonstrates the fact that, for several reasons, it is much more attractive for a right-holder to make a claim against an intermediary than to go after an individual infringer. First and foremost, it is of course more cost-efficient to bring action against a single intermediary than to pursue a multitude of its

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<sup>128</sup> C-70/10 Scarlet Extended paragraphs 45-50 and C-360/10 Netlog paragraphs 43-48.

<sup>129</sup> C-70/10 Scarlet Extended paragraph 52 and C-360/10 Netlog paragraph 50.

<sup>130</sup> C-70/10 Scarlet Extended paragraphs 53-54 and C-360/10 Netlog paragraphs 51-52.

users. But another important reason is that by requiring action from the various service providers that are facilitating the infringing activities, right-holders may be able to prevent copyright violations from happening in the first place.<sup>131</sup> To what extent various measures can be imposed on Internet intermediaries are therefore a much-debated issue. And, as the ECJ rulings in *Scarlet Extended* and *Netlog* illustrates, the answer to these questions will have spillover effects on freedom of expression, as ‘policing’ activities assigned on the intermediaries may impede the freedom of expression and freedom of information enjoyed by its users.

It has been widely acknowledged that the injunctions sought by SABAM were vast or even extreme in their scopes.<sup>132</sup> Psychogiopoulou has pointed out that if the filtering system sought in *Scarlet Extended* would have been granted, similar actions would most certainly have been brought against other operators all across Europe and such a development would have put the openness of the Internet in serious jeopardy.<sup>133</sup> Another important aspect, however, is that the ECJ only rejected the specific injunction sought by SABAM, it did not rule out filtering systems or blocking measures as such.<sup>134</sup> Potentially, the ECJ may well accept injunctions that do not encompass all of the five elements outlined above.<sup>135</sup>

As a comparison to *Netlog* and *Scarlet Extended*, it may be fruitful to mention *Newzbin2*<sup>136</sup>, a case decided by a British High Court in 2011. In that case, the Court obligated an ISP to block some user’s access to the Newzbin2 website. Judge Arnold, referring to *Promusicae* and the AG’s opinion in *Scarlet Extended* (the ECJ had yet to lay down its ruling), gave freedom of expression aspects due consideration. However, the website was used almost entirely for illegal file sharing. Moreover, as Headdon has pointed out, the injunction sought was circumscribed in three important ways: the domains it applied to, the persons it was targeted against and the technology used for implementation.<sup>137</sup> Accordingly, the Court found that the sought injunction passed the proportionality test as the plaintiff’s right to property, according to Article 1 of the First Protocol to the ECHR, outweighed the right of other stakeholders to freedom of expression under Article 10 of the ECHR.<sup>138</sup>

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<sup>131</sup> For discussions on the benefits with launching an action against an intermediary, see for example Scerri & George from p. 10 onwards, Headdon p. 137 and Meale p. 429, 431.

<sup>132</sup> See for example Meale p. 430, Psychogiopoulou p. 555.

<sup>133</sup> Psychogiopoulou p. 554.

<sup>134</sup> Psychogiopoulou p. 555.

<sup>135</sup> Meale p. 431.

<sup>136</sup> *Newzbin2*, decided by the High Court of Justice Chancery Division on 28 July 2011.

<sup>137</sup> Case comment by Headdon, p. 143.

<sup>138</sup> *Newzbin2* para 200.

Meale has stated that for the rest of this decade, we will probably see procedures in which judges have to consider everything in between the blocking measure accepted in *Newzbin2* and the general filtering system rejected in *Scarlet Extended* and *Netlog*. Accordingly, the ECJ will most assuredly be asked over and over again to establish guidelines on which sorts of measures are legitimate and which are not.<sup>139</sup> However, the real battle is likely to move away from peer-to-peer file sharing and into the field of e.g. streaming.<sup>140</sup> As for the main legal considerations in these battles, courts will, following the ECJ's recent case law, not least be required to pay much attention to the proper balancing of fundamental rights.<sup>141</sup> In other words, it is most likely that we in the near future will continue to see cases in which the relationship between copyright and freedom of expression is considered.

### 2.3.2 What is a fair balance?

As recognized in the previous section, in *Scarlet Extended* and *Netlog* the ECJ gave the narrowest answers possible to the questions asked by the domestic courts.<sup>142</sup> Accordingly, it is difficult to draw any far-reaching conclusions from the rulings concerning the standing of freedom of expression aspects in copyright infringement cases. But in regards to the concise statements that the ECJ did make, Psychogiopoulou has observed that the ECJ only declared that the contested filtering systems could *potentially* violate the users' right to freedom of expression. According to her, ECJ's careful language can probably be explained by the considerable uncertainty that surrounded the disputed filtering system and its ability to make accurate distinctions between lawful and unlawful content. But Psychogiopoulou also sees the ECJ's statement that the national court had to take into consideration 'in particular' the operator's right to conduct business as yet another example of the more economic-oriented approach that permeates ECJ's case law.<sup>143</sup>

Moreover, although not a binding source of law, Advocate General Cruz Villalón's opinion in *Scarlet Extended* (no AG opinion was given in *Netlog*), provides some food for thought in relation to freedom of expression considerations. The Advocate General based his opinion primarily on considerations in relation to the fundamental rights of the users and elaborated

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<sup>139</sup> Meale p. 432.

<sup>140</sup> Meale p. 431.

<sup>141</sup> See Headdon p. 144 where this 'key battleground' as well as three other key areas is outlined.

<sup>142</sup> Meale p. 431.

<sup>143</sup> Psychogiopoulou p. 554-555.

quite thoroughly on the freedom of expression aspect. After reformulating the questions referred by the domestic court so that provisions in the EU Charter were considered in the light of the ECHR and not the other way around, the AG first established that the sought injunction would come into conflict with Article 11 and the right to freedom of expression (as well as with the right to privacy).

More specifically, the AG pointed out that there was no doubt that the contested system, in particular the blocking mechanism, would constitute a restriction according to said provision in the EU Charter and Article 10 of the ECHR. According to the AG, this was the case regardless of the efficiency and thoroughness of the control mechanism. However, the AG did also conclude that the filtering system at hand would not be able to distinguish between legal and illegal content in an adequate manner, as copyright law differs between Member States. In conclusion, the AG found that the sought measure would impose a restriction on freedom of expression and that it therefore had to fulfill the requirements laid down in Article 52 (1) of the Charter in order to be legitimate.<sup>144</sup>

As we have seen above, one of these requirements is that any limitation must be provided for by law. The AG paid this requisite much attention and eventually concluded that the requirement was not met in the present case. More specifically, references were made to the case law of the ECtHR that demonstrates that the relevant law must inherit certain ‘qualities’. Not least, the application of the law must lead to results that are predictable.<sup>145</sup> The AG found that, through the intermediaries’ and the Internet user’s perspective, an imposition of the contested filtering and blocking system would be such a unique and unexpected measure that this obligation had to be explicitly, clearly and precisely prescribed by the law.<sup>146</sup> According to the AG, this was not the case with the applicable national law.

Since the requirement ‘prescribed by law’ was not met, there would be no need for the Court to also apply the proportionality test set out in Article 52 (1) of the EU Charter. The AG did however state, *obiter dictum*, that the sought injunction aimed at protecting copyright and that this most certainly constitute an example of the “rights and freedoms of others” addressed in the aforementioned article. Moreover, the AG underlined that copyright itself is a right protected by Article 17 (2) of the EU Charter. Hence, the need to protect copyright could potentially motivate the restriction on other freedoms and

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<sup>144</sup> C-70/10 Scarlet Extended, AG Opinion, paragraphs 85-87.

<sup>145</sup> C-70/10 Scarlet Extended, AG Opinion, paragraph 94.

<sup>146</sup> C-70/10 Scarlet Extended, AG Opinion, paragraph 105.

rights in accordance with Article 52 (1) of the EU Charter.<sup>147</sup> Furthermore, the AG stated that, since the relevant EU Directives did not warrant the sought injunction, a particularly sensitive question could await, namely if the directive provisions in themselves violated fundamental rights enshrined in the EU Charter.<sup>148</sup>

Furthermore, it may be noted that some scholars have speculated on how the ECtHR would rule on a case that involves a distinct conflict between copyright and freedom of expression. This is of interest since, as we have seen above, the ECHR is of importance when appraising the scope of protection guaranteed under the EU Charter and the ECtHR has yet to lay down a precedent on the relationship between the two rights. In an article on injunctions against ISPs, Sandfeld Jacobsen and Salung Petersen holds that the requisite ‘necessary in a democratic society’ and ‘pressing social need’, may well be met in cases where sought injunctions provide right-holders with a means to stop large-scale Internet-based infringements which otherwise may be impossible to hinder.<sup>149</sup>

But in concern of the requirement of proportionality, Sandfeld Jacobsen and Salung Petersen state that although minor limitations on freedom of expression may pass the test, not least when the violations of copyright are vast in scope and are difficult to stop by other means, the balance act is likely to fall out in favor of freedom of expression when restrictions are more extensive. Moreover, they argue that freedom of expression values are more likely to prevail if the sought injunction is likely to affect other persons than the actual infringers or when the measure will hinder a broad circle of people from accessing or spreading significant information of public concern.<sup>150</sup> Similarly, Akester has assumed that the right to freedom of expression will overtrump copyright if the contested material is of public interest and users are unable to invoke existing exemptions in order to get access to political, journalistic, artistic or literary speech.<sup>151</sup>

### 2.3.3 The on-going policy discussion

Finally in this section, we shall have a look at the on-going policy discussion within the EU on questions relating to copyright and freedom of expression. Indeed, there have been some developments within the EU that suggest that

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<sup>147</sup> C-70/10 Scarlet Extended, AG Opinion, paragraph 89-92.

<sup>148</sup> C-70/10 Scarlet Extended, AG Opinion, paragraph 111.

<sup>149</sup> Sandfeld Jacobsen & Salung Petersen p. 178-179.

<sup>150</sup> Sandfeld Jacobsen & Salung Petersen p. 179-180.

<sup>151</sup> Akester p. 31.

lawmakers are putting an enhanced focus on issues related to the balance of interests between copyright-holders and user's rights in the age of web 2.0. An introduction to this discussion can provide us with some interesting reflections on the value of fundamental right provisions as external tools in copyright cases.

Neelie Kroes,<sup>152</sup> has recently spoken out about the importance of having a copyright framework in place that is adopted to cope with present challenges imposed by the digital age. She has acknowledged that the proposals behind the Copyright Directive were formulated in 1998 and that the world has changed dramatically since then. The most important development, according to Kroes, is that creation and distribution of creative works is now in the hands of everyone, something that *inter alia* has empowered people to generate and exchange ideas on a larger scale. Against this background, Kroes has questioned whether the present copyright rules “...make it easier or harder for people to upload and distribute their own, new creative content? And is that the best way to boost creativity and innovation?”. In order to answer these and other questions, the EU Commission has decided to examine whether further changes are needed.<sup>153</sup>

A Communication from 2011 hints at where this overview might lead as it contains a section on UGC that recognizes that it might be problematic that “amateur” users whom create UGC for non-commercial purposes face infringement proceedings when uploading content without the right-holders consent. It is stated that “*The time has come to build on the strength of copyright to act as a broker between rights holders and users of content in a responsible way*” and that a dialogue with stakeholders would take place with the aim to find a balance between “*the rights of content creators and the need to take account of new forms of expression*”.<sup>154</sup>

Also, in the 2008 *Green Paper on Copyright in the Knowledge Economy*<sup>155</sup>, the EU Commission acknowledged that the Copyright Directive does not contain an exemption that allows users to create new or derivative works by using existing copyright-protected material. However, the consultations led to the conclusion that regulation on UGC would be premature as the phenomenon as such was still evolving.<sup>156</sup> One year later, the General Directorate for Information

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<sup>152</sup> Vice-President of the European Commission, responsible for the Digital Agenda.

<sup>153</sup> “Copyright and innovation in the Creative Industries”, speech given by Neelie Kroes at the 2012 Intellectual Property and Innovations Summit, The Lisbon Council, Brussels 10 September 2012. Available online at [http://europa.eu/rapid/press-release\\_SPEECH-12-592\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-12-592_en.htm).

<sup>154</sup> COM(2011) 287 final.

<sup>155</sup> COM (2008) 466/2.

<sup>156</sup> COM (2009) 532 final.

Society and the General Directorate for the Internal Market presented a Reflection Document in which it was pointed out that UGC plays a new and significant function as a complement to works produced by professionals. Hence, it was declared that: “*The co-existence of these two types of content needs a framework designed to guarantee both freedom of expression and an appropriate remuneration for professional creators, who continue to play an essential role for cultural diversity*”.<sup>157</sup>

Notably, some EU Member States have also started to examine whether copyright law needs to be updated in order to better cope with modern needs.<sup>158</sup> For instance, both the UK and Ireland have reviewed their respective copyright laws to assess whether it would be feasible and desirable to adopt exceptions for *inter alia* ‘fair uses’ of works.<sup>159</sup> In this context, policymakers and legal experts have drawn inspiration from the United States where the legislator has chosen a more flexible approach when framing exceptions to copyright. More specifically, it has been noted that the ‘fair use’ exception in American copyright law provides judges with more room to correct imbalances in the copyright system.<sup>160</sup> For example, American judges have applied this rule as a mean to provide users of the web 2.0 with stronger rights.<sup>161</sup> Also noteworthy is that Canada in June 2012 modernized its copyright law by *inter alia* introducing an explicit exception for UGC besides expanding fair dealing, and that Australia is currently considering similar reforms.<sup>162</sup>

In the Irish consultation paper, it was questioned whether current EU law precluded Member States from adopting a fair use provision. However, even though it was concluded that EU law did not necessarily preclude a fair use doctrine (since recent ECJ case law could allow for a liberal interpretation of the Copyright Directive), the authors of the consultation paper concluded that it was unclear whether it would be desirable to adopt a fair use doctrine in Ireland.<sup>163</sup> In the UK, professor Hargreaves concluded that a wholesome import of fair use would be impossible given the EU’s present legal framework. He suggested that the UK instead could achieve many similar

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<sup>157</sup> Creative Content in a European Digital Single Market: Challenges for the Future, a Reflection Document of DG INFSO and DG MARKT, 22 October 2009, p. 3-4, 10.

<sup>158</sup> Primarily UK, Ireland and the Netherlands.

<sup>159</sup> See the Professor Hargreaves Report from 2011 (UK) and the Copyright Review Committee’s Consultation Paper on Copyright and Innovation from 2012 (Ireland).

<sup>160</sup> The Hargreaves Report p. 42.

<sup>161</sup> Chik p. 245.

<sup>162</sup> See the new Canadian *Copyright Modernization Act*, which received Royal Assent on June 29 2012, and the issues paper *Copyright and the Digital Economy* which was released by the Australian Law Reform Commission (ALRC) on 24 August 2012 (submissions were due by 16 November 2012).

<sup>163</sup> The Irish Copyright Review Committee’s Consultation Paper on Copyright and Innovation p. 119-120.

benefits by adopting limitations already permissible under the Copyright Directive, *inter alia* by introducing an exception for parody. Furthermore it was recommended that the UK government should pursue their Brussels colleagues to consider additional copyright exceptions.<sup>164</sup> The UK government has later endorsed this approach.<sup>165</sup>

Legal scholars have also contributed to the debate by acknowledging problems related to a rigid copyright system and by presenting different solutions going forward. Hugenholtz and Sentfleben have argued for a more flexible copyright system, not least in order to promote freedom of expression aspects. According to Hugenholtz and Sentfleben, the present inflexibility in copyright law impedes such communication on the web that arguably should be permissible. They argue that external rules such as those protecting freedom of expression can contribute with some flexibility, but that new internal exceptions should be introduced into copyright law so that legal predictability and technological neutrality is also ensured. According to Hugenholtz and Sentfleben, the EU copyright system provides more room for such exemptions than a *prima facie* assessment gives at hand.<sup>166</sup>

Mendis has also acknowledged that there is a problematic tension between copyright and freedom of expression in the modern information society. In pursuit of a proper solution to this situation, he has explored whether it is possible for Member States of the European Union to introduce to their copyright regime a broad and general public interest exemption. The rationale behind such a limitation on copyright would be to preserve the notion that copyright is a means to promote the interests of society in its entirety and that this goal can be better achieved by making unauthorized uses legitimate if it is justified by the interest of the public. Mendis argues that such an exception is desirable but that the Copyright Directive and its exhaustive list of exemptions may preclude such an introduction. If so, it is suggested that Article 10 of the ECHR may be invoked as a means to circumvent the restriction imposed by the Directive. According to Mendis, the biggest problem, however, is that the politicians seem to lack the will for such an adoption.<sup>167</sup>

Cook too has pointed out that it may take considerable time before the EU amends its legal framework in a way that allows Member States to adopt more flexible restrictions on copyright. Therefore, he argues, it can be held that the EU is worse off than e.g. the United States when it comes to responding to new technological developments and associated business models. He has noted

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<sup>164</sup> The Hargreaves Report p. 5.

<sup>165</sup> See <http://www.ipo.gov.uk/ipresponse-full.pdf>.

<sup>166</sup> Hugenholtz & Sentfleben.

<sup>167</sup> Mendis, p. 5, 15-16, 60-67 and 80-81.

that this has forced courts to apply *inter alia* provisions on freedom of expression in the ECHR and the EU Charter in order to find the necessary tools in some infringement cases. In the long run, however, he predicts that Europe will move towards more flexible copyright limitations, but that it is unlikely the EU will ever adopt a fair use provision such as the one present in the United States.<sup>168</sup>

A somewhat different approach is taken by Angelopoulos who advocates a more distinct ‘externalization’ of the conflict. She argues that if we admit freedom of expression and copyright are at odds with each other, and that copyright too is a fundamental right, then the conflict moves into a new battleground, namely that of human rights. And this approach has several important consequences according to Angelopoulos: i) It places the two rights on an even footing, ii) it provides the judiciary with enhanced power to solve the conflict (it is noted that this also has a negative aspect since influence is moved away from the legislative body), and most importantly iii) human right provisions, such as Article 10 of the ECHR, inherit a balancing mechanism that is well suited for the double balancing act required by a court that considers a face-off between the two antipodal fundamental rights.<sup>169</sup>

Geiger also supports a ‘constitutionalizing’ of intellectual property law. Although he acknowledges that it would be preferable to solve issues such as the conflict between copyright and freedom of expression ‘inside’ copyright law, he also stresses that there is much to win by recognizing copyrights’ human rights dimension. Geiger argues that by using fundamental rights as the frontier of copyright, legislators and judges can rebalance the matter. By extension, this can help copyright overcome the legitimacy crises it faces when a vast portion of the citizens of the information society does not find current copyright law viable. Geiger concludes that a new foundation is critical as an “unbalanced system is at risk of collapsing at any time”.<sup>170</sup>

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<sup>168</sup> Cook p. 243-245.

<sup>169</sup> Angelopoulos from p. 351.

<sup>170</sup> Geiger (2009) p. 37-40, 48-49, (2007) p. 43-44 and (2006) p. 406.

## 3 Reflections

### 3.1 What is the relationship, *de jure* and *de facto*, between copyright and freedom of expression in the information society?

We have seen above that there are opposed opinions on the relationship between copyright and freedom of expression. Sometimes it has been held that the two rights are compatible, and other times that there is a troublesome conflict between them. This is perhaps not that startling as both assumptions certainly are true to some extent, depending on how one looks at the issue. On the one hand, we have seen that part of copyright's *raison d'être* indeed is to promote freedom of expression aspects. But on the other hand, it is perfectly clear that the relationship carries a built-in conflict as copyright simply imposes a restriction on others' right to express themselves and to receive and impart information. Moreover, the idea/expression dichotomy in copyright law may well ensure that a vast majority of speech completely avoids the sphere of copyright, but it is simultaneously beyond doubt that some of it does not as people sometimes, for various reasons, choose to partly or fully echo copyright-protected expressions.

Many times, it is of course manifest that such dispositions should be considered unlawful and that the infringer should be held accountable if none of the existing exceptions are applicable. However, sometimes the contested expression may constitute comments that are clearly safeguarded by the various examined human rights instruments. For instance, sometimes people may want to exercise their freedom of expression by using the complete work of someone else, or such a significant portion that the exception for e.g. quotation is inapplicable, in order to spread important information (as in *Ashdown*). For example, sharing of such information can be crucial in order to facilitate public debates on topical matters of political significance. And as we have seen above, such political expressions enjoy a particularly strong protection by the ECHR and thus also by Article 11 of the EU Charter. To name another example, copyright-protected material can be used by third parties when they '*participate in the cultural life of the community*' (a formulation found in the UDHR and the ICESCR) by creating a derivative work that others can enjoy (as in *Germania 3*). Such dispositions can also give rise to a

potential conflict as artistic expressions undoubtedly fall under Article 10 of the ECHR and, by extension, Article 11 of the EU Charter.

It is when a court finds that the contested action constitutes an exercise of freedom of expression that deserves protection, but that none of the exceptions existing within copyright law are applicable, that a true, and external, conflict between copyright and freedom of expression emerges. Interestingly, this is a conflict that has a twofold constitutional dimension. Indeed, one should not overlook that copyright too constitutes a fundamental right according to the EU Charter, ECHR and national constitutions such as the Swedish GF. For what its worth, copyrights' position as a fundamental right has been somewhat clarified by the new EU Charter since that instrument, contrary to the ECHR, explicitly mentions that intellectual property rights shall be protected. Adding this to the analysis, it becomes clear that the relationship between copyright and freedom of expressions is an intricate one, which inherits a potential conflict between two rights both categorized as 'fundamental'.

Although it has been noted that this conflict-oriented dimension of the relationship has been largely ignored in Europe for a long time, it is not a novelty as such. Indeed, above we have seen cases from decades ago in which defendants invoked freedom of expression arguments in copyright disputes. But recently, the issue has required much larger attention as the friction between the two rights has increased significantly in the information society. As we have seen, this has a twofold explanation. First, when harmonizing central aspects of copyright, Europe introduced wider and stronger copyright protection. Then, after that extensive and rigid copyright system was put in place, new behaviors enabled by innovative web-based technologies have arguably increased the justification of copyright-related activities on the Internet, the main 'marketplace of ideas' of our time.

More specifically, freedom of expression aspects become present to a much larger degree when focus is shifted from flagrant infringements in the form of piracy and 'pure' illegal downloading and file-sharing, to the usage of copyright material in 'conversational media' and various forms of user-generated content. The Internet has simply empowered ordinary citizens with the platforms to, on the one hand, receive and impart information on an unprecedented scale and to more easily share e.g. political and artistic expressions with large audiences. On the other hand, the idea/expression dichotomy has become a more hallow watershed between the two rights since the same web technologies have made it much easier and tempting for third parties to copy protected material and make it available to the public in a way that violates other's exclusive rights. In

essence, it has become more common that ordinary citizens infringe copyright in a way that simultaneously actualizes freedom of expression aspects.

With that said, it is clear that the intersection between copyright and freedom of expression presents a potential *de jure* conflict between two fundamental rights which *de facto* concerns a broad circle of people.

### **3.2 Can the constitutional right to freedom of expression successfully be invoked as a defense in a copyright infringement case?**

A delicate issue of enhanced significance then is whether the conflict between copyright and freedom of expression has been appropriately solved once and for all through the various limitations imposed upon copyright by the legislator within private copyright law (the ‘internal solution’), or if a defendant who is unable to invoke existing exceptions nevertheless may escape liability or sanctions by invoking his or her constitutional right to freedom of expression (the ‘external solution’).

Case law from Sweden illustrates unambiguously that Swedish courts so far have refrained from applying constitutional provisions on freedom of expression as an external tool. As we have seen, this has been the case regardless of whether the interest to safeguard freedom of expression has manifestly overtrumped the interest to protect copyright (the *Manifesto* case) and notwithstanding if the dispute has concerned a critical political comment, something that adheres to the very core of freedom of expression (*Swedish Flag*). Seemingly, this pattern has different explanations.

First, the Swedish Supreme Court lacks the power of a constitutional court and at the time when the referred judgments were laid down, it had the authority to set aside statutory law only if it manifestly contradicted with the constitution. And if we also consider that copyright is explicitly exempted from the FPA and the FEA (and arguably falls outside the scope of the GF too), it is obvious that the Swedish courts traditionally have had little room to apply the constitutional right to freedom of expression in copyright cases. For example, this fact is clearly demonstrated by the Supreme Courts’ reasoning in the *Manifesto* case, where the Court acknowledged that a considerable freedom of expression interest was at hand, but stated that it was up to the legislator to introduce new exceptions.

Another reason is that, in general, Swedish courts have been reluctant to take heed to constitutional rights in private disputes and the referred cases demonstrate that copyright procedures provide no exceptions. This element is most prevalent in *Swedish Flag*, in which the Supreme Court stressed that copyright protects private interests when dismissing the defendant's argument. Also, the reasoning in *Manifesto* does to some extent illustrate this standing as the Court concluded that it could apply a provision in the Penal Code when facing a dire need to declare an infringement non-punishable due to extreme free speech interests, not the constitutional provisions safeguarding freedom of expression (the constitutional provisions were regarded as 'illustrative' rather than 'applicable'). However, in *Mein Kampf*, the Court acknowledged that the ECHR *could* present a legal basis for arguments that an infringement should be declared non-punishable due to exceptional freedom of expression concerns. Noteworthy, this corresponds with the notion that the incorporation of the ECHR into domestic law has cleared the way for a stronger focus on fundamental rights also in private disputes.

However, the Swedish courts have yet to apply Article 10 of the ECHR in a case regarding copyright infringement. In *Mein Kampf*, the Court abstained from applying the convention provision since the freedom of expression argument was regarded as insufficiently persuasive. This holding could in part stem from the fact that the ECtHR has yet to rule on the relationship between copyright and freedom of expression. If a precedent from the Strasbourg court clearly showed that Article 10 of the ECHR constitutes a frontier in relation to copyright protection, national courts would surely be encouraged to pay more attention to arguments related to the constitutional right of freedom of expression.

However, we have seen that Europe today has an intricate and pluralistic system of human rights protections that also involve the EU Charter. And since central aspects of copyright law have been harmonized within the EU in recent time, important issues related to the subject matter have entered into a new arena. More specifically, the relationship between copyright and other fundamental rights such as freedom of expression can nowadays depend on considerations made by the judges in Luxembourg. Seen against the backdrop of Swedish case law, this development brings new light on the intersection between the two fundamental rights, since the ECJ can have a different approach to the issues at hand.

As for whether the ECJ has cleared the way for an externalization of the conflict or not, it can at the outset be noted that the Court in *Scarlet Extended*

and *Netlog* held that the sought injunction potentially could undermine freedom of information since the contested system would not be able to distinguish between lawful and unlawful content in a satisfactory way. Furthermore in that passage, the ECJ underlined that the lawfulness of a transmission also depended on statutory exemptions that varied from one Member State to another. These statements in themselves do not give a clear answer as to whether the ECJ supports external application of fundamental rights provisions or not. In fact, the focus on lawful and unlawful content and the reference to domestic statutory exemptions also support the more strict internalized solution.

However, the intrinsic element in *Promusicae*, *Scarlet Extended* and *Netlog* is, at least as far as the subject of this thesis is concerned, that intellectual property rights are not inviolable, that they must not be absolutely protected, and that *a balance needs to be struck between copyright and other fundamental rights such as freedom of expression*. Moreover, the ECJ referred to Article 17 (2) of the EU Charter on the one hand, and Article 11 of the EU Charter on the other, when holding that copyright-protection shall be balanced against other individuals' right to *inter alia* freedom of expression and freedom of information. Accordingly, it seems reasonable to conclude that the ECJ has established that national courts need to acknowledge that there can be an 'external' conflict between these two fundamental rights and that this clash, when it falls within the scope of EU law, must be solved by application of the tools provided for by the EU Charter.

A closely related conclusion is that the ECJ seemingly does not hesitate to let fundamental rights affect the outcome of disputes between private subjects. In *Promusicae*, *Scarlet Extended* and *Netlog*, the ECJ stated that national authorities and courts must perform the required balance act between relevant fundamental rights when applying legislation that stems from EU directives. Noteworthy, the ECJ did not even question whether or not the relevant EU Charter provisions could be applied in disputes between private parties. Moreover and interesting enough, the aforementioned preliminary rulings also removed doubts as to whether not only equal treatment provisions but also other fundamental rights enshrined in the EU Charter have horizontal effects.

Put simply, the ECJ seems to acknowledge that the national courts are representing the Member States when they enforce rules upon private subjects through judicial proceedings and, by extension, that the courts in that manner are implementing Union law in accordance with Article 51 (1) of the EU Charter. Hence, the ECJ paid no regard to the fact that the parties to the domestic cases were two private subjects, not a State and an individual.

Moreover, it can be noted that the domestic courts had to pay respect to the rights of “*individuals who are affected by such measures*” and that this also included those who were using the defendants’ services. Accordingly, the ECJ also confirmed that third party interests must be taken into account when appropriate.

Indeed, the ECJ’s task in these preliminary rulings is to evaluate whether rules should be interpreted in a certain manner or set aside due to the fact that they are in conflict with a superior EU norm. Given the fact that EU primary law nowadays include a legally binding “bill of rights”, the ECJ more or less resembles a European constitutional court within the context of EU law. Therefore, it should perhaps come as no surprise that the issues at hand are less dramatic to the ECJ than to those domestic courts that are lacking the same authority against respective legislators. By extension, national judges can now invoke the guidance provided by the ECJ when addressing future conflicts between copyright and freedom of expression, which possibly makes the issue less dramatic also in the eyes of domestic judges. This is not least important since, again, the ECtHR has yet to rule on the relationship between copyright and freedom of expression.

But before drawing any more far-reaching conclusions one must also acknowledge that the ECJ in fact has provided minimal guidance on *how* the balance between copyright and other fundamental rights should be struck, besides holding that accepting the contested filtering systems would violate e.g. Article 11 of the EU Charter. And although it is telling that the conflict between the two fundamental rights emerged when the judiciary considered how far a copyright-holder can be allowed to go in order to protect his right by injunctions targeted against intermediaries (as we have seen, such injunctions are arguably the most efficient means available to copyright-holders, but it may in practice impose a censorship on speech), it makes it somewhat harder to draw conclusions on the persuasiveness of freedom of expression arguments in copyright disputes.

More specifically, one factor that likely contributed to the fact that the ECJ could keep its reasoning on freedom of expression to a minimum was that freedom of expression did not stand on its own two feet against copyright, so to speak, as it was accompanied by the intermediaries’ right to conduct business and the user’s right to privacy. Another significant consequence of the fact that the referred cases concerned injunctions targeted against intermediaries in order to prevent further infringements is that we can only speculate in what sorts of expressions that would have been impeded should the injunction have been granted. In the Netlog case, the defendant ran a

Facebook-like service that facilitated activities that arguably brought interesting freedom of expression aspects up to the surface. It is therefore regrettable that the ECJ did not have a closer look on the relationship between UGC, copyright and freedom of expression.

But it must of course also be remembered that the relationship between copyright and freedom of expression can be considered not only in the context of procedural provisions, but also when a court applies substantive liability rules. Indeed, as we saw when examining case law from some EU Member States, freedom of expression arguments can be assimilated in various ways; in order to set aside copyright law in a specific case, in order to interpret existing copyright exceptions liberally or, as we have seen in the cases decided by the ECJ and in *Ashdown*, to dismiss a request for a certain sanction (such as an injunction that censors speech). An interesting question is therefore whether the harmonization of copyright in the form of directives and the enactment of the EU Charter also brings new light to the question on whether or not freedom of expression aspects can allow a court to declare an otherwise infringing action as permissible, thus preventing the right-holder from claiming any sanction whatsoever.

It shall be noted that the ECJ has not yet been asked to rule on the compatibility between the Copyright Directive's rights and exceptions as such and freedom of expression.<sup>171</sup> But nevertheless, it is an interesting thing in itself that, to the extent clashes between copyright and freedom of expression falls within the scope of EU law, the question on whether a conflict can be solved 'internally' or 'externally' no longer only is a matter of whether higher-ranking national constitutional provisions should affect the application of domestic copyright rules, but also a matter of whether a judicial review on the conformity of EU secondary law with EU primary law should be undertaken. Therefore, it can reasonably again be recognized that the core lesson from the referred cases, most clearly expressed in paragraph 68 of *Promusicae*, is that national courts, when ruling on copyright cases that actualize rules contained in EU directives, must ensure that such provisions are not applied in a manner that violates fundamental rights enshrined in the EU Charter. This view also corresponds with Recitals 31 of the Copyright Directive that underlines that a fair balance must be struck between right-holders and users of protected subject-matter.

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<sup>171</sup> The closest we get is Case C-145/10 *Painer*, laid down on 1 December 2011, in which the ECJ was asked to rule on whether the publication of a photograph by the media was permissible since the purpose of the publication was to assist the police authority in a criminal investigation.

Against that backdrop, it seems reasonable to conclude that, since the national court would act ‘within the scope of EU law’ also when applying provisions that stem from the Copyright Directive’s articles on rights and exceptions, it will have to pay due respect to fundamental rights enshrined in the EU Charter also in such situations. And since EU law is superior even to provisions enshrined in national constitutions, it is no longer sufficient to solely refer to provisions in the Swedish constitution and statements in the domestic *travaux préparatoire* when assessing a defendants’ claim that an action should be declared permissible due to freedom of expression aspects. Also, it is worth noting, again, that the rights of the EU Charter can affect the outcome in cases that regards provisions that regulate relationships between private parties. If anything, a national court should keep in mind that it may be necessary to ask the ECJ for a preliminary ruling on cases that present such strong freedom of expression aspects that it could be on the map to e.g conduct a liberal application of exceptions enlisted in Article 5 of the Copyright Directive.

However, regardless of whether freedom of expression values are accounted for in the context of substantive or procedural law, the balance act between copyright and freedom of expression will likely be performed in the form of a proportionality test (however, in AG Villalóns opinion, the injunction sought by SABAM was regarded as such an unique measure that it did not even fulfill the requisite “prescribed by law”). As for procedural law applicable when a court assesses whether to grant an injunction, we have seen above that such a requisite already stems from general principles of Swedish law. The interesting thing then is the finding that also fundamental rights enshrined in the EU Charter shall be weighed on the scale when appropriate (including those protecting third party interests). However, in the case of substantive law, the balance of interests prerequisite stems only from Article 52 (1) of the EU Charter, Article 10 (2) of the ECHR and ECtHR case law.

It is of course up to the national courts to strike the balance in each individual case. However, as is obvious from the discussion in previous sections, the ECJ will likely be asked to present further guidance on the proper balance between copyright and freedom of expression in the years ahead. Since the ECtHR has provided no guidance on the matter, the ECJ has plenty of room to give its “own view” on what national courts need to consider. As we have seen above, Psychogiopoulou has pointed out that the ECJ held in *Scarlet Extended* and *Netlog* that national courts had to respect ‘in particular’ the defendants right to conduct a business, and that this underscores ECJ’s more economic approach to fundamental rights. If it is correct to assume that, in general, the ECJ takes special heed to economic rights, than it could possibly be predicted that the ECJ would find the need to protect copyright (a right that indeed has been

protected by several EU directives in order to ensure the EU's competitiveness in the global knowledge economy) very dire even when a political right such as freedom of expression is at stake. If so, it could be argued that the ECJ would possibly strike the balance in a different way than the ECtHR would in a similar case.

However, the assumption that the ECJ would favor copyright over freedom of expression *per se* can be questioned for several reasons. First, as regards the statement made by the ECJ in *Scarlet Extended* and *Netlog*, it could also be concluded that the Court in this regard actually noticed, albeit implicitly, that the users of the services were not part to the case and that the domestic court primarily had to consider the defendants interest before turning to third party interests. Second, in the common cases where a right-holder goes after infringers by requiring actions from intermediaries, it can again be noted that freedom of expression values will "team up" with a fundamental economic right (the right to conduct a business), which perhaps neutralizes the effect of an economic approach.

Third, even though the ECtHR has not ruled on the conflict between copyright and freedom of expression as such, it has laid down many rulings on the permissibility of restrictions on freedom of speech and as we have seen, the Strasbourg court tends to interpret these limitations restrictively. The ECJ is bound to pay due regard to ECtHR's guidance in this respect. Fourth, even if it would be correct to hold that the ECJ traditionally tend to find economic rights particularly defensible, it is perhaps in order to point out that it remains to be seen how ECJ case law is affected by the enactment of the EU Charter and the increased visibility of political rights. Seemingly, the only thing certain is that it will be interesting to follow how the courts will carve out the proper balance between copyright and freedom of expression in the years ahead.

In sum then, it seems reasonable to conclude that the harmonization of central aspects of copyright law within the EU, and the fact that fundamental rights today enjoy a strong and visible protection by supranational instruments directly applicable in domestic courts, have removed some barriers that in the past have forced *inter alia* Swedish courts to reject freedom of expression defenses in copyright disputes. However, to what extent arguments based on the constitutional right to freedom of expression can be *successfully* invoked in cases less obvious than *Scarlet Extended* and *Netlog*, meaning that the aspect not only is taken seriously but indeed helps the defendant to avoid liability or a certain sanction, is hard to predict in the absence of further precedents from the ECJ and the ECtHR. The persuasiveness of freedom of expression arguments will therefore heavily depend on how domestic courts assess the

circumstances present in each individual case and on *how* they apply constitutional provisions governing fundamental rights. However, if a freedom of expression argument is of such magnitude that it possibly could require considerations on how to balance rights enshrined in the EU Charter (interpreted in accordance with the ECHR) against each other, domestic courts may or should ask the ECJ for a preliminary ruling.

### **3.3 What are the consequences of applying, or not applying, the constitutional right to freedom of expression in copyright infringement cases?**

The examination of case law from various European courts proves that cases can arise in which a contested act does not fall in under any of the existing statutory copyright exceptions, but where a present freedom of expression aspect is of such dignity that it arguably could overtrump the interest of protecting copyright. These cases are of course troublesome for judges, given the fact that the court is asked upon to punish an action that actualize a value that belongs to the very cornerstones of a democracy. It shall therefore be welcomed that the development goes towards an increased acceptance for the horizontal effect of the fundamental right to freedom of expression in copyright cases.

Indeed, seen through the perspective of the subject who is exercising the right to freedom of expression, it would be hard to understand why a court should be allowed to “contribute” to the imposition of a restriction on this basic right only because the plaintiff is a private subject (quite likely a strong company) and not a state actor, not least since the court itself is an organ of the state.<sup>172</sup> Hence, the constitutional right to freedom of expression can constitute an important external tool, or lifebuoy as Hugenholtz has expressed it, which leaves courts and defendants in a less awkward position. At the same time, since copyright too is a fundamental right, the plaintiff may also have some benefits from the horizontal effects of fundamental rights in copyright disputes since, as Angelopoulos has noted, the two rights will be placed on an even footing.

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<sup>172</sup> A standpoint that corresponds with Westberg’s reasoning in *Privaträttsliga kontrakt och regeringsformen*, see footnote 30.

Furthermore, given the fact that the friction between copyright and freedom of expression has increased in recent time, it seems reasonable to conclude that so has the necessity of a horizontal application of these fundamental rights. Not least, this is demonstrated by the on-going policy discussion within the EU and in the legal doctrine. As we have seen, it seems to be widely acknowledged that the existing statutory exceptions within copyright law has become less adequate means by which to strike a proper balance between the two rights in the information society. And although this *de lege ferenda* discussion should not encourage a court to act prematurely and reach conclusions that are not in line with the current law, it does indeed highlight the importance of using all tools in the toolbox, including constitutional rights, in order to accommodate concerns related to freedom of expression. And while we have seen above that the Supreme Court of Sweden has acknowledged that in exceptional cases it could be forced to apply a provision in the Penal Code that regulates acts committed out of necessity, it would arguably be more appropriate to apply constitutional provisions in these situations.

The presentation above also unveils that the legislation in many Western countries provide more flexible exceptions within copyright law than does the EU copyright system. It may therefore be concluded that European courts are less properly equipped to balance the interests of copyright-holders against freedom of expression concerns in general and to meet the challenges imposed by new web technology in particular. By applying fundamental right provisions, courts could to some extent make up for this fact. Indeed, the lead words in the current policy-discussion seem to be ‘balance’ and ‘flexibility’. And as Angelopoulos has pointed out, an externalization of the conflict will achieve just that as Article 51 (1) of the EU Charter and Article 10 of the ECHR inherits balancing mechanisms. Also, we have seen above that Article 27 (1) of the UDHR and Article 15 of ICESCR provides for a flexible and balanced approach. Accordingly, fundamental rights instruments are seemingly well equipped to provide the flexible tools that the European copyright system seems to lack.

But with that said, it must also be acknowledged that a ‘constitutionalizing’ of a conflict per definition requires a true conflict. In other words, it seems appropriate after outlining the conclusions above to recognize that the starting point is, of course, that an action constitute an infringement and should be remedied accordingly if none of the statutory exceptions are applicable and that application of the fundamental right to freedom of expression reasonably should occur only in exceptional cases in which such interests are truly substantial. Indeed, a too frequent and broad application of the constitutional

right to freedom of expression would certainly be at the expense of legal predictability, which would be to the detriment of not only copyright-holders but also the users. Last but not least, the fact that a constitutionalizing of the conflict empowers the judiciary with enhanced discretion can be seen as a troublesome consequence since it moves the decision on how to strike a balance between two fundamental rights away from the democratically elected lawmaker and into the hands of the judges. Therefore, judges should remain cautious when considering these external solutions.

Moreover, the lawmaker should as a minimum be encouraged to provide clear guidance on under what circumstances a conflict between copyright and freedom of expression should be elevated to the human rights level and what factors a court needs to consider when performing the balance act. For example, what sorts of freedom of expression aspects are of such magnitude that they could possibly overtrump the interest of safeguarding copyright? And is it sufficient that the freedom of expression value at stake is significant or is it also necessary that the copyright-holder's interest at the same time is weak? Also, a particularly sensitive question is of course how a court should solve situations where a sought injunction is targeted against future, large-scale, actions that cannot be easily overlooked or predicted and where the impacts on the respective rights therefore are immeasurable.

### **3.4 Reflections on the hypothetical cases**

Obviously, the first hypothetical case presents striking similarities with the *Netlog* case. Accordingly, it follows from ECJ case law that the national court would have to take the defendant's argument (which concerns the rights of third parties) seriously and assess whether issuance of the injunction would violate Article 11 of the EU Charter. It would of course not be a matter of striking down copyright law as such, but rather to examine whether how far a copyright-holder is allowed to go in order to safeguard his right and to evaluate whether a strict application of copyright law in the present case would impede freedom of expression in an unreasonable way.

In this case, the sought injunction is circumscribed in several important ways compared to the one sought in *Scarlet Extended* and *Netlog*. Not least, the copyright-holder has offered to bear half of the cost and the system would only be monitoring activities by some of the users. It is therefore likely that the national court would have to ask the ECJ for a new preliminary ruling. And

although freedom of expression aspects would likely “team up” with other fundamental rights also in this case, the clash between the two rights discussed in this thesis would perhaps be more distinct (especially if the sought measure would not impose a general monitoring requirement on the intermediary, whereby EU secondary law does indeed provide a basis for the claim). Possibly, the ECJ would have to further elaborate on what freedom of expression related consequences a sanction that in practice leaves the assignment of censoring user-generated content to a technical system would cause.

The second hypothetical case is interesting since it concerns such a neighboring right that more recently was granted status as an ‘exclusive right’ according to the the Copyright Directive and the SCA. Also, it demonstrates how the web has empowered ordinary citizens with new and effective means by which to exchange important ideas and information in a way that promotes freedom of expression whilst at the same time is harming copyright-holders.<sup>173</sup> However, the case represents a “traditional” conflict between the interest of the copyright-holder and the interest of the public in freedom of expression, which has much in common with the referred Swedish case law. Seen only against the backdrop of e.g. the *Manifesto case*, it is difficult to see that a Swedish court would invoke the defendants’ constitutional right to freedom of expression and declare the act permissible.

But since Article 11 of the EU Charter and Article 10 of the ECHR could protect the publication of the video clip, and as the copyright-holder seemingly has not suffered any economic loss because of the publication, it can be put into question whether rights and exceptions stemming from provisions in the Copyright Directive should be applied and interpreted accordingly. Arguably then, the court should refer the case to the ECJ for a preliminary ruling that could provide much needed guidance on the closer relationship between copyright and freedom of expression in the European Union.

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<sup>173</sup> It can be noted that the mere posting of someone else’s film does not fall in under the definition of ‘UGC’ presented above, but that the blog post as such potentially can do that since the posting is accompanied by personal comments. However, whether we are dealing with UGC or not in this hypothetical case is, legally speaking, irrelevant in the absence of exceptions that directly exempts such dispositions from the scope of copyright protection.

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