

Copyright, freedom of speech and the news

Evaluating a proposed EU neighbouring right for news publishers

Abstract

The EU Commission is currently proposing to create a ‘neighbouring right’, a right related to copyright, to benefit news publishers. This is contentious. One area of controversy is whether any such right will breach free speech law. Whether it will or not so is difficult to say, given the complexity of the relevant inter-relating copyright regimes and free speech laws that exist.

However, the question can be simplified by analyzing the possible relationships of copyright and free speech in different jurisdictions. This leads to the conclusion that the CJEU is likely to try to scrutinize any EU neighbouring right internally: that means not subjecting to a review external to copyright and related laws. But such an approach is deficient. In particular, the narrow interpretation of the closed list of exceptions to copyright found in the Information Society Directive is likely to result in insufficient regard being paid to the interests of the audience.

Keywords

Freedom of expression law, copyright law, proposed EU neighbouring right for publishers.

Introduction¹

The news industry is widely seen as being in turmoil, in many countries in Europe and in America. One central problem is the inability of many advert-funded commercial news companies to adapt their business models to an environment that has been fundamentally changed by the Internet. Their difficulty is in generating enough profit to sustain the type and range of activities that they have undertaken in the past. Such problems are so great that many companies have retrenched, shrunk or gone bankrupt.

Many commentators see this as a looming catastrophe – not only for a productive sector of the information economy, but also for democratic communication. News, it has been said, is the lifeblood of a democracy, and commercial advertising-funded news has played a central part its production for three centuries.² Society, such commentators

¹ The author gratefully appreciates the invaluable criticism of an earlier draft of this paper from Professors Lionel Bently and Ian Hargreaves. It evolved from a working document prepared for the AHRC-funded project, details of which can be found here: Centre for Intellectual Property and Information Law University of Cambridge, (2016) <<http://www.cipil.law.cam.ac.uk/research/appraising-potential-legal-responses-threats-production-news-digital-environment-ahrc>> accessed 13 June 2016, AHRC grant H/L004704/1.

² Walker describes the first advertisement appearing in an English newsbook – a forerunner of a newspaper – in 1624, and by 1648, a newsbook regularly including advertisements: R. B. Walker, ‘Advertising in London Newspapers, 1650 - 1750’ (1973)

argue, would feel its loss, keenly.³ But others, by contrast, are more phlegmatic. They see the crisis as over-stated. Or, perhaps, admit there are problems, but see them as opportunities to remake, and improve, the means by which news is generated and circulated in society. Some critics follow Habermas,⁴ and consider aspects of the commercial news industry to be a detriment, not a benefit to democratic discourse and the public sphere.⁵ Or hold that the turmoil heralds the death throes of a doomed business model, but do not consider this to be a problem. Following Schumpeter,⁶ they foresee valuable new ways of making money being created by this destruction.⁷

15:2 Business History 112. Pettegree notes that by the early years of the eighteenth century, adverts were regularly carried in news publications: A. Pettegree, *The Invention of News : How the World Came to Know About Itself* (New Haven ; London, England: Yale University Press, 2014), 303.

³ For example, A. Jones, *Losing the News: The Future of News That Feeds Democracy* (Oxford: Oxford University Press, 2009), and the selection of different perspectives contained in found in .R. McChesney and V. Pickard, *Will the Last Reporter Turn out the Lights: The Collapse of Journalism and What Can Be Done to Fix It* (New York: New Press, 2011).

⁴ J. Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* (Cambridge: Polity, 1989).

⁵ For example, R. McChesney, *Digital Disconnect* (New York, London: The New Press, 2013).

⁶ J. Schumpeter, *Capitalism, Socialism and Democracy* (London: Unwin University Books, 3rd ed, 1950).

This paper does not engage with this debate head on, but discusses an aspect of it that concerns copyright and freedom of speech law. This is because, on the assumption that there is a crisis, and that this amounts to a serious economic and democratic problem, attention has turned in many countries to copyright and related laws as possible means to help the news industry. A lot is at stake, perhaps the viability of many companies, and there is a hope that copyright and related laws can be part of the solution. Clarifying the extent to which this is plausible, legally, is important, for legislators, those who run commercial news businesses, journalists, and for the wider public.

The attraction of copyright and related laws

It is not difficult to see why copyright has become a focus of attention for those seeking to help the news industry. For, if copyright and related laws can help commercial news organisations increase revenue, then this may help alleviate some of the turmoil. But there are also other reasons. There are natural rights arguments, related to the creativity and investment involved in the processes that generate news, that can support the case that copyright and related rights are an appropriate policy tool for any intervention.

People working in the industry gather, select, edit, produce, write, arrange, publish and

⁷ For example, J. Naughton, *From Gutenberg to Zuckerberg: Disruptive Innovation in the Age of the Internet* (New York, London: Quercus, 2014).

distribute news, in a variety of creative and expensive ways,⁸ and copyright can be seen as a means of recognising and protecting this creativity and investment.

Moreover, news publishers argue that many digital communications companies, and in particular Google, free ride on their efforts.⁹ Such companies, the argument goes, derive profit by performing actions in relation to published content that should entail copyright liability. Intervention by means of copyright and related rights, they argue, is appropriate to deal with the mischief that is occurring. And finally, there is the argument that many other publishers receive particular protection under copyright and related laws, and so from the point of view of equality, so should news publishers.¹⁰

German and Spanish legislation, and the proposed European neighbouring right

Arguments such as these have led to at least two prominent instances in Europe of copyright-related legislation intended to benefit the commercial news industry. One occurred in Germany in 2013, when a law was passed that introduced a right related to

⁸ A useful comparison of the news gathering process in various different sectors of the industry is found in Mediatique, *A Report for Ofcom (Annex 6 to Ofcom's Advice to the Secretary of State for Culture, Olympics, Media and Sport)* (2012).

⁹ For example, R. Levine, *Free Ride: How the Internet Is Destroying the Culture Business and How It Can Fight Back* (London: Vintage, 2012), chapter 4.

¹⁰ European Publishers Council and others, 'Publishers' Right in a Digital Age' (2016) <<http://www.publishersright.eu>> accessed 13 June 2016.

copyright for press publishers, the Leistungsschutzrecht für Presseverleger.¹¹ Spain saw another in 2014, when the exception in Spanish copyright law that permits quotation of copyright works was amended in a way that benefitted news publishers.¹² Despite both being copyright-related, these interventions operate in different ways. The German measure amounts to an exclusive right that benefits some news publishers, while the Spanish law creates, in effect, a remuneration right.

But more significantly for present purposes, policy makers continue to be attracted to copyright and related laws as a means of benefitting the commercial news industry. The European Commission has proposed that there should be a pan-EU right for publishers in general, and in particular news publishers, which it terms a ‘neighbouring right’. The idea was mooted in the Commission’s Communication in December 2015,¹³

¹¹ §87f - H German Copyright Act, as Amended; English translation at (2016)

<http://www.gesetze-im-internet.de/englisch_urhg/> accessed 22 August 2016.

¹² Article 32.2 Texto Refundido De La Ley De Propiedad Intelectual (Spanish Intellectual Property Law), Approved by Royal Legislative Decree 1/1996 of April 12, as Amended. Xalabarder provides a translation at R. Xalabarder, ‘The Remunerated Statutory Limitation for News Aggregation and Search Engines Proposed by the Spanish Government; Its Compliance with International and Eu Law’ (*infojustice.org*, 2014) <<http://infojustice.org/archives/33346>> accessed 10 October 2014.

¹³ European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Towards a Modern, More European Copyright Framework* (2015).

and there was a consultation on the idea in the spring of 2016.¹⁴ Concrete proposals are expected to be published in the autumn of this year.

Is this a good idea? Not everyone thinks so, to say the least. Just as the use of copyright and related rights to assist the news industry in Germany and Spain was deeply controversial, so too is the proposed EU neighbouring right.

The grounds of controversy are various. Some critics question, as has been noted, the idea that there should be any assistance offered to the commercial news industries in the first place. But even those who accept that some intervention is merited, question whether an EU right derived from copyright and related laws is the correct tool to use. Will any new right work? Will, in particular, a neighbouring right provide enough money to resolve any crisis that exists? The evidence from the German and Spanish laws is not promising, to say the least.¹⁵ Will there not be other harmful consequences of such a law? Might it harm the efficient functioning of the Internet? Would it breach regional or

¹⁴ European Commission, ‘Public Consultation on the Role of Publishers in the Copyright Value Chain and on the ‘Panorama Exception’’ (2016)
<<https://ec.europa.eu/digital-single-market/en/news/public-consultation-role-publishers-copyright-value-chain-and-panorama-exception>> accessed 13 June 2016.

¹⁵ See the discussions of Professors Xalabarder and Grünberger at the CIPIL / IViR conference (text to n 16) transcript available at Centre for Intellectual Property and Information Law University of Cambridge, ‘Conference: Copyright, Related Rights and the News in the Eu: Assessing Potential New Laws’ (2016)
<<http://www.cipil.law.cam.ac.uk/seminars-and-events/conference-copyright-related-rights-and-news-eu-assessing-potential-new-laws>> accessed 13 June 2016.

international copyright doctrines? And are actors such as Google really free riding on the effort of news publishers, or in fact promoting it?

Much attention has been paid to some of these issues. Many were canvassed at a conference was organised by Cambridge University's Centre for Intellectual Property and Information Law (CIPIL) and Instituut voor Informatierecht (IViR) at the University of Amsterdam on the 23rd April 2016, where the proposed EU neighbouring right was discussed.¹⁶ But there is one area of controversy that has not attracted so much attention. This is the question of the extent to which any such right would violate free speech law.¹⁷ It is this that is the focus of this paper.

Summary

The analysis proposes a way to understand the interface between free speech laws on the one hand, and copyright and related laws on the other. I will explain how this helps us understand the impact that a proposed EU neighbouring right would have on freedom of speech law, by comparing some recent jurisprudence of the US Supreme Court, the European Court of Human Right (ECtHR) and the Court of Justice of the European Union (CJEU). Four points will emerge, and their implications considered. It is useful to summarise them, briefly, here.

¹⁶ *Ibid*

¹⁷ Although there is a significant difference between 'freedom of speech' and 'freedom of expression', the difference is not particularly salient in the content of this paper. I will therefore use the terms interchangeably, unless the context requires more specificity.

The first is that, if a new EU neighbouring right is created, this may well disturb the delicate balance – the on-going ‘definitional balance’¹⁸ – found by the CJEU in EU law between speech and copyright laws. The second point is that the CJEU will strive to deal with any challenge that does occur to the proposed right by a process of ‘internal review’.¹⁹ However, in contrast, the ECtHR is likely to consider such a right to be at least susceptible to an external free speech review. This may lead to conflict between the two courts.

The third relates to the interests of the audience who read and consume news. Both the CJEU and the ECtHR recognise the importance of the interests of the audience to receive information, when considering whether copyright and related rights are consonant with free speech law. The interests of the audience will be of prime importance in any assessment of the EU neighbouring right.

The fourth point is that this will pose difficulties for the CJEU’s preferred process of internal review. In particular, in order to take account of the interests of the audience, there will be pressure to change the way the CJEU interprets some copyright exceptions, and to approach these in a more liberal way. This may well mean that the closed list of exceptions contained in the Information Society Directive²⁰ begins to resemble more closely the open exception of the US doctrine of fair use.

¹⁸ The term is explained in the text to, and n 27.

¹⁹ The term is explained in the text to n 24.

²⁰ Directive 2001/29/Ec of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the

All in all, any challenge to an EU neighbouring right at the CJEU is likely to test the CJEU's current approach to reconciling the tension between copyright and related laws and free speech, and have long term implications not only for those interested in news and the news business, but also for the relationship between the laws of freedom of speech and copyright and related laws in Europe.

The proposed EU neighbouring right and free speech laws

Those who wish to evaluate whether the proposed EU neighbouring right breaches free speech law face a difficult task. This is for a number of reasons, foremost of which is that we do not have a text of any proposed EU neighbouring right to consider. This is important because, as was seen in respect of the German and Spanish laws, differences in the way in which any copyright-related news publishers' right is worded can lead to significant differences in the ways such laws operate, and so the ways in which they affect freedom of speech. Moreover, European copyright law is incompletely harmonised, and differences in the copyright and related laws in Member States are likely to have an effect on the way any EU neighbouring right will operate in different countries.

The picture is further complicated because, when considering how the EU neighbouring right will work, there are a variety of different free speech laws that need to be considered. Principal amongst these are the subtly different free speech guarantees

Information Society (Information Society Directive, InfoSoc Directive). The exceptions are contained in Article 5.

contained in Article 10 of the European Convention on Human Rights (ECHR)²¹ and Article 11 of the Charter of Fundamental Rights of the European Union (the ‘Charter’),²² but also one should consider the effect of Member States’ fundamental and constitutional rights regimes. This leads to a fourth difficulty, that of institutional competence. No single court has exclusive authoritative jurisdiction over the copyright and free speech codes that will be engaged by any EU neighbouring right. The Court of Justice of the European Union is the apex court in relation to the copyright and related rights and free speech provisions of European Union law. But the European Court of Human Rights is

²¹ (1) 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. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

²² (1) 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. (2) The freedom and pluralism of the media shall be respected.

the final arbiter when it comes to interpreting the ECHR, and Member States courts possess the authority to interpret various domestic fundamental and constitutional rights provisions. It is difficult to predict how each court will respond to any challenge to an EU neighbouring right. And, of course, Brexit further complicates matters.

So it is difficult to evaluate the proposed EU neighbouring right against specific European free speech laws: indeed, even if there were a text, it is doubtful that one could evaluate it concisely. However, there does remain useful work that can be done. This is because one can consider how the proposed EU neighbouring right relates to free speech law in general terms. Such consideration draws on recent scholarly and doctrinal work that examines the relationship between copyright and related laws and fundamental rights – including freedom of speech.²³

One way of conceiving the relationship between copyright and related laws, and freedom of speech law

One useful way of conceiving the relationship between copyright and related laws and freedom of speech law is that there are, generally speaking, three ways in which the bodies of law interact. The first is that copyright is seen as not subject to an external free speech review – by this I mean that copyright and related laws are not considered subject

²³ For example, C. Geiger and E. Izyumenko, ‘Copyright on the Human Rights’ Trial: Redefining the Boundaries of Exclusivity through Freedom of Expression’ (2014) 45(3) *International Review of Intellectual Property and Competition Law* 316, and C. Geiger, *Research Handbook on Human Rights and Intellectual Property* (Cheltenham: Edward Elgar, 2015).

to a review from a body of law external to copyright, to assess the extent to which they comply with free speech guarantees. The second is that copyright and related laws are considered to be subject to an external free speech review. Where this is the case, courts are prepared to assess copyright and other similar laws against the rules set out in freedom of speech laws, to see if free speech guarantees are breached.

The third possibility is the position between these two. This is the position where copyright is not subject to an external free speech review, but neither is it considered always to take sufficient account of free speech concerns. Here, copyright can be subject to what Grosse Ruse-Khan has described as an ‘internal review’ to ensure that it complies with free speech.²⁴

Examples from three jurisdictions

The law of the US, ECtHR and CJEU demonstrate each of these possibilities. In the US, copyright and related laws are considered immune to external free speech review, in that the First Amendment has no external purchase on copyright. This is because the Supreme Court considers that US copyright law as a body of doctrine already sufficiently incorporates free speech concerns. There are number of features of US copyright doctrine that, it is argued, achieve this balance, many of which were identified by Melville

²⁴ H. Grosse Ruse-Khan, ‘Overlaps and Conflict Norms in Human Rights Law: Approaches of European Courts to Address Intersections with Intellectual Property Rights ’ in Christophe Geiger (ed), *Research Handbook on Human Rights and Intellectual Property* (Cheltenham: Edward Elgar, 2015).

Nimmer in a seminal article written in 1970.²⁵ These include the idea/expression dichotomy,²⁶ the limited duration of copyright, and (though Nimmer was less convinced about this) the fair use privilege.

Nimmer called this process ‘definitional balancing’, because in his view, the US Supreme Court defined certain speech acts as ‘not speech’, and so not benefitting from the protection afforded by the First Amendment. In the case of the idea/expression dichotomy, for example, Nimmer suggested that expressions should not be classed as ‘speech’ for the purposes of the First Amendment, and so need not be protected – while, by contrast, ideas are considered to be ‘speech’, and should be protected. Accordingly, the copying of ideas is protected by the First Amendment and not restricted by copyright, while the copying of expressions is not protected by the Constitution’s speech guarantee, and is restricted by copyright.

²⁵ M. B. Nimmer, ‘Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?’ (1970) 17 UCLA Law Review 1180.

²⁶ This is the idea that copyright protects the expression of an idea, but not the idea itself. For an account of the dichotomy, its historical effects on news reporting, and its origins in nineteenth century English law, see L. Bently, ‘Copyright and the Victorian Internet: Telegraphic Property Laws in Colonial Australia’ (2004) 38 Loyola of Los Angeles Law Review 71 96-106. For the international context of copyright and news from the late nineteenth century, directly relevant to the idea/expression dichotomy, see H. Tworek, ‘Protecting News before the Internet’ in Richard John and Jonathan Silberstein-Loeb (eds), *Making News: The Political Economy of Journalism in Britain and America from the Glorious Revolution to the Internet* (OUP, 2015).

Obviously there is no question of challenging the EU neighbouring right under American law, but it is worth discussing, as the US position highlights some important issues that are useful when considering other jurisdictions. Not least of these is the notion of definitional balancing, which – when taken out of the context of the US First Amendment – can be understood as describing the process whereby mechanisms internal to copyright law seek to bring about the protection of freedom of speech. This is a feature found in the copyright laws of many jurisdictions.²⁷

²⁷ Grosse Ruse-Khan (n 24) sets out some of these mechanisms, including ‘general concepts of balancing and proportionality (as expressed in Articles 7 and 8 TRIPS [Trade Related-Aspects of Intellectual Property Rights], exceptions and limitations, compulsory licensing, the public domain...’; and see Xalabarder (n 12). Some hold that provisions such as these provide sufficient protection for freedom of speech concerns: eg R. P. Merges, *Justifying Intellectual Property* (Cambridge, Mass. ; London: Harvard University Press, 2011) 19, who talks of intellectual property laws ‘baking in’ third party rights, including to freedom of speech. In English law, this view was prefigured by Morritt VC in *Ashdown V Telegraph Group Ltd* [2001] Ch 685 (High Court): ‘the balance between the rights of the owner of the copyright and those of the public has been struck by the legislative organ of the democratic state itself’, [13]. However, Morritt VC was overruled in *Ashdown V Telegraph Group Ltd* [2001] EWCA (Civ) 1142, when the Court of Appeal found that provisions such as these may provide necessary – but do not provide sufficient – protection of freedom of speech: [38 – 45]. The Court of Appeal’s view is normatively much more convincing, as demonstrated by the discussions in E. Barendt, *Freedom of Speech* (Oxford University Press, 2nd ed, 2007) 247 – 60, J.

By contrast, the ECtHR is a good example of a court that has held copyright to be appropriately subject to an external free speech review. This, perhaps, is unsurprising, given the competence of the court, as the ECtHR has no direct control over the copyright and related law of the member states of the Council of Europe. Given this, it was perhaps inevitable that the Court would reject definitional balancing: the ECtHR is prepared to scrutinise copyright provisions to see if they breach the free speech guarantee contained in article 10 of the ECHR. This means that the proposed EU neighbouring right could be challenged at the ECtHR. Whether it does breach article 10 or not depends, of course on the exact nature of the wording of the right, and on other issues. Moreover, even if the EU neighbouring right breaches article 10, the Court will only find a violation of article 10 where, for example, the interference with free speech is disproportionate.

The position at the CJEU is more complex, and lies somewhere between that of the US and the ECtHR. The CJEU does consider that copyright should be balanced with fundamental rights, including the right to freedom of expression contained in article 11 of the Charter. However, the CJEU has not accepted the notion that copyright and related laws as a set of rules has achieved a definitional balance. But nor has it completely rejected the notion. The CJEU rather seeks to achieve definitional balancing of speech

Griffiths and R. Deazley, 'Copyright Law, Article 10, and Media Freedom' in Helen Fenwick and Gavin Phillipson (eds), *Media Freedom under the Human Rights Act* (Oxford: Oxford University Press, 2006), and J. Griffiths, 'Pre-Empting Conflict - a Re-Evaluation of the Public Interest Defence in UK Copyright Law' (2014) 34 *Legal Studies* 76. Doctrinally, this is also the view of the ECtHR: see the discussion above, and the text to and following n 50. See also the discussion in the text to n 40.

and copyright (and related laws) as an on-going process. This is achieved mainly by the interpretation of EU laws, but the CJEU has also recommended that the balance can be achieved in the way Member States transpose EU laws. This is the kind of process Grosse Ruse-Khan has described as subjecting copyright to an ‘internal review’.²⁸ In practice, this means that the EU neighbouring right can be challenged at the CJEU on the grounds that it breaches free speech, but that this challenge will largely take place in the interpretation of copyright law, and its transposition from EU to national levels.

Analysing each of these situations in more detail draws out the four points that are relevant to an evaluation of the extent to which an EU neighbouring right is likely to be compliant with aspects of European free speech law.

United States Supreme Court

The US Supreme Court has said that copyright is immune from an external speech review by the First Amendment. This might come as somewhat of a surprise, because as Nimmer pointed out more than forty years ago, copyright on its face appears inconsistent with the First Amendment.²⁹ This, famously, is expressed in absolute terms – ‘Congress shall make no law ... abridging the freedom of speech, or of the Press’. Yet copyright appears to be just such a law that has just such an effect. Moreover, as the Constitution expressly authorises Congress to pass copyright granting exclusive rights to authors to their writing

²⁸ Grosse Ruse-Khan (n 24).

²⁹ Nimmer, ‘Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?’ (n 25).

– the ‘copyright clause’—so there appears to be a tension between two elements of the founding texts of the US. Nimmer described this in 1970 as a ‘largely ignored paradox’, and proposed it could be resolved by invoking the notion of definitional balancing.

Fifteen years later, Nimmer’s terminology was expressly adopted by the US Supreme Court in the case of *Harper & Row v Nation Enterprises*, where the court observed that ‘copyright’s idea/expression dichotomy ‘strike[s] a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author’s expression.’³⁰ This view was endorsed in *Golan v Holder*, the current leading case on the relationship between the two bodies of law.³¹ The *Golan* court confirmed the view that free speech concerns are sufficiently accounted for by facets of copyright law, such as the fair use doctrine: definitional balancing.

Interestingly though, as Neil Netanel observes, the position of the Supreme Court has shifted subtly.³² It has begun to concede that there is a *prima facie* tension between speech and copyrights, a view it earlier rejected. So in *Harper*, for example, the Court explained that the apparent tension between speech freedom and copyright could be resolved when it was borne in mind that copyright can be seen as a systemic contributor to freedom of speech. O’Connor J explained: ‘the Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one’s

³⁰ *Harper & Row V Nation Enterprises* 471 US 439 (1985) 195.

³¹ *Golan V Holder* 132 S Ct 873 (2012).

³² N. W. Netanel, ‘First Amendment Constraints on Copyright after *Golan V Holder*’ (2013) 60 UCLA Law Review 1082.

expression, copyright supplies the economic incentive to create and disseminate ideas'.³³ In one sense, O'Connor was denying that there was any tension between copyright and freedom of speech.

This thesis of Justice O'Connor's was cited with approval in a later Supreme Court case on the relationship between copyright and freedom of speech, *Eldred v Ashcroft*.³⁴ However, it is no longer the preferred explanation as to how copyright relates to the First Amendment. This is because in *Golan*, it was accepted that 'some restriction on expression is the inherent and intended effect of every grant of copyright'. By recognising this, which is surely accurate, the court accepted what Justice O'Connor denied in *Harper & Row*, namely that there can be a tension between free speech and copyright.³⁵

Unsurprisingly US copyright litigation in recent times has demonstrated the vitality of definitional balancing in US law. An example can be found in litigation relating to the commercial news industry, the 2013 case of *Associated Press v*

³³*Harper & Row V Nation Enterprises* *ibid* (n 30). Other US authorities support such a view, for example: *Dallas Cowboys Cheerleaders Inc V Scorebord Posters, Inc* 600 F 2d 1184 (5th Cir, 1979) 'The judgment of the Constitution is that free expression is enriched by protecting the creations of authors from exploitation by others, and the Copyright Act is the congressional implementation of that judgment'.

³⁴ *Eldred V Ashcroft* 538 US 916 (2003) 219.

³⁵ The tension between free speech and copyright is complicated by the fact that copyright and related laws can contribute to the production of new expression, while at the same time inhibit the recirculation of already existing expressions.

Meltwater.³⁶ In this case, heard in the US District Court for the Southern District of New York, Associated Press brought an action against Meltwater, a media monitoring organisation – an organisation that surveys media coverage on certain subjects, and reports the findings to a client. AP argued that Meltwater was infringing their copyright by various activities. The infringement alleged related not only to copyright, but also to a breach of the ‘hot news’ misappropriation tort.³⁷ Meltwater countered by arguing that their actions were protected by the doctrine of fair use.

The case proceeded to a cross-application for summary judgment, which Meltwater lost. But what is interesting for present purposes is that at no point in the judgment was the issue of the First Amendment raised. Given the approach of the US Supreme Court in *Golan* that it is unnecessary to consider First Amendment issues outside the framework of the copyright and related laws one can understand why. As the Supreme Court has indicated that the law assumes that free speech concerns are sufficiently accounted for in the corpus of copyright and related law, there was no prospect that such a point would succeed.

³⁶ *Associated Press V Meltwater* 931 FSupp2d 537, SDNY Mar 21, 2013 (US District Court for Southern District of New York).

³⁷ This tort originated in *International News Service V Associated Press* 248 US 215 (1918), but its existence and ambit today is unclear. See, for example, S. Balganes, ‘The Uncertain Future of "Hot News" Misappropriation after Barclays Capital V Theflyonthewall.Com’ (2012) 112 Columbia Law Review Sidebar 134.

Points of relevance to the proposed EU neighbouring right

What is the relevance of this brief survey of US doctrine to the proposed EU neighbouring right? There are two points to draw out.

Legislation may upset the balance

The first point is that, as Netanel argues, the notion that a definitional balance between speech and copyright is achieved by US doctrine is a contingent, not a necessary fact. The law has, in other words, been developed by the Court in such a way that the two interests are now protected, but there is no guarantee that this was inevitable. Nor is it true that this will always be the case. If the law changes, this delicate balance may well be upset. Hence Netanel argues that, when a new intervention related to copyright is proposed, it should be assessed as to whether it ‘disturbs ... copyright’s free speech accommodations’. He describes two examples of such interventions that in his view disturb this accommodation, the Digital Millennium Copyright Act of 1998’s anticircumvention provisions, and provisions relating to intermediary liability.

One need not consider his argument about those pieces of legislation, but only recognise the issues it raises relevant to the current discussion of the EU neighbouring right. The point to carry across is that it is important in any system that seeks to balance speech and copyright interests internally, that there is an assessment of any new copyright-related legislative act as to how and whether it affects this balance. This, it will be seen, applies to the proposed EU neighbouring right.

The importance of flexible fair use

The second is that, again as Netanel argues, definitional balancing only is a coherent idea in US law given the development of various aspects of US doctrine. These include the flexible US fair use defence. Why is this so? A commonly described explanation relates to limitations of the idea/expression dichotomy.³⁸ Despite some assertions to the contrary,³⁹ this is insufficient to protect speech interests by itself. Amongst other things, that is because it is axiomatic in freedom of speech law that freedom of speech entails that on occasion individuals should be able to choose the exact words in which they express themselves. As the US Supreme Court observed in the 1971 case of *Cohen v California*, ‘we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process’.⁴⁰ But this freedom to choose one’s exact words, on occasion, may exist even if the use of these words is

³⁸ Netanel’s observations about the limitations of this as a sufficient protection for speech is echoed by others, in other jurisdictions. For example, *Ashdown V Telegraph Group Ltd* (n 27) [39]-[46].

³⁹ *Harper & Row V Nation Enterprises*, (n 30).

⁴⁰ *Cohen V California* 403 US 15 (1971), referring to a Vietnam War protestor’s use of the words ‘Fuck the Draft’ written on the back of his jacket. The point is recognized in other jurisdictions: for example, *Fressoz and Roire V France* (2001) 31 EHRR 2; *Jersild V Denmark* (1994) 19 EHRR 1: ‘the Court recalls that Article 10 protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed’. The issue is discussed in Barendt, *Freedom of Speech* (n 27) 249, 258. See also n 27.

restricted by copyright. Therefore, it cannot be right to suggest that people's speech interests are always sufficiently protected by the idea/expression dichotomy, as this only permits the repetition of ideas and not particular words. Sometimes, it is the use of those particular words that freedom of speech should protect. As Netanel explains:

The indeterminacy of where expression ends and idea begins has long been a fault line in copyright doctrine. That is bad enough. But if the idea/expression dichotomy is what saves copyright from running afoul of the First Amendment, we now have a problem of constitutional dimensions. If, in forbidding the copying of the overall look and feel of a copyrighted work, copyright law in fact chills a speaker's use of ideas or facts in that work, copyright law raises serious First Amendment concerns.⁴¹

This is not to say, of course, that freedom of speech demands that there should be no protection for expression, but only that on occasion copyright must permit the liability-free use of expressions in order to comply with the demands of freedom of speech.

Which occasions? Those, for example, covered by the defence of fair use. Hence, it is not the idea/expression dichotomy by itself that sufficiently protects speech. The definitional balance of speech within copyright is also achieved by other features within the body of copyright law are of great importance, and in particular, the defence of fair use.

⁴¹ Netanel, 'First Amendment Constraints on Copyright after *Golan V Holder*', (n 32)

1107.

The importance of the *flexibility* of fair use emerges when one considers the position of photographs. Indeed, this is a point that Nimmer himself made. Photographs are relevant, because on occasion, they collapse the idea and the expression into one artefact. Nimmer describes why this is so, using the example of news.

Consider the photographs of the My Lai massacre.⁴² Here is an instance where the visual impact of a graphic work made a unique contribution to an enlightened democratic dialogue. No amount of words describing the “idea” of the massacre could substitute for the public insight gained through the photographs.⁴³

If the law, therefore, restricts the copying of photographs on all occasions, it unduly compromises freedom of speech: there will be occasions when freedom of speech ought to permit the liability-free copying of photographs. This does not mean that it is never appropriate to afford such works copyright protection. But it does mean that on occasion – for example, again perhaps under the circumstances set out in the doctrine of fair use - freedom of speech demands that it should be permissible for news photographs to be copied.

Evidently, the copyright and free speech law in the US is greatly different to that found in the EU, and its member states. However, there are sufficient similarities to recognise how important it is to have a flexible set of exceptions to copyright and related

⁴² A massacre of civilians perpetrated by American troops during the Vietnam War.

⁴³ Nimmer, ‘Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?’, (n 25) 1197.

right for a definitional balance to work.⁴⁴ The situations when a photograph, for example, should be permitted to be used by an infringing speaker without copyright liability will be difficult to predict in advance, but a system that purports to balance speech and copyright (and related interests) needs to be sufficiently flexible to recognise these situations. For example, where a system of copyright does not permit the possible unrestricted use of photographs in circumstances when freedom of speech law would consider it appropriate, it does not provide sufficient protection for freedom of speech.⁴⁵ This, it will also be seen, is relevant to discussions about the CJEU's approach to assessing a potential EU neighbouring right.

⁴⁴ The idea that use of a photograph can be protected by free expression guarantees, even when it is a copyright protected work, is recognized outside the US. For example, *Verlagsgruppe News GmbH V Austria (No 2)* Application no 10520/02, 14th December 2006 [29-30], and the useful discussion in Griffiths, 'Pre-Emptying Conflict - a Re-Evaluation of the Public Interest Defence in UK Copyright Law' (n 27) 89, 95 -97.

⁴⁵ This, on the face of it, is the position in the UK's Copyright Designs and Patents Act (CDPA) 1988, s 30(2). The point is discussed in *Ashdown V Telegraph Group Ltd* [2001] EWCA (Civ) 1142, and the limitations of this aspect of the CDPA regime recognised. The CDPA s 171(3) public interest defence may alleviate the situation: the question is analysed in Griffiths, 'Pre-Emptying Conflict - a Re-Evaluation of the Public Interest Defence in UK Copyright Law' (n 27).

European Court of Human Rights

The position of the ECtHR on the relationship between copyright and related laws and free speech is clearly different to that of the US Supreme Court, as the ECtHR has rejected definitional balancing. It has accepted that copyright and related laws should be subject to free speech scrutiny. This, as has been mentioned, is perhaps not surprising, given the lack of control that the ECtHR has over the copyright and related laws of member states.

But, perhaps what is surprising is that this acceptance that copyright could be subject to external free speech review was not clear until the early years of this decade. This was because the court had provided little authority on the question of the relationship between copyright and freedom of expression under the Convention.⁴⁶ As recently as September 2012, the President of the ECtHR, Judge Dean Spielmann described the case law of the ECHR on the relationship between copyright and freedom of expression as ‘scant’.⁴⁷

⁴⁶ *Société Nationale De Programmes FRANCE 2 v. France* (dec.) (ECommHR, No. 30262/96, 15 January 1997, unreported) and in *N.V. Televizier v. The Netherlands* (report) (ECommHR, No. 2690/65, 3 October 1968, unreported), discussed in Geiger and Izyumenko, ‘Copyright on the Human Rights’ Trial: Redefining the Boundaries of Exclusivity through Freedom of Expression’ (n 23).

⁴⁷ D. Spielmann, ‘Variations on an Original Theme: Music and Human Rights’ in Joseph Casadevall and others (eds), *Freedom of Expression Essays in Honour of Nicolas Bratza, President of the European Council of Human Rights* (Wolf Legal Publishers, 2012), cited

How the two rights relate is not clear from the text of the Convention itself, as both speech and copyright are protected. Expression is protected by article 10, and intellectual property by article 1 of protocol 1.⁴⁸ And, unlike the absolute nature of the wording of the US First Amendment ('Congress shall make no law...abridging the freedom of speech, or of the press'), article 10 is not drafted in absolute terms. That means it is not obviously in tension with copyright and related laws. And so, unlike the position in America, the drafting of article 10 does not necessarily lead to a 'largely ignored paradox'.

in D. Voorhoof, 'Freedom of Expression and the Right to Information: Implications for Copyright' in Christophe Geiger (ed), *Research Handbook on Human Rights and Intellectual Property* (Cheltenham: Edward Elgar, 2015).

⁴⁸ (1) Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. (2) The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties. Geiger and Izyumenko, 'Copyright on the Human Rights' Trial: Redefining the Boundaries of Exclusivity through Freedom of Expression' (n 23) challenge whether copyright and wider IP rights ought to be protected under article 1, protocol 1

However, in two cases from 2013, the ECtHR determined that copyright as a code was indeed subject to free expression review. As Geiger and Izyumenko have pointed out:

according to the ECtHR, freedom of expression has to be considered as the point of departure, the principle from which copyright law deviates: in this sense, the rule becomes the exception and the exception becomes the rule, challenging the prevailing traditional position in copyright law.⁴⁹

The first case to make this clear was *Ashby Donald and Others v France*,⁵⁰ a decision on the merits, and the second was *Neij and Sunde Kolmisoppi v Sweden*, the ‘Pirate Bay’ case, an admissibility decision.⁵¹ A variety of questions about the exact nature of the relationship between article 10 and copyright have been left unanswered by the decisions, but the question of whether copyright as a doctrine is subject to external free speech review was clarified. This is because both decisions confirmed that convictions for copyright breach, even if arrived at after due regard to the protections for speech that are embedded in copyright law, can amount to an interference with freedom of expression.

⁴⁹ *Ibid*

⁵⁰ *Ashby Donald V France* Application No 36769/08 (10 January 2013) [2013] ECHR 28 (5th Section).

⁵¹ *Neij V Sweden* (Admissability) App No 40397/12, (2013) 56 EHRR SE 19.

Ashby Donald related to the publication online of photographs of a fashion parade in France. A French statute restricted the publication of such photographs, and the photographers were ultimately found to be in breach of French criminal and civil law. They appealed to the European Court of Human Rights, and argued that their article 10 right of freedom of expression had been violated by their conviction.

The court found that it had not, but came to this conclusion after applying the margin of appreciation – the doctrine by which the ECtHR defers to domestic courts in particular situations. Importantly though, in explaining why this was so, the Court took the step of recognising article 10 could restrict copyright. The reasoning by which they arrived at this route is somewhat unclear: the court said that article 10 protects communication on the medium of the Internet, whatever the message is that is conveyed, even when it is done for commercial purposes, and even when it is a photograph.⁵² The court then held that it was an exercise of free expression to publish such photos on the internet, and so the applicants' conviction for such an action amounted to an interference with it. Copyright, in other words, could breach article 10 speech rights.

Clearly, the court did not consider the definitional balancing argument in terms – it did not, in other words, review the proposal that speech rights were sufficiently protected in the structure of copyright law, and so it cannot be said that it expressly rejected this idea. Nevertheless, the result arrived at logically entails rejecting definitional balancing, in that it seems to follow from the court's conclusion that even when diligent regard is paid to the safeguards for speech contained in copyright, copyright can breach

⁵² *Ashby Donald V France* Application No 36769/08 (10 January 2013) [2013] ECHR 28 (5th Section) [34].

article 10. The upshot of this is to conclude that the ECtHR has confirmed that under the Convention, copyright is susceptible to an external free speech review, on the basis of the individual interests affected.

This interpretation of *Ashby Donald* is supported by the ‘Pirate Bay’ decision, decided a month later. In this case, two guiding minds behind the Pirate Bay file sharing website appealed to the European Court claiming that their conviction for copyright infringement violated their article 10 rights.

Again, the court found no violation – indeed, it found the complaint to be inadmissible, but in coming to such a conclusion the court confirmed the susceptibility of copyright to free expression review. The court followed the reasoning of *Ashby Donald*, recognising the fact that article 10 applies to the Internet, and that profit-making does not discount its application, but took the argument further. It expanded on the reasoning in *Ashby Donald*, by giving more attention to the aspect of article 10 that the court found to be engaged. Article 10 protects not only the right to communicate, but also the right of the public to be informed – the audience reception right. Not only are copyright holders and speakers right-bearers with potential causes of action, but audiences should be recognised as those whose interests need to be balanced against the interests of copyright holders. The court said:

The Court has consistently emphasised that Article 10 guarantees the right to impart information and the right of the public to receive it ... In the light of its accessibility and its capacity to store and communicate vast amounts of

information, the Internet plays an important role in enhancing the public's access to news and facilitating the sharing and dissemination of information generally ... Moreover, Article 10 applies not only to the content of the information but also to the means of transmission or reception since any restriction imposed on the means necessarily interferes with the right to receive and impart information⁵³

The proposed EU neighbouring right at the ECtHR

These decisions have been criticised,⁵⁴ but for the present purposes it is sufficient to observe that their consequences are likely to be profound. And while it is not possible to predict in advance whether the ECtHR would find that a new EU neighbouring right breached article 10, for the reasons mentioned above, it is possible to draw some threads from these cases of relevance to any potential adjudication about the right.

Article 10 and external review

The first is that these decisions confirm that according to Convention, copyright and related laws can be subject to an external article 10 review. This, it is likely, includes the proposed EU neighbouring right. Such a finding is important, as it will disturb some previous decisions of domestic courts, and even perhaps the CJEU, when those courts have been resistant to the notion of subjecting copyright to a thorough freedom of speech review. Indeed, some domestic courts have taken this position, on the basis of the view that copyright already sufficiently takes account of free expression concerns: definitional balancing. This is no longer tenable.

⁵³ *Neij V Sweden* (Admissability) App No 40397/12, (2013) 56 EHRR SE 19, 9-10.

⁵⁴ For example, Voorhoof (n 47).

An example of this can be found in a case where copyright has been used to attempt to generate revenue for news institutions. This is the Belgian *Copiepresse* litigation. The facts, in short, were that a group of Belgian Collective Management Societies sued Google for violation of copyright, related rights and database rights in respect of Google's publication of news material on both Google search and Google news. As part of their defence, both at first instance and on appeal, Google raised the issue of the application of the free speech guarantee contained in article 10 of the European Convention on Human Rights.

Both the Belgian courts, at first instance and appellate level, rejected this, relying on similar reasoning. So, at first instance, the court recognised that there might be free speech interests at play here, namely the right of the public to receive information, guaranteed under article 10 of the ECHR. But the court rejected that this amounted to a reason to resist liability for breach of copyright, partly on the basis of the idea that copyright had already sufficiently taken speech concerns into account. Thus, the court found that freedom of expression concerns were taken into account by the existence of 'some exceptions to the copyright from opposing the reproduction or communication of their work to the public [that] are based on the freedom of expression, notably such as citations'.⁵⁵ *Ashby Donald* and the 'Pirate Bay case' show this to be an insufficient basis – by itself - for dismissing a claim that article 10 rights have been violated.

⁵⁵ *Google V Copiepresse* 13 February 2007; No 06/10/928/C of the general roll (Court of First Instance, Brussels) §3, available in English at (2007).

<https://www.copiepresse.be/images/file/Google/Jugement_Google_130207_EN.pdf>
accessed 20 August 2016.

The appeal court followed a similar line of reasoning. First, they noted that the ‘European legislator did indeed take the fundamental freedoms into consideration, because he provides in the 3rd Preamble of Directive 2001/29 that: “The proposed harmonisation ... relates to compliance with ... freedom of expression.”’. The court went on to rely on the authority of the Belgian and French Courts of Cassation in support of the proposal that: ‘[there is no] conflict with the public’s right to information [as a result of] the author’s legal monopoly over his work... in relation to which the legislator sets proportional limits.’⁵⁶ Again, this definitional balancing approach is no longer sufficient for an article 10 analysis. It may be that Google for a variety of reasons should not have been able to rely on article 10 as reason to resist the copyright action brought against it, and so the finding that there was no violation would stand.⁵⁷ However, the court’s argument that because the European legislator said they took freedom of expression in account there can be no infringement of article 10, is no longer persuasive. If *Copiepresse* were appealed to Strasbourg, this point should not succeed.

⁵⁶ *Google V Copiepresse* Presented 11/5/2011, Cause List No: 2007/AR/1730 (Court of Appeal of Brussels, 9th Chamber), available in English at <https://www.copiepresse.be/images/file/Google/Copiepresse_%20ruling_appeal_Google_%205_May_2011.pdf> accessed 20 August 2016.

⁵⁷ The first instance found, for example, that article 10 wasn’t engaged as Google’s actions were automatic – and hence it was not involved in an act of expression.

The audience reception right

The second thread to draw from the ECtHR cases discussed is how important it is to correctly identify those speech interests that are in issue in a case where copyright is being externally reviewed against freedom of speech law. Evidently the right owner has a speech interest, and – as Waldron and others have argued – so, too, does the infringing author who re-uses of copyrighted work.⁵⁸ But the ECtHR case law highlights the fact that there are a variety of others who may also have a free speech interest. For example, as well as the rights owners, an original author may have a free speech interest, in as far as a work is the expression of her personality – and so she may have a free speech interest derived from her autonomy.⁵⁹

However, the interests of greatest significance where news related expression is involved, are not the interests of the speakers, but the interests of the audience.⁶⁰ These interests – to receive information, the audience reception element of the right to free speech – are more important than the speaker interests of news publishers or author

⁵⁸ J. Waldron, 'From Authors to Copiers: Individual Rights and Social Values in Intellectual Property' (1993) 68 *Chicago-Kent Law Review* 841; Barendt, *Freedom of Speech* 254-259 (n 27); L. Lessig, *Remix: Making Art and Commerce Thrive in the Hybrid Economy* (London: Bloomsbury Academic, 2008); Naughton, *From Gutenberg to Zuckerberg: Disruptive Innovation in the Age of the Internet*, (n 7) 115 relying on TS Elliot: 'Immature poets imitate; mature poets steal', and chapter 8.

⁵⁹ A significant autonomy based theory of free speech is advanced in Scanlon T, 'A Theory of Freedom of Expression' (1972) *Phil & Pub Aff* 204.

⁶⁰ Barendt, *Freedom of Speech* (n 27) 25-30.

journalists. This is because news – and the news industry – is primarily valued instrumentally in our society (at least in terms of its contribution to freedom of speech). It is as important as it is, not because we consider the speaker interests of individual journalists and publishing institutions to be particularly forceful, but because of the contribution that news makes to a well-functioning democracy. This contribution mainly takes place because of the effect of the news on the audience, who read and consume the information contained in the news, and – for example – use it to formulate and develop their political views.⁶¹ An informed electorate is of central importance to many models of democratic legitimacy.⁶² Indeed, there are some cases that indicate that in some specific situations, audience interests are so strong that they amount to a legally enforceable right to know.⁶³

⁶¹ This account of the value of news in a democracy, and particularly a deliberative democracy, is described (for example) by C. R. Sunstein, *Republic.Com 2.0* (Princeton ; Oxford: Princeton University Press, 2007). It is criticized, a critique emphasizing the commercial media's deficiencies, by many, including J. Keane, *Democracy and Media Decadence* (Cambridge: Cambridge University Press, 2013). There is not space to explore the debate here.

⁶² There are other models of democracy that reject this suggestion, that emphasise the importance of autonomy rather than decision –making as the source of legitimacy in a democracy.

⁶³ *Guseva V Bulgaria* Application no 6987/07, [2015] ECHR 171 (17 February 2015 [36 – 41], in respect of a journalist or human rights defender seeking information that the state possesses, but see the dissent of Mahoney J [3] and Wojtyczek [1 – 8]. The point is

There is a concrete example of where the audience reception right applies to the potential EU neighbouring right. Currently, without a EU neighbouring right, the actions of media monitoring organisations and news aggregators can be argued to facilitate the informing of the electorate. A great deal of information can be known immediately by the actions of websites that aggregate published news stories (news aggregators) and organisations that monitor media publications (media monitoring organisations), as they aggregate the news disseminated on a wide variety of disparate individual sites. There is a value in their provision of an immediate broad news distribution service, covering many different news sources. Moreover, they also make it possible to compare the reporting by different news outlets on the same subject. This means that they make it easier for the audience not only to be informed, but also to evaluate the editorial line and truthfulness of various news organisations when compared with each other. In other words, they can increase the media literacy of the news-consuming public. Any potential EU neighbouring right may put this at risk, by incurring an increased financial cost on those who operate such websites.

Now, clearly this point is not determinative. There are counter arguments that an EU neighbouring right may benefit the audience reception right. For example, assuming that commercial news organisations are in difficulty, there is a need for a long-term sustainable solution. If media monitoring organisations and news aggregators are free to act without an EU neighbouring right, this may well put at jeopardy the long term

discussed in J. Wadham, K. Harris and E. Metcalfe, *Blackstone's Guide to the Freedom of Information Act 2000* (Oxford: Oxford University Press, 2013) 1-10. Moreover, in relation to the CJEU, see *Uefa V Commission* C-201/11 (2013), [10 – 11]

survival of the commercial news industry. And if commercial news organisations fold, the media monitoring organisations and aggregators will have much less source material to monitor and aggregate. And, therefore, the audience reception right will be compromised, because there will be less news of the type produced by commercial news organisations that the audience can consume. The absence of an EU neighbouring right, it can therefore be argued, does not in the long-term contribute to the audience reception right, but will hinder it.

This may be true, or it may not – it is a disputed question. But it is not necessary to resolve this argument here. What is important, and is the point being made here, is that the audience reception interest should move centre-stage when assessing the extent to which the proposed EU neighbouring right impacts on freedom of speech law. What that means in practice is that when one is considering whether and the extent to which copyright and related laws – and in the current discussion, the proposed EU neighbouring right – infringe freedom of speech, the most significant speech interest one needs to consider is the interests of the audience. Does, a court will need to ask, an EU neighbouring right serve the interests of the audience, or hinder them?

European Court of Justice

The third area to consider is the position at the European Court of Justice. The picture here is less clear than the other two courts for a number of reasons. One is because the court has a much shorter history of considering the effect of human rights on legal disputes than the ECtHR or the US Supreme Court, as it was only relatively recently that the EU Charter on Fundamental Rights was adopted. While it is clear that the Charter

protects both expression and copyright,⁶⁴ the consequences of this have not been fully established. Moreover, the relationship between the EU Charter and the European Convention on Human Rights remains unsettled, and it is not clear the extent to which the Charter replicates the Convention, nor what should be the interplay between the decisions of the ECtHR and the CJEU. However, leaving aside such complications, there are some points can be drawn out from the case law relevant to the current discussion.

They follow from the central observation that, as Voorhoof has said:

the contextualising of Article 17(2) of the EU Charter in its broader framework of human rights law and the jurisprudence of the CJEU show that the protection of intellectual property, including copyright, is in its turn restricted by the application of and respect for other fundamental rights. The right to freedom of expression and information as guaranteed by Article 11 of the EU Charter and by Article 10 ECHR especially became an important element in delimiting the scope or enforcement of copyright⁶⁵

The first is that the Luxembourg court has indicated that copyright should not be resistant to freedom of speech concerns, and that copyright should be balanced against other fundamental rights including that of free expression. However, the court has sought to

⁶⁴ Expression in article 11 (n 22) and property and intellectual property in article 17(1) and (2): Griffiths, 'Pre-Empting Conflict - a Re-Evaluation of the Public Interest Defence in Uk Copyright Law' (n 27) 95.

⁶⁵ Voorhoof, (n 47) 345.

achieve this balance by internalising any conflict between the two norms. It recommends this should generally be brought about by sensitive transposition of EU instruments by Member States into national law, and by the way the Court interprets the provisions of EU copyright law. (Clearly, interpretation may not be possible for Member States, as the meaning of EU law is a matter for the CJEU). So far, it has rejected the notion that copyright should be subjected to an external review to assess its compliance with free speech norms.

These techniques mean that the Court has preferred to attempt to develop copyright in a way that takes into account free speech concerns. It has been noted how Grosse Ruse-Khan argues this amounts to an *internal* review of copyright by free speech law.⁶⁶ It is, it can be seen, rather closer to the line taken by the US Supreme Court than that taken by the ECtHR. But, while it resembles the definitional balancing recommended by Nimmer, the CJEU is embarking on a different approach. By recommending that copyright law evolves and develops in such a way that it builds in freedom of speech concerns, the court is attempting to adopt definitional balancing as an on-going process, as a means of developing the doctrine of copyright law. It is looking forward, rather than backwards.

Moreover, and this is significant, in the *Telekabel* case,⁶⁷ the CJEU indicated that the substantive law of member states may in certain situations need to be altered to conform to freedom of speech law. And, echoing the approach of the ECtHR, this is a

⁶⁶ H. Grosse Ruse-Khan (n 24).

⁶⁷ *UPC Telekabel V Constantin Film & Wega* C-314/12 (2014) (ECJ, 4th Chamber)

step that can be required to give due regard to the audience's interest in receiving information.

But to return to the starting point, this was when the court recognised that copyright can be subject to some sort of review to assess its compliance with fundamental rights. The foundation for this was the case of *Promusicae v Telefonica*.⁶⁸ Promusicae, a Spanish non-profit organisation of copyright holders, sought a court order compelling the telecommunications provider Telefonica to disclose the identities and addresses of people who it said were breaching copyright by file sharing. Ultimately, the case arrived before by CJEU.

The court found that such an order was not precluded by EU Data Protection law, but nor was it required by EU Intellectual Property law. But the important point for the current discussion is that the court, in coming to its conclusion, considered the impact on copyright of fundamental rights. It observed at [68] that:

Member States must, when transposing the [copyright related] directives mentioned above, take care to rely on an interpretation of the directives which allows a fair balance to be struck between the various fundamental rights protected by the Community legal order. Further, when implementing the measures transposing those directives, the authorities and courts of the Member States must not only interpret their national law in a manner consistent with those directives but also make sure that they do not rely on an interpretation of them

⁶⁸ Case C-275-06 [2008].

which would be in conflict with those fundamental rights or with the other general principles of Community law, such as the principle of proportionality.

Clearly, while *Promusicae* established that copyright should be balanced with fundamental rights in general, it did not establish that copyright should be balanced with freedom of expression in particular. There might have been doubt whether this was so. But any doubt was resolved by the cases of *Scarlet Extended v SABAM*, and *SABAM v Netlog*. Both concerned the validity of injunctions designed to filter the Internet, such filtering being designed, according to the claimants, to prevent breach of copyright.

In deciding that this filtering was not legal, the CJEU in *Scarlet* relied on *Promusicae*, adopting its reasoning by stating that courts must strike a balance between IP and fundamental rights. It then went on specify some of the particular rights that were engaged in the case before them, notably –for example – the right to run a business. But the court also observed that:

the effects of that injunction would not be limited to the ISP concerned, as the contested filtering system may also infringe the fundamental rights of that ISP's customers, namely their right to protection of their personal data and their freedom to receive or impart information, which are rights safeguarded by Articles 8 and 11 of the Charter respectively.⁶⁹

⁶⁹ *Scarlet Extended V Sabam* Case C-70/10 (CJEU (Third Chamber)), [50].

Hence the court clarified that one of the fundamental rights against which IP should be balanced is the right to freedom to receive and impart information. This view was echoed in *Netlog* in very similar terms.

A more recent example of the court balancing copyright and expression rights was the *Deckmyn* decision. This case involved a claim for breach of copyright that was resisted on the grounds that the infringing use of the protected material was parodic. Parody is a permitted defence to copyright breach under the Information Society directive.⁷⁰

The CJEU referred the question as to whether the defence was available on these particular facts to the national court, but had to clarify the meaning in European Law of the term ‘parody’. In doing this – and this is the relevant point for the current discussion — the Court observed that interpreting the article in the relevant directive pertaining to parody ‘must strike a fair balance between, on the one hand, the interests and rights of persons referred to in Articles 2 and 3 of that directive⁷¹ and, on the other, the freedom of expression of the user of a protected work who is relying on the exception for parody, within the meaning of Article 5 (3) (k).’⁷²

This is a somewhat surprising result. The court here decided to balance freedom of expression concerns with those of copyright, by construing an EU legal text broadly in a way that was protective of speech. This is surprising, as the exceptions in the

⁷⁰ Art 5 (3) (k) of InfoSoc Directive (n 20).

⁷¹ The articles refer to the reproduction right and the right of communication to the public.

⁷² *Deckmyn V Vandersteen* Case C-201/13 (2014) [27], [34].

Information Society Directive have until now been interpreted strictly.⁷³ The CJEU was required to adopt a wide and flexible interpretation, as Voorhoof points out, to enable the parody concept to ‘enable the effectiveness’ of the exception and safeguard its purpose.⁷⁴ This is an example of internal balancing of speech and copyright in action, by means of on-going definitional balancing.

Before considering how this applies to the proposed EU neighbouring right, it is important to draw out one further matter, namely the importance of one element of the speech right engaged. This is the right of the audience to receive information: the

⁷³ *Ibid* [22] ‘That interpretation is not called into question by the context of Article 5(3)(k) of Directive 2001/29, which lays down an exception to the rights provided for in Articles 2 and 3 of that directive and must, therefore, be interpreted strictly (see, to that effect, judgment in *ACI Adam and Others*, EU:C:2014:254, paragraph 23).’ See also *Football Association Premier League Ltd and Ors V Qc Leisure and Ors and Karen Murphy V Media Protection Services Ltd*, Joined cases C - 403/08 and C-429/08 [2011] ECR I-9083 (ECJ, Grand Chamber) [71]. Griffiths discusses some arguments for a less stringent approach on the basis that freedom of expression is a general principle of EU law and so takes precedence over art 5 Griffiths, ‘Pre-Emptying Conflict - a Re-Evaluation of the Public Interest Defence in Uk Copyright Law’ (n 27) 85-88.

⁷⁴ Voorhoof (n 47) ; see also, making the same point, C. Geiger and e. al, ‘Limitations and Exceptions as Key Elements of the Legal Framework for Copyright in the European Union: Opinion of the European Copyright Society on the CJEU Ruling in Case C-201/13 Deckmyn’ (2015) 46(1) *International Review of Intellectual Property and Competition law* 93.

audience reception right. This was emphasised as significant in *Scarlet* and *SABAM*, and it is a view that accords (it will be remembered) with the approach of the ECtHR in the ‘Pirate Bay’ case. Both courts recognised the audience reception right as an important element of a right of free expression in Europe, whether under the Charter and the Convention. The consequence of this aspect of free expression for the CJEU has been underscored in a later case, *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH*.⁷⁵

Telekabel was an enforcement case that concerned an injunction. One aspect of what was contested was the propriety of a particular type of Austrian injunction. The injunction focused on achieving particular outcomes, without specifying the means by which they could be attained. The injunction in question was directed at an ISP who had no direct relationship with those it was alleged who were seeking to infringe copyright, instructing it to block access by its customers to this material. Its validity under EU law was challenged.

The court decided that this type of injunction was permissible, but in arriving at this conclusion emphasized the importance of the audience reception right: the freedom of the users of the ISP’s service to be informed.⁷⁶ And, significantly, not only was this a factor to be taken into consideration in evaluating the propriety of the injunction, but it also led the court to set out a particular additional substantive development for the Austrian injunction to be legal. This was the requirement that individuals must be permitted locus to bring actions to challenge the effect of any injunction. Establishing

⁷⁵ *Upc Telekabel V Constantin Film & Wega*.

⁷⁶ *Ibid*, [56] .

this was necessary so that anyone who may have had their article 11 audience reception rights violated by the injunction would have a route to bring a claim.⁷⁷

The audience reception right, therefore, has provided the basis for the CJEU to go beyond mere internal balancing of speech and copyright, in the area of enforcement. It has led the CJEU in this particular area, in this particular case, to require the adoption of a substantive legal procedure outside the corpus of copyright law, in order that copyright law can comply with freedom of speech concerns. This is, admittedly a limited step: *Telekabel* is not a precedent for fundamental rights ‘liberalizing’ copyright law. But it is an important indication of the tensions the CJEU experiences with its preferred method of internally reviewing speech and copyright. But it is of central importance, as the audience needs to have a means by which they can challenge the operation of a law that affects their interests protected by an element of the right of freedom of expression.

The proposed EU neighbouring right and the CJEU

The four points, summarised earlier, which flow from the previous discussions that are of relevance to any challenge that may be made of the proposed EU neighbouring right at the CJEU are as follows:

First, the CEJU should recognise that a new EU copyright or related law – such as the EU neighbouring right – is likely to alter the established balance within EU law of speech interests and copyright and related interests, and, when the occasion arises, subject it to scrutiny to assess the extent to which freedom of speech interests are

⁷⁷ *Ibid* [57].

sufficiently protected. This is just as was argued to be the case in respect the jurisprudence of the United States Supreme Court. Jurisdictional differences aside, it is also true of the CJEU, because both Courts adopt a system of definitional balancing and internal review. (Though, as has been explored, these are subtly different.) Any system that purports to balance speech and copyright internally, needs to be acute to the ways in which a new law will change the balance.

Second, in any such scrutiny, the CJEU is likely to strive to internally review EU copyright and related law, to ensure that the neighbouring right does not breach article 11 and other free speech guarantees. However, the ECtHR is likely to subject any such right to an external review, should a case come before it. This may result in a clash of courts, as each strives to establish supremacy in its field of law – though both will, no doubt, strive to the utmost to avoid this. Alternatively, the CJEU might wish to avoid this, by striving to adopt a ‘harmonious interpretation’ of ECHR and EU law.⁷⁸

Third, when undertaking any scrutiny – external or internal – of the EU neighbouring right, the crucial interest that needs to be borne in mind by any reviewing court is that of the audience, not that of speakers. Indeed, in any assessment of whether, and the extent to which, any new EU neighbouring right complies with the various free speech guarantees it affects, the interests of the audience need to be put first. This may

⁷⁸ The point is discussed by Grosse Ruse-Khan (n 24), who discerns that the CJEU attempts to avoid conflict by creating a ‘somewhat artificial coherence within its own system by internalizing the rule of another system, and subjecting them to its own interpretation – rather than having a closer look at how the other system may understand its own rules.’ 76.

mean – and this is a point about which the CJEU has shown itself aware in the *Telekabel* case, albeit only in the area of enforcement - there may need to be alterations to various aspects of copyright law to ensure that the interests of the audience are sufficiently protected.

The final point is that any system of internal balancing of speech and the proposed EU neighbouring right needs to be sufficiently flexible to accommodate the full ambit of freedom of speech laws, including the interests of the audience. There must be doubt as to whether this flexibility is found in EU copyright law, with its closed list of exceptions contained in the InfoSoc Directive, provisions that the CJEU has interpreted restrictively.⁷⁹ Indeed, any challenge to an EU neighbouring right may therefore provide a stimulus that may result in the EU's copyright exceptions evolving into something closer to the fair use doctrine in the US. Alternatively, it is possible the CJEU may abandon the approach of internal review, or pay insufficient regard to the interests of freedom of speech.

⁷⁹ D. Voorhoof, 'Freedom of Expression and the Right to Information: Implications for Copyright' in Christophe Geiger (ed), *ibid* (Cheltenham: Edward Elgar, 2015), (n 47) 351. A difficulty in this is, as discussed in the text to n 73, that the line of authority that indicates that the InfoSoc list is closed, and to be interpreted restrictively. Griffiths, 'Pre-Empting Conflict - a Re-Evaluation of the Public Interest Defence in UK Copyright Law' (n 27) 84-86 assesses some of the counter-arguments to this position, in the context of trying to find doctrinal space for freedom of expression, by virtue of s 171(3) of the Copyright Designs and Patents Act 1988, in the InfoSoc Directive (n 20) .

Conclusion

So far, freedom of expression arguments do not seem to have played much part in those news-related copyright actions that have reached the CJEU. The point is not raised in *Infopaq v DFF (No 1)*⁸⁰ or *Infopaq v DFF (No 2)*,⁸¹ or *Svensson v Retriever Sverige AB*,⁸² all prominent cases relating to news and copyright that have been referred to the CJEU.

But as there is undoubtedly a freedom of expression issue engaged in these cases, this might be seen as a little surprising. The omission can be understood because of the CJEU's line that free speech concerns should be taken into account internally by the transposition and interpretation of copyright laws, an approach somewhat similar to that taken by the US Supreme Court.

However, the foregoing discussion opens the door to an argument that has not been explored in these copyright news cases. The point derives from the realisation that the strongest freedom of expression interest in these copyright news cases is that of the audience – the audience reception right, recognised in *Telekabel*, *Scarlet* and *SABAM*. This makes sense in normative terms in relation to copyright and news cases, as there is a much more important societal interest in the audience reading news widely, than there is in respecting the speaker interests of institutions publishing the news.

⁸⁰ *Infopaq V Danske Dagblades Forening* C-5/08, [2009] EUECJ C-5/08 (16 July 2009).

⁸¹ *Infopaq V Danske Dagblades Forening* C-302/10, [2012] EUECJ C-302/10.

⁸² *Svensson V Retriever Sverige Ab* C-466/12, [2014] Bus LR 259, [2014] ECDR 9.

Moreover *Telekabel* has opened the door a crack to external balancing of speech and copyright in the EU, in that it has recognised that more may be needed to make copyright align with freedom of speech concerns than internal measures such as statutory interpretation or appropriate transposition of EU laws. Balancing copyright and freedom of expression may on occasion require novel legal developments, particularly when the aspect of freedom of expression that is engaged most strongly is the audience reception right.

This is an argument that is now *prima facie* viable at the CJEU. If or when an EU neighbouring right is challenged, it is a point that ought to be pursued. Of course, there is no guarantee that an EU neighbouring right will necessarily be found deficient – much analysis of the particular provision will be required before one can arrive at such a conclusion. However, the case law of the CJEU has now provided space for this consideration to take place, and the possibility of it resulting in alterations to the substantive laws of member states.

This is important, as the internal balancing of speech and other rights, the preferred method of the CJEU is already under strain. A challenge to any EU neighbouring right will increase this pressure. It may result in either the CJEU declining to take freedom of speech sufficiently seriously, to adapt the famous phrase of Dworkin;⁸³ or adopting a more flexible approach to the interpretation of the exceptions to copyright and related laws approximating more closely to the US notion of fair use; or retreating from the notion of internal review as a means of reconciling the tension

⁸³ Dworkin R, *Taking Rights Seriously* (London: Duckworth 1977)

between freedom of speech guarantees, and copyright and related laws. The consequences of each alternative are likely to be significant.

