Chapter 21
Contemporary Art on Trial – The Fundamental Right to Free Artistic Expression and the Regulation of the Use of Images by Copyright Law

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I. Copyright, Appropriation Art and Artistic Freedom

1. Appropriation art's discontents with copyright

Undeniably, copyright – or authors' right, as the legal protection of authors is called in countries following a continental European tradition – aims to protect the interests of authors of creative works. In this sense, the interest of *all* authors should be protected, including those that have created and those who will create or are already in the creative process. However, recently, authors of visual arts are increasingly at odds with copyright legislation. The reason is that copyright legislation, based on traditionalist author's rights conceptions, clearly privileges initial creations over any form of copying, partial taking, repetition or creative reuses of protected works. This is highly problematic for many forms of contemporary art expressions which stem from a long-standing artistic tradition: from Marcel Duchamp's famous ready-mades to Andy Warhol's use of famous brands, commercials or photographs of pop culture icons, different forms of appropriation art have become the main characteristic of a whole array of artistic activities in postmodern times.[1] In fact, many artists frequently use such a process, primarily by reworking elements protected by intellectual property rights (copyright, trademark, or designs rights) for the purpose of criticism or homage, their aim being to trigger artistic reflection on society and its current icons. Appropriation therefore plays a central role in the modern and contemporary art movements, original

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* This contribution draws from and is building upon previous articles by the author on the same subject; see Geiger (2021); Geiger/Izyumenko (2019) and (2020a).

1 On this issue, see already Bauer (2022) and (2020); see also before the turn of the century, e.g., Sandler (1996).

works being sometimes modified, transformed, or even reused without any alterations in a new artistic context.

Fortunately, most creative appropriations are not subject to copyright infringement litigation because, given their frequency, such litigation would likely lead to seizure of the contemporary art collections of many of the world's major museums.[2] Without doubt, these artistic activities tremendously benefit from the ease of copying by way of digital technology; however, as technology became a central component of everyday life, artists also incorporated digital technology and its evolutions – including the opportunities and dangers of it – in their artistic discourse.[3] Appropriation and copying became an essential tool to reflect on the control of images and on the role that copyright itself plays in our information society.[4] "Infringing" copyright is then even sometimes "elevated" to a militant act and is used to expose the negative effect of the copyright system on society.

However, such cases (fortunately) only occasionally end up before the courts, usually when two factors are present, sometimes in combination.[5] The first is extrinsically linked to the success of the derivative work in question. If it is successful, the author of the appropriated work is likely to consider him or herself entitled to a share of the fruits of that success. The second is when the appropriation harms the reputation of, or is contrary to the idea behind, the original work or is simply objected to by the original

2 Museums can in addition to the artists also be liable for copyright infringement, to the extent an exhibition can be considered as an act of communication to the public.

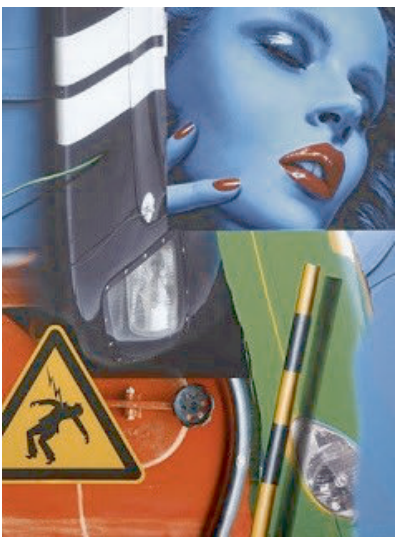
3 For an example see the first Strasbourg biennale of Contemporary art on the topic "Touch me – Being a citizen in the Digital age" organized at the end of 2018, "inviting the public to consider our relationship with new technologies and how the internet has profoundly affected our behavior and society" (https://biennale-strasbourg.eu/en/).

4 See for example the fascinating work of artists such as Paolo Cirio, who are putting appropriation at the core of their artistic and politic message (see https://paolocirio.net/). For example, in his 2019 work called "Property", Paolo Cirio "examines images as a form of capital accumulation, bound by intellectual property laws, trade agreements, legal contracts, and litigations" in order to "reflect on the stock photography company Getty's dominance in the market, capitalization, and control of images on the Internet" and in order to do so, the artist "adopts the semantics of appropriation art through transforming images into compositions of colored shapes and texts, which overlay with the prints of the original photos appropriated from Getty's websites". Copying therefore becomes a necessary part of an artistic reflection and a way to expose the negative impact of the abusive use of legal tools such as copyright.

5 For more detail of some of these cases see Geiger (2018b).

author. The latter occurs primarily in cases in which the derivative work contains a criticism of the primary work.

To illustrate the problem appropriation art faces when confronted with copyright law in the courtroom, exemplary reference shall be made to one very prominent case adjudicated by the French courts. The facts of the case are as follows: The painter Peter Klasen, a member of the artistic movement known as Narrative Figuration,[6] incorporated into his paintings three photographs from an Italian fashion journal showing the face of a young model after colouring them blue (Figs. 1 and 2).



Figs. 1 and 2: Left: Alix Malka, photograph for the Fashion magazine "Flair" (2005); Right: Peter Klasen, Painting

Justifying his appropriation of the photographs as symbols of excessive consumption, Peter Klasen stated that the objective of his artistic approach was to use advertising images in his paintings to provoke reflection by the spectator, thereby placing the initial work in a new context and expressing something entirely new and unexpected. Whereas in the first instance

6 On this artistic movement, which often intends to give art a political dimension, see Pradel (2008); Wilson (2010).

the Paris District Court held that the photographs lacked originality,[7] the Paris Court of Appeal overruled that decision, finding that the photographer's choices reflected genuine aesthetic decisions that were an imprint of his personality as an author and, consequently, that the photographs at issue were deserving copyright protection.[8] The application of the parody, quotation, and incidental use exceptions were all rejected. The only remaining defence available to the painter was to claim it was a legitimate use supported his fundamental right to free artistic expression. However, the Court of Appeal dismissed this argument, holding that there was no higher public interest that would justify the rights of a derivative artist prevailing over those of an original work's author. The court held that freedom of expression can be limited to protect other individual rights, and that the reworking of visual material in Klasen's work could not reasonably permit him to ignore the rights of the original photographer. The French Supreme Court however surprisingly reversed the Court of Appeal ruling based on Article 10 of the ECHR.[9] The Supreme Court criticized the appellate judges for not having explained "*in the specific case* the manner in which the search for a fair balance between the fundamental rights at issue required the decision as pronounced" (emphasis added).

2. *The traditional approach: narrow interpretation of exceptions and internal control by fundamental rights*

Before discussing the French Supreme Court's reversal of the Paris Court of Appeal decision in more detail, it should be noted that traditionally fundamental rights played a limited role when deciding copyright cases for mainly two reasons: first, according to the traditional author's right doctrine, exceptions to copyright should be interpreted narrowly which does not leave room for extensive interpretations in the light of, e.g., free-

7 Tribunal de Grande Instance Paris (Paris Court of First Instance), of 31 January 2012, No. 10/02898 (Fr.).

8 Cour d'Appel de Paris (Paris Court of Appeal), Pole 5, 1st Chamber, 18 September 2013, No. 12–02480 (Fr.).

9 Cour de Cassation (French Supreme Court), 1st Civil Chamber, 15 May 2015, Bull. Civ. 1, No. 13/27391. – It seems however worth mentioning that already at the end of the 1990s, in the "Utrillo"-case, the Paris District court had allowed the use of copyright protected work to report on current events based on the fundamental right to information protected by Art. 10 ECHR, Tribunal de Grande Instance of Paris, 3rd chamber, 23 February 1999, No. 98–7053. On this issue see Geiger (2007).

dom of expression.[10] This doctrine was by and large accepted by French courts, but also, initially, the European Court of Justice (CJEU).[11] This is despite significant doubts regarding its legitimacy raised by scholars against this traditional approach.[12] Moreover, it was traditionally assumed that any balancing of fundamental rights which affected the interests of the parties involved had already been undertaken by the legislature, when crafting within copyright legislation the limitations and exceptions, such as those contained in Article 5 of the Information Society Directive.[13] In other words, the control of conflicts which touched upon the protection and balancing of fundamental rights only takes place *internally* within the copyright law itself.[14]

As a result, once a reproduction or communication to the public was found and no limitations or exceptions applied, the facts of the case proved to be immune against any additional *external* fundamental rights control. That is, unless national copyright law provided for some additional limitation to the adaptation right, such as the so-called "free use" according to Section 24 of the German Copyright Act, which permitted partial taking of someone else's copyrighted work, if the taking was made particularly for purposes of freedom of information and freedom of the arts.[15]

10 See on this issue Geiger/Schönherr (2014), Geiger (2010) and (2016), criticising this approach of restrictive interpretation of limitations and exceptions often used by national courts in continental author's right countries or the CJEU, but which is not mandated by the copyright legal and theoretical framework nor the rationale of copyright law. For detailed analysis see also recently Rendas (2021).

11 See only CJEU, C-5/08 of 16 July 2009, ECLI:EU:C:2009:465 – Infopaq.

12 See, e.g., Geiger/Schönherr (2012); Geiger (2010) and (2016b).

13 Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, O.J. EU L 167 of 22 June 2001, 10 et seq.

14 See for example in this sense the French Supreme Court of 13 November 2003, Bull. Civ. I, No. 01–14385 (Fr.). For comment, see Geiger (2004b); Belgian Supreme Court of 25 September 2003, Auteurs et médias 2004, 29, holding in an abstract manner that "the freedom of expression guaranteed by Article 10 of the European Convention on Human Rights and by Article 19 of the International Treaty concerning Civil and Political Rights does not prevent the protection of a literary or artistic work by copyright".

15 For comment, see, e.g., Loewenheim (2020) notes 1 et seq.; Schulze (2018) notes 1 et seq.

II. External Control in the Light of Freedom of Artistic Expression

However, recently an increasing use of fundamental rights in copyright disputes in many civil law countries can be observed.[16] This development challenges the assumption that copyright interests can only be balanced against fundamental rights internally, not externally. In addition, this development raises the question whether a sort of "fair use" limitation modelled after the US precedent[17] is not already in place through the weighing of interests and use of the proportionality test, which are both required when the judiciary is applying fundamental rights.[18] This change in approach by the courts can be witnessed in many civil law jurisdictions across Europe, and even by the CJEU, thus strengthening the argument for the introduction of an open clause for limitations in EU copyright law.

1. Fundamental Rights and the CJEU

Whereas in the beginning, the CJEU largely left the national Member States to balance conflicting rights,[19] after the adoption of the European Charter of Fundamental Rights in 2012, the CJEU, in its judgements, not only continuously referred to European fundamental rights, but increasingly applied and balanced them in the cases referred to the Court.[20]

As can be seen from the three recent decisions *Funke Medien*, *Pelham*, and *Spiegel Online*,[21] as a matter of principle, the CJEU, in essence, adopts quite a liberal position towards the national courts' interpretation of existing copyright norms in the light of the freedom of expression require-

16 More generally on this trend, see Geiger (2006), (2009) and (2012).

17 Title 17 U.S.C. § 107. – For discussion of the U.S. "fair use"-test see below, IV.1.

18 For further discussion of the principle of proportionality, see Christoffersen (2015); Afori (2014); Geiger/Izyumenko (2018) and (2020).

19 See only, regarding the conflict of copyright, i.e., property protection, with the protection of personal data before the adoption of the General Data Protecting regulation (GDPR), CJE, case C-275/06 of 29 January 2008, ECLI:EU:C:2008:54 – Promusicae.

20 See, e.g., CJEU case C-314/12 of 27 March 2014, ECLI:EU:C:2014:192 – UPC Telekabel Wien (also regarding copyright and data protection). Since the cases are too numerous to be cited here, for further references, see only Geiger (2016b); Griffiths (2018); van Deursen/Snijders (2018).

21 CJEU, cases C-469/17 of 29 July 2019, ECLI:EU:C:2019:623 – Funke Medien NRW; C-476/17 of 29 July 2019, ECLI:EU:C:2019:624 – Pelham and others; and C-516/17 of 29 July 2019, ECLI:EU:C:2019:625 – Spiegel online.

ments. The Luxembourg judges fully accept that fundamental rights take part in shaping copyright law in the EU. The CJEU explicitly refers to the need to interpret at least copyright law's *internal* norms in such a manner that freedom of expression, including freedom of the press and freedom of artistic creativity, are sufficiently protected and balanced against each other.[22] The CJEU goes even as far as to term the exceptions listed in Article 5 of the Information Society Directive not as "exceptions" as such, but as self-sufficient "rights" of users of copyright-protected subject matter.[23]

However, as further discussed below,[24] it may not be overlooked that the great emphasis on fundamental rights, did not hinder the CJEU to limit their consideration to the interpretation of copyright's *internal* limitations and exceptions, thus unequivocally rejecting any *external* free-wheeling application of fundamental rights. This position taken by the CJEU openly conflicts with the stance taken by another European Court on the same matter: the European Court of Human Rights (ECtHR).[25]

2. *Fundamental Rights and the ECtHR*

The ECtHR determined in *Ashby Donald*[26] that a prohibition on the communication of works on the Internet, even in breach of copyright, might constitute a violation of freedom of expression. Hence, even where there has been a clear copyright infringement, it is always necessary to evaluate whether the resulting restriction to freedom of expression is "necessary in a democratic society". After pointing out that "freedom of expression constitutes one of the essential bases of a democratic society, one of the basic conditions for its progress and the development of each individual," the ECtHR confirmed that "it involves exceptions that in any event require a narrow interpretation, and the need to restrict it must be established convincingly."[27] The court thus clarified that intellectual property rights must be interpreted as exceptions to freedom of expression and that, given the great importance of that freedom within the framework of a democrat-

22 See Jütte (2020) 481–482.
23 For an extensive comment see Geiger/Izyumenko (20201); Dreier (2020).
24 See below, III.2.
25 For a discussion see Goldhammer (2021).
26 Ashby Donald v. France, App. No. 36769/08, of 10 January 2013; see also the so called "Pirate Bay" decision (Neij & Sunde Kolmisoppi v. Sweden, App. No. 40397/12 of 19 February 2013).
27 Ashby Donald v. France, App. No. 36769/08, para. 38.

ic society, judges need to be very careful in the presence of a restriction, particularly when it comes to political and artistic speech.[28]

3. *Other national jurisdictions*

Even in France, considered an exemplar of traditional reasoning in copyright matters, a recent and highly commented-upon decision of the French Supreme Court concerning the balancing of freedom of artistic expression with copyright has paved the way for a judicial *in concreto* assessment of copyright limitations. In the *Klasen v. Malka*-case already referred to above,[29] the French Supreme Court reversed the Court of Appeal ruling based on Article 10 of the ECHR. By doing this, the French Supreme Court ended a debate that had been raging for over 15 years on the application of fundamental rights in the intellectual property arena and, more precisely, on the manner in which a fair balance is to be struck between copyright and freedom of expression, even outside existing internal copyright limitations and exceptions.

Courts in other jurisdictions have also gone into the same direction. One should also mention the German Constitutional Court, which stated in two cases that the proper legal understanding of the quotation exception must be expanded and interpreted more extensively to guarantee the protection of artistic freedom. This would reinforce the notion that copyright exceptions must be read in the light of such freedom to strike a balance between various interests.[30] In sum, there is a clear tendency to apply the principle of proportionality in copyright to legitimize the freedom of artistic expression in diverse situations of creative appropriation.

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28 In this sense, see Geiger (2004a); Porsdam (2007); Geiger/Izyumenko (2014).

29 Cour de Cassation, 1e civ., May 15, 2015, Bull. Civ. 1, No. 13/27391.

30 The first case decided by the German Constitutional Court (Bundesverfassungsgericht, BVerfG), 1 BvR 825/98 of 29 June 2000, Gewerblicher Rechtsschutz und Urheberrecht (GRUR) (2001) 149, concerned an extensive interpretation of the quotation right in a theatrical play (for non-official English translation, see Adeney/Antons (2013)); the second case, 1 BvR 1585/13 of 31 May 2016, Gewerblicher Rechtsschutz (GRUR) (2016) 690 – Metall auf Metall about the sampling of snippets of someone else's phonogram. – For other jurisdictions, see Geiger (2021) 179 et seq.

III. Resistance to Change and the Internalization of a (Limited) Flexibility by Way of Fundamental Rights

1. Resistance to change: the improper use of the proportionality test by the judiciary in copyright cases

However, despite this tendency to apply the principle of proportionality in copyright to legitimize the freedom of artistic expression in diverse situations of creative appropriation, a number of trial courts have continued to support a more restrictive approach. These include the *Koons v. Bauret* decisions by the Paris District Court[31] later confirmed by the Paris Court of Appeal,[32] the *Koons v. Davidovici* decisions by the Paris District Court[33] also recently confirmed by the Paris Court of Appeal[34], and the remittal decision by the Versailles Court of Appeal in the case *Klasen v. Malka.*[35] However, only a few cases shall be briefly discussed here to serve as examples of the pitfalls when it comes to improperly referring to fundamental rights.[36]

Koons v. Bauret centered on a postcard featuring a black-and-white photograph of two naked children holding hands, taken in 1970 by Jean-François Bauret (Fig. 3), that the American artist Jeff Koons had used as inspiration in 1988 in designing the porcelain sculpture Naked as part of his "Banality" series (Fig. 4).

The Paris District Court welcomed the argument that Article 10 ECHR protects the freedom of artistic creativity, stating that assessing the facts on a case-by-case basis is required to guarantee a fair balance between copyright and freedom of expression. The Paris District Court began the justification of

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31 Tribunal de Grande Instance [TGI] de Paris (Paris District court of first instance), 3rd Chamber, *Succession Bauret c. Jeffrey Koons et le Centre national d'art et de culture Georges Pompidou*, 9 March, 2017, No. 15–01086 (Fr.).

32 Cour d'appel de Paris (Paris Court of Appeal), Pole 5, 1st Chamber, 17 December 2019 (No. 152/2019). The Court of Appeal simply confirmed the decision of the Paris District court and the factual assessment by the first instance judges without much argumentation, far from a proper proportionality analysis required by article 10 ECHR. Therefore, the following developments will concentrate on the Paris district court decision, not on the Appeal decision.

33 Tribunal de Grande Instance [TGI] de Paris (Paris District Court of First instance), 3rd Chamber, 8 November 2018, *Koons and Centre Georges Pompidou vs Davidovici* (No. 15/02536).

34 Cour d'appel de Paris (Paris Court of Appeal), Pole 5, 1st Chamber, 23 February 2021 (No. 034/2021); for comment see Sutterer (2022).

35 Cour d'appel (CA) de Versailles (Versailles Court of Appeal), 1st Chamber, 16 March 2018, No. 15/06029, Dalloz IP/IT (2018) 300.

36 For more detailed discussion, see Geiger (2021) 185 et seq.


Figs. 3 and 4: Left: Jean-François Bauret (photograph, 1970); right: Jeff Koons, "Naked" (porcelain sculpture, 1988)

its ruling by highlighting that the weight of the right to freedom of expression is intrinsically linked to the type of discourse used in the given circumstance (political speech enjoying greater protection than commercial speech). The judges considered it necessary to ascertain whether the situation concerned the reuse of copyright for commercial intent or for a higher public interest purpose in order to properly measure the impact on that fundamental right. This stance was clearly a consequence of the ECtHR's approach and the aforementioned *Klasen*-decision of the French Cour de cassation. However, in appreciation of the particularities of the case, the court concluded that the creative use in question should not be allowed, as Koons had failed to justify the imperative necessity of using Bauret's photograph without seeking the photographer's prior authorization. It seems worth noting that to arrive at this conclusion, the Paris court surprisingly reversed the burden of proof. Rather than placing the burden on the photographer to demonstrate that the restriction of free speech by invoking his copyright was justified, the Paris Court placed the burden on the creator of the artistic reuse, who was to prove that the restriction was indeed necessary and imperative for the benefit of a

democratic society. This is an incorrect understanding of how Article 10 ECHR should be applied in copyright cases, as it implies that the artist must justify his creative choices to the court. Moreover, neither the argument concerning the particularities of the artistic movement of which the work of art was a part of, nor the description of the aim of the individual sculpture or series of sculptures was evaluated with the attention it deserved. Instead, the Paris judges came rather close to judging the artistic merits of the sculpture in question, and even the pertinence and legitimacy of the art movement to which Koons belongs.

Thus, the judges seemed to be assessing his art rather than limiting themselves to matters of law,[37] which entails a strong risk of interfering in the artistic process, potentially leading to a denial of the artist's intellectual and creative freedom. Rather, judges should be extremely prudent in their rulings when asking for artistic justifications, such as in the U.S., where the Court of Appeals for the Second Circuit, overturning a decision of the lower trial court, concluded that the appropriation by the artist Prince in the way of inserting a photograph taken by Patrick Cariou of a Rastafari man (Fig. 5) constituted "fair use" (Fig. 6).[38] As Valérie-Laure Benabou has pointed out, the judges in these two French cases seemed alarmingly interested in assessing the merits of particular works of art, which has traditionally been considered undesirable when it comes to copyright, as judges are not to play the role of art critics.[39]

Moreover, the Paris court held that for an artist's reuse to be justified by Article 10 ECHR, the public must have knowledge of the primary work, as only then can the reuse provoke a reflection. However, on the facts, the primary work was unknown to a broader audience.

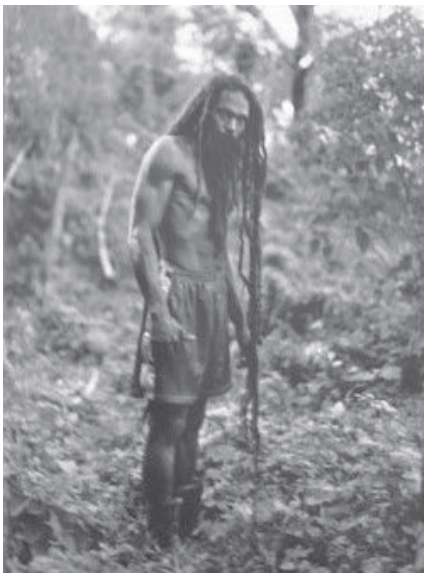
It thus seems that the Paris court confused the requirements of the parody exception, for which a reference to the original work is of major importance, with those of artistically creative re-appropriation, which is protected under Article 10 of the ECHR. In this respect, the judges seemed to imply that Koons had run out of inspiration and wanted to save himself the effort of creating something new. However, this way of reasoning not only fails to understand the process behind creative appropriation, but also the notion that the core of a new work is based on an existing work of art. Such reasoning not only deprives French citizens of access to a major piece of art by a

37 Sharing this concern, see Treppoz (2017) 440.

38 United States Court of Appeals for the Second Circuit in *Cariou v. Prince* 714 F. 3d 694 (2d Cir. 2013).

39 Benabou (2018).

renowned 20th-century artist, but also prevents the artist from publicly conveying his artistic message.



Figs. 5 and 6: Left: Patrick Cariou, photograph from "Yes, rasta" (2000); Right: Prince, work from "Canal Zone" (2008)

In the *Klasen v. Malka*-case, the Court of Appeals reasoned similarly. First, the court stated that Peter Klasen, who had invoked his freedom of expression in defence, must establish the extent to which a fair balance between the protection of his rights and those of the original work's right-holder should be sought to justify his failure to obtain authorization for use of that work. Second, because of that failure, the court considered that Klasen's unauthorized use of the photographs in question had not been indispensable for the exercise of freedom of expression he was claiming. Although Klasen admitted that the primary work was perfectly capable of being substituted by any other advertising photographs of similar kind for achieving the same means, he nevertheless explained sufficiently well that his rationale for using the photographs was to expose how cultural materials convey a message about consumer society. However, in the eyes of the court, this justification was not sufficient. It held that the painter had failed to explain exactly why he had chosen these particular photographs, even though his explanation made it clear that the appropriated material was

part of his creative process, if not the heart of his artistic speech. In addition, quite like the Paris District Court in its *Koons v. Bauret*-decision, the Versailles Court of Appeal based its decision on the additional argument that the photographs appropriated were not known to the public. Using notoriety as a yardstick to measure the level of protection a work of art deserves is rather odd. In reality, it is not the notoriety of a piece of art that might permit its appropriation, but rather the artistic reasoning behind that appropriation.[40] If this stance had been adopted in the two aforementioned cases, the uses would undoubtedly have been deemed permissible.

Figs. 7 and 8: Top: Franck Davidovici, photograph from 1985 used in a commercial of the brand "Naf-Naf" entitled "Naf-Naf. Le grand méchant look"; Bottom: Jeff Koons, "Fait d'hiver", porcelain sculpture, taken from the serie "Banality", 1988

40 Benabou (2018) 301.

These same surprising arguments were re-used by the Paris Court of first instance and of Appeal[41] in the *Koons and Centre Georges Pompidou vs Davidovici* case, where it was alleged that Jeff Koons had infringed the copyright of a photographer when using the image of an advertisement campaign (Fig. 7) as a point of departure for one of his sculptures (Fig. 8).

The Paris court found no violation of Article 10 ECHR and that there was no disproportionate restriction of the artist's freedom of artistic expression, as no artistic dialogue was possible since the original work was unknown. Very surprisingly, the court considered that the artist just wanted to spare a creative effort.

Regarding the freedom of artistic creativity and its protection in the case, the Paris Court of Appeal had another surprising argument. According to the Court, the message by Jeff Koons was an act of artistic creation and not political or related to questions of general interest, and would thus benefit from a weaker protection with regard to Article 10 ECHR.[42] Because Jeff Koons was a top selling artist, the Court held that his artistic project had a commercial nature.[43] Noting that commercial speech is less protected then political speech, the Court thus considered, with regard to the European Convention, that copyright justified a proportionate and necessary restriction of Jeff Koons artistic freedom. Such a position seems to misunderstand completely the case law of the European Court of Human Rights on the issue of freedom of artistic expression.[44] On the contrary, according to the Strasbourg Court, "freedom of artistic expression […] affords the opportunity to take part in the public exchange of cultural, political and social information and ideas of all kinds […]. *Those who create, perform, distribute or exhibit works of art contribute to the exchange of ideas and opinions which is essential for a democratic society.* Hence there is an obligation on the State not to encroach unduly on the author's freedom of expression […]."[45] Works of art benefit on the contrary from a particular

41 See the references supra, notes 33 and 35.

42 Cour d'appel de Paris (Paris Court of Appeal), Pole 5, 1st Chamber, 23 February 2021 (No. 034/2021) 22; see also note 34.

43 The Court of Appeal even cites the price paid for the sale of one of Jeff Koons' works: "En outre, comme le relève à juste raison M. DAVIDOVICI, qui produit un article extrait du site internet du Monde en date du 16 mai 2019 qualifiant l'artiste de '*commercial hors pair*' et faisant état de la vente d'une de ses oeuvres, 'Rabbit', adjugée au prix record de 91,1 million de dollars, la démarche artistique de Jeff KOONS n'est pas dénuée de caractère commercial" (ibid., p. 22).

44 For more detail see Geiger (2018a).

45 ECtHR, *Alınak v. Turkey*, no. 40287/98, 29 March 2005, para. 42 (emphasis added).

strong conventional protection. The fact that the art is sold (and even very well sold!) does not diminish in any way the public interest dimension of the artwork. Nor does the fact that a newspaper is sold diminishes the protection that journalists enjoy by freedom of information.

Typically, commercials or advertising are considered commercial expressions.[46] Categorizing Jeff Koons' artwork as commercial is not only contrary to the artistic understanding of his role (and other artists from the same appropriation-art movement) in contemporary art, but it is moreover dangerous and discriminatory as it implies an artistic judgement of the judges on the merit of his work, denying him a public interest dimension. When copyright is used as a vehicle for taste, we are close to censorship and the darkest hours of our civilization. It is thus very much hoped that Jeff Koons will take the case to the French Supreme court who should, in accordance with its *Klasen* decision, ask for a better motivation from the Appeal judges to restrict freedom of artistic creativity, as there have been manifest errors in the proportionality analysis of the Paris Court.

2. *CJEU: Internalization of a (limited) room to manoeuvre using fundamental rights*

Although the CJEU has recognized that the freedom of expression and its balancing factors play a crucial role in shaping the contours of copyright, and although in applying freedom of expression to EU copyright, the CJEU has largely relied on the case law of the European Court of Human Rights,[47] the Luxembourg Court nevertheless indicates in its recent decisions *Funke Medien*, *Pelham*, and *Spiegel Online*[48] that an externally introduced flexibility (by means of complementing that already existing in the EU list of exceptions) could be harmful to copyright harmonization and legal certainty. Therefore, despite having taken a more favourable position on the possibility of shaping EU copyright by fundamental rights norms, the CJEU does not completely adopt this approach since it considers, in quite categorical terms, that an *external* exception of freedom of expression beyond the exhaustive list of limitations of Article 5 of the Information So-

46 Geiger/Izyumenko (2020b) 580, noting that advertising is one of typical forms of commercial speech protected by the European Convention on Human Rights.

47 See above, II.

48 CJEU, cases C-469/17 of 29 July 2019, ECLI:EU:C:2019:623 – Funke Medien NRW; C-476/17 of 29 July, 2019, ECLI:EU:C:2019:624 – Pelham and others; and C-516/17 of 29 July 2019, ECLI:EU:C:2019:625 – Spiegel online.

ciety Directive is clearly unacceptable. According to the CJEU, copyright's own internal mechanisms present sufficient safety valves for balancing with freedom of expression.

Even if *Funke Medien* and *Spiegel Online* did not involve the artistic use of images, in both cases fundamental rights were at stake, namely freedom of information and of the press.[49] The former related to the publication of internal governmental reports and the latter to the republication of an older book. Similarly, in *Pelham*, the court addressed the conflict between the property right of copyright owners and freedom of the art as a two-second snippet was taken from a phonogram of the German band "Kraftwerk" in the song of another German pop artist and played on loop.[50] However, the rejection of an external application of fundamental rights outside the exceptions listed in Article 5 of the Information Society Directive – and, one might add, the additional exceptions to copyright's exclusive right created by Articles 4–6 of the Digital Single Market Directive[51] – undoubtedly also applies to copyright protected images.

The problem with the CJEU's approach, however, is that the list of copyright exceptions and limitations contained in Article 5 of the Information Society is both limited and exhaustive. According to this approach, unless the existing exceptions for "quotations for purposes such as criticism or review", and for "the purpose of caricature, parody or pastiche"[52]

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49 Article 11(1) second sentence of the European Charter of Fundamental rights (freedom of information) and Article 11(2) of the Charter (freedom of the press).

50 Article 17(2) of the Charter (protection of intellectual property), and Article 13 of the Charter (Freedom of the arts and sciences).

51 Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, O.J. EU L 130 of 17 May 2019, 92 et seq.

52 Article 5 (3) (d) and (k) of the Information Society Directive. See in this sense the interesting recent decision by the First instance Court of Rennes (Tribunal judiciaire de Rennes), 2nd civ. Chamber, 10 May 2021, *Société Moulinsart v. Xavier Marabout*, involving paintings by a French contemporary artist showing Tintin (the famous comic figure created by Hergé) in the environment of the painter Edward Hopper (the 1950s in the US) together with sexy girls. The Court considered that the conditions for parody were fulfilled: immediate identification of the work subject of parody, humor or criticism (here the mixture of the asexual Tintin put in the universe of US 1950s with reference to Hopper), as well as no confusion with the original work. The Court also considered that since parody is justified by freedom of expression, there is a need to assess on a case by case basis if a fair balance has been found between the interest of the artist and those of rightholders. It concluded, quoting almost verbatim a famous decision

can be made operational, artistic uses of someone else's copyrighted material cannot be justified. There is only one other limitation which provides for some sort of flexibility, but apart from only allowing takings of "minor importance", the exception is limited to analogue uses and does not apply to digital uses. Moreover, such exceptions are only permissible if they have been part of national law prior to the adoption of the Information Society Directive in 2001.[53] But not all artistic uses can be described as "quotations for purposes such as criticism or review", or for "the purpose of caricature, parody or pastiche", unless such exceptions are broadly interpreted in the light of fundamental rights.

To provide sufficient flexibility in this respect, the German Copyright Act contains a limitation which allows so-called "free uses" of copyrighted material were permissible if the material taken "faded away" behind the new work.[54] The CJEU, however, declared this national provision to be incompatible with EU law.[55] Rather, in *Pelham*, the CJEU assumed that the freedom of the arts may well limit the scope of the exclusive rights which in this case was the reproduction right of a phonogram of Article 2(c) of the Information Society Directive. However, the court accepted such a limitation of the exclusive right only in cases where the material taken was "unrecognizable" to the consumer.[56] Needless to point out that this is not a true limitation of the exclusive right based on the freedom of artistic creation, since if what has been taken from the existing work is not recognizable in the new work, by definition no copyright infringement exists in the first place.

In sum, regarding artistic works which are not covered by any of the named copyright exceptions and limitations of Article 5 (3) of the Information Society Directive, the CJEU only seems to pay lip service to the

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of the German Constitutional court on the interface of freedom of the arts and copyright law (see above, note 30): "The potential violation of copyright is of small range and entails only a small if not hypothetical financial loss for the claimants. In this case, the freedom of artistic expression and the artist's interest to use the work freely in the context of an artistic confrontation must prevail over the simple financial concerns of the claimants". The exception for parody is thus read "in the light" of freedom of expression to allow the use in question, showing that extensive interpretation of the existing exceptions can help to justify some contemporary art uses.

53 Article 5 (3) (o) of the Information Society Directive.

54 Sec. 24 of the German Copyright Act. For discussion see Bauer (2022).

55 CJEU, case C-476/17 of 29 July 2019, ECLI:EU:C:2019:624, paras. 56 et seq. – Pelham and others.

56 Ibid. para. 31.

freedom of the arts as enshrined in the European Charter of Fundamental Rights. Although, admittedly, the CJEU is the last arbiter in these questions, it is argued here that the opinion of the CJEU itself which relies on the fact that the legislature has anticipated all the potential conflicts between copyright and higher-ranking norms such as fundamental rights, might be incompatible with the EU legal order. It remains to be seen, how the conflict between the position taken by the CJEU on the one hand, and of the ECtHR on the other hand,[57] will be resolved in light of the future pending accession of the EU to the European Convention on Human Rights.[58] Hence, a different solution is needed, given the protection and importance fundamental rights deserve.

IV. Proposal of a European Style "Fair Use" Grounded in Freedom of Expression

It is apparent that unless one adopts a reading of the CJEU decisions which not only considers fundamental rights when interpreting statutory exceptions to the exclusive rights, but also when determining the scope of the exclusive rights in the first place, the internal control of copyright through fundamental rights remains rather limited. If the fundamental right to free artistic creativity and the use of images by copyright law are to be sufficiently supported, this present contribution advocates that the legislator introduce into the EU copyright framework an open provision based on the freedom of expression balancing-test.[59]

It should be noted, however, that such internalization through the implementation of a new exception for uses made for creative purposes is not a totally new idea. In fact, it was clearly considered to be a potentially viable option by the European Commission[60] a good decade ago, and was also envisaged as a possibility by the European Parliament in a resolution dated July 9, 2015.[61] In the same spirit, a group of European academics

57 See above, II.2.

58 For discussion see Geiger/Izyumenko (2020a) 301 et seq.

59 For a more detailed discussion see Geiger/Izyumenko (2019). – On an economic merit of reflecting on open, "fair use" like clauses, see, among others, Flynn/Palmedo (2017).

60 Commission of the European Communities (2008).

61 European Parliament Resolution (2015) para. 42, in which the European Parliament "notes with interest the development of new forms of use of works on digital networks, in particular transformative uses, and stresses the need to examine solutions reconciling efficient protection that provides for proper remuneration and fair compensation for creators with the public interest for access

working on the European Copyright Code project proposed the adoption of a general clause covering all uses justified by freedom of expression that are not provided for by existing EU legislation.[62] In a similar vein, scholars have proposed to implement a new use privilege for User-Generated Content which, combined with the obligation to pay equitable remuneration, would satisfy all requirements of international copyright law such as the three-step test and create a new revenue streams for creators.[63]

Even if currently an EU "fair use" does not as such (yet) exist, the search for possible theoretical models of its construction might, however, be unnecessary. Surprising as it may seem, in Europe we might already have some sort of "fair use". As highlighted above,[64] in recent years it has been gradually shaped by courts through the application of the right to freedom of expression and information to copyright disputes. The fundamental right to freedom of expression is characterised by a developed list of balancing factors that have been elaborated throughout the years of the human rights jurisprudence in Europe.

V. The U.S. "Fair Use" Exception

Overall, these balancing factors of the courts resemble to the American "fair use" factors. In the EU, these factors include: 1) the character of expression (commercial or not; artistic; etc.); 2) the purpose and nature of expression/ information at stake (political; cultural; entertaining; otherwise in the general interest); 3) the status of a counterbalanced interest and the degree of interference with it; 4) availability of alternative means of accessing the information; 5) the timing/ "oldness" of speech; 6) the status of the speaker/ user (active or "passive"; press; etc.); 7) the form of expression; 8) the medium of expression (notably, the Internet); and 9) the nature and severity of the penalties; etc.[65]

It should be noted that these factors reveal some striking similarities with the fairness factors to be found in the US "fair use doctrine". US "fair use" includes four factors which are non-exhaustive (meaning that new

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to cultural goods and knowledge". For a comment, see Geiger/Bulayenko/Hassler/Izyumenko/Schönherr/Seuba (2015).

62 Wittem Project (2010); see, in particular Dreier (2013).

63 See only Senftleben (2020); Quintais (2017), in particular chapter 6, 365 et seq.

64 See II.

65 Geiger/Izyumenko (2014).

additional factors can be identified by the courts) and some of which split, in turn, into several important subfactors[66].

Factor 1 is the purpose and character of the use. It encompasses the following subfactors: commerciality of the use; transformativeness; and correspondence of the use to one of the preambular purposes or the purposes analogous to them. Preambular purposes include criticism, comment, news reporting, teaching, scholarship, and research. Educational purpose is further identified in the wording of factor 1 itself. Non-commercial, transformative use for one of the purposes considered to be socially valuable would tilt towards the finding of fair use in American case law.

Factor 2 deals with the nature of the copyrighted work. Here again, two important subfactors stand out: the published or unpublished nature of the work and its fictional or factual character. More protection is usually given to creative/fictional works and to those works that have not yet been published (although some case law to the contrary exists as well).

Factor 3 concerns itself with the amount and substantiality of the copyrighted work that has been used (quantitatively and qualitatively[67]).

Finally, factor 4 looks at the effects of the use on the potential market for or value of the copyrighted work. Alongside transformativeness and commerciality, it is often claimed to be one of the most influential factors.

Some further factors have sometimes been identified in addition to the statutory ones. Those include: how long the copyrighted work has been on the market; the refusal to license; the existence of a market failure; the availability of alternative means (or, almost along the same lines, necessity or availability of a work to a user); custom; failure to utilize the technical protection measures; acknowledgement of source material; good faith or "propriety of the defendant's conduct"; social desirability of the transfer of use to the defendant; and impact of an award of fair use on the incentives to create of the plaintiff copyright owner.

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66 Several scholars have for example analyzed problems posed by appropriation art in particular in the context of the "fair use" defence of US copyright law, as in the US a certain number of copyright cases dealt with the delicate issue of what can be appropriated or not in the copyright context. See, e.g., Greenberg (1992); Jaszi (2009); Bresler (2003); Landes (2000); Hick (2013); Morley (2015); Adler (2016). For a comparative approach, see Geiger (2018a); Lucas/Ginsburg (2016); Westenberger (2018).

67 Taking even of small parts can be considered excessive if what is taken is the "heart" of the work; see, e.g., *Harper & Row v. Nation Enterprises*, 471 U.S. 539 (1985), at 600.

VI. A proposal for a European "Fair Use" Test

Admittedly, the mere transplant of a U.S.-type fair use provision would not be ideal, as the copyright systems on the two sides of the Atlantic, despite certain convergences,[68] remain different in scope and spirit.[69] Thus, as has been recently proposed, a more promising way forward – and one that is more compatible with the EU legal system – might be to codify the criteria already used by judges when balancing fundamental rights and copyright law and introduce a European fair use provision based on freedom of expression in the EU *acquis* in addition to the existing list of exceptions.[70] Such a European "fair use" grounded on freedom of expression would be not the four-factor test known from the US law but, rather, would subsist in the proportionality test. It can further be combined with an already existing list of limitations as found, currently, in Article 5 of the Information Society Directive. One possible proposal of how such a clause could be worded is presented hereby:

"1. Any other proportional use for the purpose of freedom of expression and information is permitted. In determining whether the use made of a work in any particular case is proportional, the factors to be considered shall include:
   a) the character of the use, including whether such use is commercial or transformative;
   b) the purpose of use (in the common interest or not);
   c) the nature of the information at stake;
   d) the degree of interference with the property of copyright holder, including whether the fair remuneration was paid;
   e) the availability of alternative means of accessing the information; and any other factor that might be relevant for the circumstances of the case.
2. All factors are considered in an overall assessment. In the case of 1.4), the payment of a fair remuneration subsequent to the use can

68 See Davies (1995).

69 See in this sense Torremans (2012). – For a detailed comparison of the different factors of the US "faire use" exception and with the factors influencing the balancing with Article 10 ECHR, see Geiger/Izyumenko (2019).

70 For more details on this text proposal see Geiger/Izyumenko (2019) 72; Calling for the introducing of an open-ended limitation in EU copyright law, see also, e.g., Senftleben (2017); Hugenholtz (2017).

re-establish its proportionality when otherwise freedom of expression and information would be unduly restricted."

Implementing an open-ended copyright clause in EU copyright law would not only be possible, but more transparent than the currently functioning external limitations to copyright (including fundamental rights) to which the judges have to recourse in the situation of a lack of appropriate legislative provision. Furthermore, a codification of the criteria of the freedom of expression balancing test would ensure a better predictability and thus an increased legal security with an ensuing harmonising effect. Finally, the "fair use" clause grounded in the European human rights tradition is, by definition, supranational, which is important in view of the EU legislator's intention of harmonisation, or even unification of IP laws, particularly significant of course in the online environment. Such clause can also reconcile, in view of the upcoming European Union's accession to the European Convention on Human Rights,[71] the current European legal framework for intellectual property rights with Europe's human rights law obligations.

VII. Conclusion

Whatever solution is adopted, it would be desirable to increase the flexibility of and the role granted to freedom of artistic expression within copyright law to better adapt legal provisions to the factual circumstances of various art movements. The failure of copyright law to take sufficient account of fundamental values such as freedom of expression ultimately risks the rejection of the entire system by creators and the general public alike if no appropriate solution is implemented.[72] In this context, the argument put forward by the EU Commission and the CJEU that flexible exceptions are not within the continental tradition, and risk increasing legal uncertainty, is not convincing as numerous other open norms can be found in continental legal systems. Moreover, the uncertainty that an open provision can generate should not be overestimated. Even in the United

71 See Article 6 (2) TEU as amended by Article 1 (8) of the Treaty of Lisbon, and Article 59(2) ECHR as amended by Article 17 of Protocol No. 14 to the ECHR. Although the CJEU rejected the latest draft agreement of EU accession to the ECHR (Opinion 2/13 of 18 December 2014, EU:C:2014:2454), this only delayed the accession, which remains binding on the EU.

72 See Geiger (2020).

States, whose copyright system is often presented as difficult to predict owing to the fair use clause, empirical studies over the past decade have shown that the solutions adopted by the courts can be forecast in most cases, largely disproving certain preconceived ideas on the matter.[73] The fact that more than 40 countries worldwide have adopted open clauses within the copyright arena,[74] and that many of those countries boast flourishing cultural industries, should serve to mitigate concerns and definitively permit a different view concerning open-ended clauses to limit copyright.

Of course, more fundamentally, it might be necessary to think ahead and carry out a more in-depth review of the mechanism of exclusivity in the context of derivative creations, even if doing so means considering other options for the remuneration of a work's original authors.[75] This fascinating, albeit complex, issue is, however, beyond the scope of this contribution.[76]

Whatever solution is adopted, it must necessarily guarantee that copyright cannot under any circumstances be misused for the purpose of censorship, regardless of whether the expression in question has political, cultural, or artistic intent.[77] All in all, one thing appears quite obvious: it can hardly be considered compatible with free artistic creativity in a democratic society to demand that artists seek authorization before creating a new work, or to ban its work later on from a museum because of copyright claims of contestable legitimacy. Consequently, the dissemination of contemporary art in museums and galleries could be in serious danger, as these institutions will be tempted to refuse showing certain artists in order to avoid copyright claims. At a time when even the core principles of copyright law are subject to artistic reflections and that appropriation is used as a vehicle for an artistic discourse about creativity, it is crucial to

73 Sag (2012); Beebe (2008); Samuelson (2009).

74 For the list of these countries and their legislation, see Band/Gerafi (2015).

75 On this issue see Geiger (2010), (2017) and (2018), advocating a "limitation based"-statutory remuneration system for commercial creative uses, administrated by an independent regulation authority which could solve ex post disputes between original and derivative creators on the price to be paid for the transformative use via mediation, taking into account the existing and expected revenue streams for the derivative work.

76 For a fundamental reflection, see Frosio (2018), examining the long history of creativity in order to demonstrate disparity between cumulative mechanics of creativity and modern copyright policies.

77 On the issue of censorship by way of copyrights exclusive rights, see Ortland (2021); see also Geiger (2016a).

ensure that copyright law continues to serve creators without becoming a tool for cultural censorship.

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Fig. 1: Alix Malka/Flair; https://ipkitten.blogspot.com/2018/03/french-court-finds-appropriation-of.html

Fig. 2: Peter Klasen; https://ipkitten.blogspot.com/2018/03/french-court-finds-appropriation-of.html

Fig. 3: Jean-François Bauret; https://ipkitten.blogspot.com/2019/12/paris-court-of-appeal-confirms-that.html

Fig. 4: Jeff Koons; https://i.dailymail.co.uk/1s/2019/12/22/02/22545666-7817383-image-a-45_1576980529527.jpg

Fig. 5: Patrick Cariou; http://www.artistrights.info/cariou-v-prince

Fig. 6: Prince; http://www.artistrights.info/cariou-v-prince

Fig. 7: Franck Davidovici; https://ipkitten.blogspot.com/2021/03/jeff-koons-loses-again-in-france-his.html

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