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FREEDOM OF EXPRESSION AS AN EXTERNAL LIMITATION TO COPYRIGHT LAW IN THE EU: THE ADVOCATE GENERAL OF THE CJEU SHOWS THE WAY

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Freedom of expression as an external limitation to copyright law in the EU: The Advocate General of the CJEU shows the way

Christophe Geiger and Elena Izyumenko[*]

This article analyses the recent opinion delivered by the Advocate General Szpunar of the CJEU in the Afghanistan Papers *case. It highlights, in particular, four crucial points that stand out in the opinion. First, the adoption of a fundamental rights perspective when evaluating copyright regulation in general. Second, the need to ensure that copyright's internal mechanisms designed to take into account the fundamental right to free expression (i.e., the idea/expression dichotomy, the criteria for protection such as the originality requirement and the exceptions and limitations) are interpreted in a manner that gives full effect to freedom of expression. The presence of such mechanisms should, third, by no means be understood as immunising copyright from any further freedom of expression scrutiny: according to the Advocate General, if on the contrary fundamental rights are not sufficiently taken into account by the existing copyright system, there are circumstances when the exclusive rights "must yield to an overriding interest relating to the implementation of a fundamental right or freedom" – an explicit admittance (for the first time at EU level) of the admissibility of an external limitation to copyright by freedom of expression. This approach is not called into question by the Advocate General in his two other opinions that shortly followed* Afghanistan Papers - Pelham *and* Spiegel Online*. If at first sight he seems to take a more restrictive approach towards the opening of the closed list of limitations in EU copyright law by the use of fundamental rights, he still considers that such an external limitation is possible "in exceptional cases", specifying that this is in particular the case when the "essence of a fundamental right" is at stake. This article concludes by addressing the final focal point of the* Afghanistan Papers *opinion - the unacceptability of misusing copyright for the purposes not corresponding to its*

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rationales and its social function. Such reference to the concept of copyright misuse is particular noteworthy since this notion has never been applied before by the EU courts in such an explicit way.

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On 25 October, Advocate General Szpunar delivered his long-awaited opinion in *Funke Medien NRW* case (also known as the *Afghanistan Papers* case).[1] The case concerns the unauthorised publication by a daily newspaper of military reports held by the German government including information about the deployments of German Federal armed forces abroad. In order to prevent the publication of some information that it considered sensitive, the German government sought an injunction claiming that the newspaper had infringed its copyright over the reports.

In his opinion on this case, the Advocate General advanced the important idea that any judicial implementation of a copyright law provision should be subjected to a freedom of expression scrutiny on a case-by-case basis if the facts require so.[2] This idea culminates a recent trend in the European jurisprudence to depart from a categorical immunity of copyright law from any external freedom of expression evaluation. Not that long ago, courts in Europe regarded such external restriction of copyright as largely impossible owing to the existence of copyright law's own mechanisms to balance exclusivity with competing rights such as free expression and its correlate "the public's right to information" through e.g. the idea/expression dichotomy and exceptions and limitations to copyright.[3] Already for a while though, the Court of Justice of the European Union (CJEU) started to depart from this unmitigated approach by admitting that intellectual property (IP) law needs at least to be interpreted

[1] Opinion of Advocate General Szpunar in Case C-469/17, *Funke Medien NRW GmbH v. Federal Republic of Germany*, delivered on 25 October 2018, EU:C:2018:870 (hereafter "Opinion of Advocate General Szpunar in *Funke Medien NRW*"). Throughout this article, this opinion will be put in perspective with the two subsequent opinions of the Advocate General in the *Pelham* and *Spiegel Online* cases, dealing with the same question of the admissibility of an external freedom of expression limitation beyond the list of codified exceptions in EU copyright law. See Opinion of Advocate General Szpunar in Case C-476/17, *Pelham and Others*, delivered on 12 December 2018, EU:C:2018:1002 (hereafter "Opinion of Advocate General Szpunar in *Pelham and Others*"); and Opinion of Advocate General Szpunar in Case C-516/17, *Spiegel Online*, delivered on 10 January 2019, EU:C:2019:16 (hereafter "Opinion of Advocate General Szpunar in *Spiegel Online*").

[2] Generally on the role of the Advocate General in the development of EU law, see N. Burrows and R. Greaves, *The Advocate General and EC Law* (Oxford: OUP, 2007).

[3] See e.g. French Supreme Court, *Tuileries*, 4 July 1995, 167 *RIDA* 259; German Federal Court of Justice, *CB-Infobank I*, 16 January 1997, *GRUR* 459 (1997); Austrian Supreme Court, *Karikaturwiedergabe*, 9 December 1997, *GRUR Int.* 896 (1998*); Hyde Park Residence Ltd. v. Yelland*, Court of Appeal – Civil Division, 10 February 2000, [2000] *EWCA Civ* 37; Belgian Supreme Court, 25 September 2003, *Auteurs & Média* 29 (2004); Federal Court of Switzerland, 22 June 2005, *sic! online* (2005), 732 *Medialex* 153 (2005); Brussels District Court, *Copiepresse SCRL v. Google Inc.*, 15 February 2007, 39(4) *IIC* 451 (2008). Thus, the courts often held that defense to a copyright infringement claim based on Article 10 (freedom of expression) ECHR outside the existing framework of copyright limitations was "invalid": see French Supreme Court, 1st Civil Chamber, *Utrillo*, 13 November 2003, 35 *IIC* 716 (2004), comment by C. Geiger. For a critical comment on these cases see C. Geiger, *Droit d'auteur et droit du public à l'information, approche de droit comparé* (Paris, Litec, 2004), at 391 et seq.

"in the light of" fundamental rights.[4] A ground-breaking shift then came from the European Court of Human Rights (ECtHR), which, in two important rulings of 2013, unequivocally subjected copyright law to an external freedom of expression examination.[5] Following an already established approach by the Court towards the evaluation, in the context of the European Convention on Human Rights (ECHR), of restrictions on freedom of expression, the Strasbourg judges admitted, first, that copyright-imposed limitations on expression in those cases constituted an *interference* with Article 10 (freedom of expression) of the ECHR. Although ultimately ruling on no violation in the case examined, the Court subjected copyright regulation at stake to a detailed Article 10 scrutiny, applying the balancing factors developed throughout its freedom of expression jurisprudence.[6] It thereby confirmed that an explicit freedom of expression review of copyright is not only possible, but also obligatory on a case-by-case basis in Europe in view of the region's long-standing tradition towards the protection of human rights and fundamental freedoms. As a consequence, several national courts of EU Member States have since then been applying fundamental rights in IP litigation, sometimes allowing external limitations to copyright law in specific circumstances.[7] In his opinion in the *Afghanistan Papers* case, Advocate General

[4] CJEU, *Scarlet Extended*, C-70/10, Judgment of 24 November 2011, EU:C:2011:771; CJEU, *Painer*, C-145/10, Judgment of 1 December 2011, EU:C:2011:798; CJEU, *SABAM v. Netlog*, C-360/10, Judgment of 16 February 2012, EU:C:2012:85; CJEU, *UPC Telekabel*, C-314/12, Judgment of 27 March 2014, EU:C:2014:192; CJEU, *Deckmyn*, C-201/13, Judgment of 3 September 2014, EU:C:2014:2132; CJEU, GS Media, C-160/15, Judgment of 8 September 2016, EU:C:2016:644; CJEU, *Mc Fadden*, C-484/14, Judgment of 15 September 2016, EU:C:2016:689. Further on the use of fundamental rights by the CJEU in intellectual property cases, see C. Geiger, "L'utilisation jurisprudentielle des droits fondamentaux en Europe en matière de propriété intellectuelle: Quel apport? Quelles perspectives?", in: C. Geiger (ed.), *La contribution de la jurisprudence à la construction de la propriété intellectuelle en Europe* (Collection du CEIPI/Litec, Paris, 2013), p. 193; J. Griffiths, "Taking Power Tools to the Acquis – The Court of Justice, the Charter of Fundamental Rights and European Union Copyright Law", in: C. Geiger, C. Nard and X. Seuba (eds.), *Intellectual Property and the Judiciary* (EIPIN series Vol. 4, Cheltenham (UK)/Northampton, MA (USA), Edward Elgar Publishing, 2018), p. 144; and S. van Deursen and T. Snijders, "The Court of Justice at the Crossroads: Clarifying the Role for Fundamental Rights in the EU Copyright Framework", 49(9) *IIC* 1080 (2018).

[5] ECtHR, *Ashby Donald and Others v. France*, no. 36769/08, 10 January 2013, CE:ECHR:2013:0110JUD003676908; ECtHR, *Neij and Sunde Kolmisoppi v. Sweden* ["*The Pirate Bay*"] (dec.), no. 40397/12, 19 February 2013, CE:ECHR:2013:0219DEC004039712. For a joint comment on these cases, see C. Geiger and E. Izyumenko, "Copyright on the Human Rights' Trial: Redefining the Boundaries of Exclusivity through Freedom of Expression", 45(3) *IIC* 316 (2014).

[6] See detailed on the ECtHR case law, C. Geiger and E. Izyumenko, "Intellectual Property before the European Court of Human Rights", in: C. Geiger, C. Nard and X. Seuba (eds.), *Intellectual Property and the Judiciary*, *supra* note 4, p. 9.

[7] See for further references, C. Geiger and E. Izyumenko, "Copyright on the Human Rights' Trial", *supra* note 5; C. Geiger, "'Fair Use' through Fundamental Rights: When Freedom of Artistic Expression allows Creative Appropriations and Opens up Statutory Copyright Limitations", forthcoming in: W.L. Ng, H. Sun

Szpunar unambiguously endorsed this approach, this time at EU level, considering explicitly that an external freedom of expression check of copyright law is legitimate when the circumstances of the case require so.[8]

Four crucial points stand out in the opinion. First, the adoption of a freedom of expression perspective when evaluating copyright regulation in general (1). Second, the need to ensure that copyright's internal mechanisms for balancing with freedom of expression (in particular, the idea/expression dichotomy, the criteria for protection such as the originality requirement and the exceptions and limitations) are interpreted in a manner that gives full effect to freedom of expression (2). The presence of such mechanisms should, third, by no means be understood as immunising copyright from any further freedom of expression scrutiny – an explicit admittance (for the first time on EU level) of the external limitation of copyright by freedom of expression (3). Finally, the opinion highlights the inadmissibility of misusing copyright for the purposes not corresponding to its rationales and its social function (4).

1. Freedom of expression is the rule: the adoption of a fundamental rights perspective to evaluate copyright regulation

Advocate General Szpunar starts his analysis on the merits by reformulating the questions submitted by the national court, suggesting to "tak[e] as the starting point not the copyright law of the Federal Republic of Germany, but the freedom of expression of Funke Medien."[9] According to the Advocate General, the national court essentially enquired "whether Article 11 freedom of expression of the Charter should be interpreted as precluding a Member State from relying on its copyright over

and S. Balganesh (eds.), *Comparative Aspects of Limitations and Exceptions in Copyright Law* (Cambridge, Cambridge University Press, 2019); Center for International Intellectual Property Studies (CEIPI) Research Paper No. 2018-09, available at SSRN: https://ssrn.com/abstract=3256899.

[8] In his two subsequent opinions on the cases involving the clash of copyright with freedom of expression, the Advocate General seems to have taken a more restrictive position, emphasising that any balancing of copyright with freedom of expression should be undertaken primarily by the legislature: see Opinion of Advocate General Szpunar in *Pelham and Others*, [94]; and Opinion of Advocate General Szpunar in *Spiegel Online*, [62]. Yet, the Advocate General did not exclude external application of freedom of expression to copyright altogether, admitting that "exceptional circumstances" might arise making such application indispensable: see Opinion of Advocate General Szpunar in *Pelham and Others*, [94], [98]; and Opinion of Advocate General Szpunar in *Spiegel Online*, [62], [64], [71].

[9] Opinion of Advocate General Szpunar in *Funke Medien NRW*, [33].

documents such as those at issue in the main proceedings in order to curtail the freedom of expression laid down in that article."[10]

Thereby reformulated, the above question has important implications as it confirms that the scope of copyright should only extend to its limits.[11] Outside this scope, one is "outside the monopoly", with the result that the copyright holder cannot exercise any control whatsoever[12]. To use a metaphor, intellectual property rights constitute islands of exclusivity in an ocean of liberty.[13] When the strict field of copyright has been exceeded, it is necessary to return to the principle that is known as freedom.[14] Suggesting to start the analysis of the case from the freedom of expression (and not copyright law) perspective, the Advocate General rightly acknowledges the fact that in a broader perspective the principle is indeed freedom (of expression and information, of competition), and the exception is the protection of the rights of copyright holders.

Further reasoning of the Advocate General comports to this statement: "[T]he communication of a work covered by copyright, whether by the author himself, with

[10] Id.

[11] As several scholars have rightly pointed out, "copyright limitations are no exceptions to the exclusive right of the author, but rather legal techniques, which determine the exact scope of copyright": see e.g. C. Geiger, "Promoting Creativity through Copyright Limitations: Reflections on the Concept of Exclusivity in Copyright Law", 12(3) *Vanderbilt Journal of Entertainment & Technology Law* 515 (2010), at 521; P.B. Hugenholtz, "Adapting Copyright to the Information Superhighway", in: P.B. Hugenholtz (ed.), *The Future of Copyright in a Digital Environment* (The Hague: Kluwer Law International, 1996), p. 81, at 94.

[12] M. Vivant, "Touche pas à mon filtre! Droit de marque et liberté de création: de l'absolu et du relatif dans les droits de propriété intellectuelle", *JCP E*, I, 1993, 251, No. 2: "Intellectual property rights do grant a (lawful) hold over intangible assets, but only from the point of view of certain economic exploitations, within the perspectives and logic that are innate in them. Outside this 'circle', there is no reservation, no appropriation."

[13] In this sense see also C. Geiger, "Fundamental Rights, a Safeguard for the Coherence of Intellectual Property Law?", 35(3) *IIC* 268 (2004), at 272-273; D. Voorhoof, "Freedom of Expression, Parody, Copyright and Trademarks", in: J.C. Ginsburg and J.B. Besek (eds.), *Adjuncts and Alternatives to Copyright* (ALAI 2001, Kernochan Center for Law Media and the Arts, New York, 2002), p. 636, at 639; A. Kur, "Of Oceans, Islands, and Inland Water – How much Room for Exceptions and Limitations under the Three-step Test?", 8 *Richmond Journal of Global Law and Business* 287 (2009); Max Planck Institute for Intellectual Property, Competition & Tax Law, Research Paper Series No. 08-04.

[14] T. Hoeren, "Access Right as a Postmodern Symbol of Copyright Deconstruction?", in: J.C. Ginsburg and J.B. Besek (eds.), *Adjuncts and Alternatives to Copyright*, *supra* note 13, p. 348, at 361: "The general rule above any intellectual property is freedom of information [...]. Copyright is an exception which needs further justifications"; C. Geiger, "Author's Right, Copyright and the Public's Right to Information: A Complex Relationship", in: F. Macmillan (ed.), *New Directions in Copyright Law*, Vol. 5 (Cheltenham (UK)/Northampton, MA (USA), Edward Elgar Publishing, 2007), p. 24.

his authorisation or without such authorisation, naturally falls within the scope of [...] freedom [of expression]."[15]

This is an important clarification, since the principle that copyright is a restriction on the broader field of free expression has long been ignored. Traditional copyright scholarship in several European countries followed by some courts has often held(and still hold sometimes) that the exclusive right of the author (or of the holders of neighbouring rights) is the principle that can only give way within the conditions listed exhaustively by the legislature.[16] This implies a hierarchy: when the strict scope of copyright's application has been exceeded, it is appropriate to return to the principle that is the exclusive right. This traditional approach has been extensively criticized in recent years for not being compatible with copyright rationales[17] and it is certainly a positive development that it is clearly abandoned in the opinion.

2. The need to give full effect to copyright's internal balancing mechanisms which reconcile it with freedom of expression

Taking freedom of expression as a founding principle does not exclude relying on the mechanisms already incorporated in copyright law to protect it from unjustifiably intruding on freedom of expression. To the contrary, it requires giving these mechanisms the full effect. The Advocate General reiterated that such

[15] Opinion of Advocate General Szpunar in *Funke Medien NRW*, [35].

[16] Restrictive approach towards copyright exceptions has been advocated by the CJEU itself (CJEU, *Infopaq International*, C-5/08, Judgment of 16 July 2009, ECLI:EU:C:2009:465, [56]; CJEU, *ACI Adam and Others*, C-435/12, Judgment of 10 April 2014, ECLI:EU:C:2014:254, [22]). In recent years, however, the Court took a more liberal stance, relying on a purposive interpretation of exceptions in light of fundamental rights (CJEU, *FAPL*, C-403/08 and C-429/08, 4 October 2011, EU:C:2011:631, [163]; CJEU, *Painer*, C-145/10, Judgment of 1 December 2011, EU:C:2011:798, [132]-[133]; CJEU, *Deckmyn*, C-201/13, Judgment of 3 September 2014, EU:C:2014:2132, [19]-[23]; CJEU, *Ulmer*, C-117/13, Judgment of 11 September 2014, EU:C:2014:2196, [27], [31]). See on these different and sometimes contradicting approaches C. Geiger, "The Role of the Court of Justice of the European Union: Harmonizing, Creating and Sometimes Disrupting Copyright Law in the European Union", in: I. Stamatoudi (ed.), *New Developments in EU and International Copyright Law* (Alphen aan den Rijn (NL), Kluwer Law International, 2016), p. 435.

[17] See e.g., with further references, European Copyright Society, "Limitations and Exceptions as Key Elements of the Legal Framework for Copyright in the European Union – Opinion of the European Copyright Society on the Judgment of the CJEU in Case C-201/13 *Deckmyn*", 37(3) *EIPR* 129 (2015).

mechanisms include the idea/expression dichotomy [18] and the exceptions and limitations to exclusive rights.[19]

Insofar as the distinction is concerned, the Advocate General had serious doubts that "purely informative documents, drafted in absolutely neutral and standardised terms, providing an accurate report of events or stating that no events of interest have occurred" should be classified as works protected by copyright.[20]

Another determining criterion was originality. Although it was not discussed from the freedom of expression perspective (i.e., it was not named an internal copyright law's mechanism for balancing with freedom of expression), it could have been well placed in this sense alongside idea/expression dichotomy and exceptions and limitations to copyright. All in all, the Advocate General doubted whether the reports at issue were original in the EU's understanding of being the "author's own intellectual creation".[21] According to the Advocate General, it is "rather unlikely that the author or authors of those documents, whose identity is unknown but who are probably civil servants or officers of the federal armed forces, were able to make free and creative choices in order to express their creative abilities when drafting those documents. The content of purely informative documents that are inevitably drafted in simple and neutral terms is entirely determined by the information they contain, so that such information and its expression become indissociable, thus precluding all originality. A degree of effort and skill is required to draw them up, but those elements on their own cannot justify copyright protection."[22]

In the Advocate General's view, these factors alone (i.e., unprotectability of ideas/raw information and the lack of originality in the reports) could exclude the classification of the documents at issue as "works" for the purpose of copyright, thereby achieving the protection of freedom of expression by the copyright law's internal means.[23] Considering, however, the possibility that the CJEU might not endorse this approach, the Advocate General moved to consider other possibilities of reconciling exclusivity with freedom of expression.

According to the Advocate General, "copyright is compatible with fundamental rights through the application of various exceptions. Those exceptions enable works to be used in different situations which may fall within the scope of different fundamental

[18] Opinion of Advocate General Szpunar in *Funke Medien NRW*, [37].
[19] Id., [38].
[20] Id., [14]. See also [15]-[16].
[21] Id., [17], with further references.
[22] Id., [19].
[23] Id., [15]-[22], [37].

rights and freedoms, without at the same time depriving authors of the substance of their rights".[24]

Although "[i]n the normal scheme of things, those internal limits on copyright make it possible to reconcile, in a satisfactory way overall, fundamental rights and freedoms with the exclusive rights of authors as regards the use of their works",[25] "[t]he fact remains that, notwithstanding the existence of such limits, the application of copyright law, like any other body of law, remains subject to the requirement of respect for fundamental rights, respect which may be reviewed by the courts."[26] Hence, according to Advocate General, "*there may be exceptional cases where copyright*, which, in other circumstances, could quite legitimately enjoy legal and judicial protection, *must yield to an overriding interest relating to the implementation of a fundamental right or freedom*."[27]

3. An explicit admission of the external freedom of expression limitation on copyright in the EU

The Advocate General thus explicitly admitted, for the first time on EU level, that copyright is not immune to external limitations based on freedom of expression and must under certain conditions be restricted by the latter.[28] He relied heavily on the 2013 ECtHR rulings affirming this external balancing approach.[29] Suggesting that the CJEU adopts a similar line of reasoning, the Advocate General nevertheless admitted that the outcome in *Afghanistan Papers* case might be different than in the ECtHR cases (i.e.,

[24] Id., [38].

[25] Id., [40].

[26] Id.

[27] Id. (emphasis added). See also Opinion of Advocate General Szpunar in *Pelham and Others*, [94], [98]; and Opinion of Advocate General Szpunar in *Spiegel Online*, [62], [64], [71], specifying that an "exceptional case" is when the "essence of a fundamental right" is at stake.

[28] Nevertheless, [a]ny balancing of copyright against fundamental rights which goes beyond merely interpreting the provisions of copyright law, an exercise on the borderline between the interpretation and application of the law, must [...] be carried out having regard to the circumstances of each individual case" (Opinion of Advocate General Szpunar in *Funke Medien NRW*, [31]), that is to say, on a case-by-case basis which is a standard approach of the human rights courts and ECtHR in particular. According to the Advocate General, "[t]hat case-by-case approach enables the principle of proportionality to be applied as accurately as possible, thereby avoiding unjustified interferences with both copyright and fundamental rights." (Id.).

[29] Opinion of Advocate General Szpunar in *Funke Medien NRW*, [41].

more favourable to freedom of expression) – due mainly to the strong public interest underlying access to the "official documents of a State of an informative nature".[30] Arguably, such public interest was not established either in *"The Pirate Bay"* case (on the peer-to-peer exchange of music, films, and computer games)[31] or in *Ashby Donald* (on unauthorised publication of the fashion show photographs for commercial purposes).[32] This confirms once again that the commerciality of expression (present in both the ECtHR and *Afghanistan Papers* cases) is only of secondary nature and must all in all be subordinate to the public interest goals.[33]

It worth however noting that the nature of an external limitation allowed by the Advocate General in *Afghanistan Papers* case is somewhat ambiguous. On the one hand, he explicitly admitted, as already stated, that freedom of expression can serve as a *limitation* on copyright in particular circumstances (by excluding, for example, the works of high informative value from copyrightability). At the same time, he also seemingly avoided to endorse expressly the possibility of applying to copyright a freedom-of-expression-grounded *exception* which would go beyond those laid down in Article 5 InfoSoc (provision on copyright exceptions and limitations in the EU).[34] According to the Advocate General, although "[i]n the present case, the national court appears to suggest a broad interpretation, influenced by freedom of expression, of the scope and conditions for application of the exceptions that may come into play", "in specific circumstances such as those of the main proceedings, the protection conferred by copyright must be refused, *notwithstanding the possible applicability of an exception*."[35] The Advocate General thus pointed to the fact that his suggested answer should not be understood as favouring the proposition advanced by the national court of creating an external freedom of expression exception beyond those listed in Article 5 InfoSoc.[36] In the Advocate General's view, there is "a significant difference" between

[30] Id., [42].

[31] ECtHR, *Neij and Sunde Kolmisoppi v. Sweden* ["*The Pirate Bay*"] (dec.), no. 40397/12, 19 February 2013, CE:ECHR:2013:0219DEC004039712.

[32] ECtHR, *Ashby Donald and Others v. France*, no. 36769/08, 10 January 2013, CE:ECHR:2013:0110JUD003676908.

[33] Further on this in detail, see C. Geiger and E. Izyumenko, "Copyright on the Human Rights' Trial", *supra* note 54, at 325-330.

[34] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (InfoSoc), OJ No. L 167 of 22 June 2001, p. 10.

[35] Opinion of Advocate General Szpunar in *Funke Medien NRW*, [70].

[36] Id., [71]. See also, confirming this resistance to extend, through the application of human rights, the InfoSoc list of exceptions further its current (restrictive) limits, unless "exceptional circumstances" are in place impairing the very "essence of a fundamental right", Opinion of Advocate General Szpunar in *Pelham and Others*, [54], [77], [94], [98]; and Opinion of Advocate General Szpunar in *Spiegel Online*, [62]-[64], [71], [82].

the approach of the national court and the approach he proposed to take in the *Afghanistan Papers* opinion: "It is one thing to give precedence to freedom of expression over copyright in a specific and very particular situation. It is quite another to introduce into the harmonised copyright system, outside the provisions of substantive EU law governing that area, exceptions and limitations which, by their nature, are intended to apply generally."[37]

Certain confusion is therefore created as to whether the Advocate General is trying to advance an *exclusion from protection* based on freedom of expression (the solution he seems to favour) or an additional *exception* based on freedom of expression. In the light of the arguments brought forward by the Advocate General, it seems that both would be admissible,[38] even if he appears to pronounce himself in the final paragraphs of the opinion in favour of exclusion.[39] In fact, he even explicitly admits that previous reasoning "might appear to favor the proposition" "of applying to copyright, on the ground of protecting freedom of expression, exceptions or limitations other than those laid down in Directive 2001/29 [InfoSoc]".[40] If, as the Advocate General rightly states, copyright in certain circumstances "must yield to an overriding interest relating to the implementation of a fundamental right or freedom",[41] there is absolutely no reason that it should always be on one side of the equation, e.g. protectability. There could be other examples where the work used is without any doubt protected by copyright but the use should still be allowed with regard to freedom of expression. Quotations, parodies, creative reuses are such examples.[42]

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[37] Opinion of Advocate General Szpunar in *Funke Medien NRW*, [71].

[38] See [38]-[41] of the Opinion in *Funke Medien NRW* in support of an external freedom of expression exception on copyright, and [70]-[71] favoring exclusion, directly on freedom of expression grounds (and not necessarily through the application of idea/ expression distinction or originality criterion), of the works at issue from the scope of copyright protection.

[39] Opinion of Advocate General Szpunar in *Funke Medien NRW*, [70]-[71].

[40] Id., [71].

[41] Id., [40].

[42] Thus, it seems that in the light of the arguments developed in the Opinion, the third question posed in the request for a preliminary ruling from the Bundesgerichtshof (Federal Supreme Court of Germany) on whether "fundamental rights of freedom of information or freedom of the media justify exceptions or limitations to the exclusive rights of authors to reproduce and publicly communicate their works, including the right to make works available to the public, beyond the exceptions or limitations provided for in Article 5 (2) and (3) of Directive 2001/29/EC" should clearly be answered positively. This is a very important conclusion since this question was also referred to the Court in another still pending case (Case C-516/17, *Spiegel Online GmbH v. Volker Beck*, lodged on August 2017) and also plays a crucial role in another pending request for a preliminary ruling of the CJEU from the Bundesgerichtshof lodged on 4 August 2017 in the "Metall auf Metall" case (Case C-476/17). On this last case, see the Opinion of the European Copyright Society published on 5 March 2018 in relation to the pending reference before the

At the end, which solution prevails might not matter that much in practice, as both bring the very same result. The important aspect is that the use is allowed based on freedom of expression: whether this creates an *exclusion* from protection or an *exception* to it is a question of perspective. Indeed, it is not of great significance whether the use is permitted because excluded from the exclusive right or because there is an exception based on freedom of expression; both are decisions on the scope, and they only apply in the particular case. If one sees exceptions as instruments that determine the scope of a right, and thus specifies the actual legal range of the right by clarifying the uses that copyright law does *not* capture, it seems unnecessary to differentiate between the scope of protection on the one hand and exceptions to copyright on the other. Copyright then can be seen with both an active and a passive aspect as a whole and cannot be divided.[43] Accordingly, the exploitation rights and the exceptions to those rights are two sides of the same coin.[44]

CJEU in Case C-476/17, *Hutter v. Pelham*, https://europeancopyrightsociety.org/opinions/. In his recent opinions on these two pending cases (Opinion of Advocate General Szpunar in *Pelham and Others*; and Opinion of Advocate General Szpunar in *Spiegel Online*), the Advocate General however clarifies that an external limitation is only admissible in "exceptional circumstances" when the "essence of a fundamental right" is at stake. As it concerns freedom of artistic creativity in particular at issue in *Pelham*, the Advocate General Szpunar considered that, as the EU law stands now, (unlicensed) music sampling should be regarded as a violation of the exclusive rights of phonogram producers and, consequently, as not covered by the "essence" of the right to freedom of expression and freedom of the arts. According to the Advocate General, such stance of EU law towards music sampling and artistic creativity in general might change in the future, but this is the step for the EU legislature, not the CJEU, to undertake (see Opinion of Advocate General Szpunar in *Pelham and Others*, [98]). Such a differentiated approach for freedom of artistic expression in general terms is however not explained or further substantiated and seems highly problematic from a fundamental rights perspective; see detailed in this sense C. Geiger, "Freedom of Artistic Creativity and Copyright Law: A Compatible Combination?", 8(3) *U.C. Irvine Law Review* 413 (2018).

[43] C. Geiger, "Promoting Creativity through Copyright Limitations", *supra* note 11, at 520-524. See also A. Drassinower, "Exceptions Properly So-Called", in: Y. Gendreau and A. Drassinower (eds.), *Language and Copyright* (Carswell/Bruylant 2009), p. 205, at 237 (according to whom "scope limitations define the very nature of the right, and therefore the boundaries constitutive of the copyright holder's entitlement"); M. Vivant and J.-M. Bruguière, *Droit d'auteur* (Dalloz, 2009), at 565: "Dis-moi quelles sont tes exceptions, je te dirais quel est ton droit" ("Tell me what are your exceptions and I will tell you what your right is" (translated by authors)).

[44] See also H. Schack, "Urheberrechtliche Schranken, übergesetzlicher Notstand und verfassungskonforme Auslegung", in: *Perspektiven des Geistigen Eigentums und des Wettbewerbsrechts: Festschrift für Gerhard Schricker zum* (Beck, 2005), p. 70, at 511.

4. Inadmissibility of misusing copyright for the purposes not corresponding to its rationales (social function)

Having adopted a freedom of expression perspective on the case, the Advocate General went to state that, although both copyright protection and protection of national security through non-disclosure of confidential military information constitute legitimate restrictions on the scope of freedom of expression,[45] one cannot substitute the other.[46] In the circumstances of the case, protection of confidential information was not a strong enough objective to justify restrictions of the newspaper's free expression rights. Therefore, the German government chose to rely on copyright protection in order to effectively achieve the same goal.[47]

According to the Advocate General, such a substitution of the public interest goal by the goal of protection of the State's copyright was inacceptable: "the Member State cannot invoke its copyright instead of the public interest".[48] Even if this were recognised as a legitimate aim of interference with free expression rights of others, such interference would have failed the test of necessity. Notably, the "undisguised aim" of protecting the confidentiality of the information[49] fell "completely outside the scope of copyright [...] [which was] used here to pursue objectives that are entirely unrelated to it."[50]

National practice knows other cases in which copyright, instead of serving as an engine of free expression, was used for the sole purpose of blocking access to

[45] Opinion of Advocate General Szpunar in *Funke Medien NRW*, [45]-[49].
[46] Id., [49].
[47] Id. In a similar way, recourse to copyright as an "unusual" (but effective) remedy has also been made in the so-called revenge porn cases, particularly in the US (see e.g. A. Levendowski, "Using Copyright to Combat Revenge Porn", 3 *NYU Journal of Intellectual Property and Entertainment Law* 422 (2014)).
[48] Opinion of Advocate General Szpunar in *Funke Medien NRW*, [56].
[49] Id., [32].
[50] Id., [61].

information in order to either stifle unwelcome criticism[51] or protect one's privacy.[52] Similar trend can be traced in the trademark law too, where extensive protection against blurring and tarnishment often serves primarily not the original functions of trademark law (such as the prevention of consumer confusion), but the purpose of silencing (frequently legitimate) criticism of corporate policies.[53] It is still not uncommon for such cases to succeed[54] – a practice that, in full consideration of the social function of IP, should not subsist in the future.[55] This was also the position of the Advocate General, who rejected the practice of using copyright protection for the aims completely alien to this legal regime.[56] He logically concludes that freedom of

[51] See e.g. Austrian Supreme Court, *Medienprofessor*, 12 June 2001, *GRUR Int*. 341 (2002) (the use by the rightholders of their copyright "with the sole objective of hindering any criticism towards their media campaign"); The Hague Court of Appeals, *Church of Scientology v. XS4ALL*, 4 September 2003, 6 *AMI* 222 (2003) (unsuccessful attempts of the Church of Scientology to invoke copyright protection over its internal documents in order to prevent their publication on a website for the purposes of criticism). Outside Europe, consider the decision of the Federal Court of Canada in *Cie générale des établissements Michelin - Michelin & Cie v. CAW - Canada*, 71 C.P.R. (3d) 348 (finding that the use by the trade union of the Michelin's Bibendum logo in a campaign critical of the company's corporate policies infringed Michelin's copyright).

[52] In US, see *Rosemont Enters. v. Random House, Inc.*, 366 F. 2d 303 (2d Cir. 1966) (attempts by Howard Hughes to use copyright in order to suppress the publication of his biography, which were ultimately prevented by the application of fair use); *Salinger v. Random House, Inc*., 811 F.2d 90 (2d Cir. 1987) (Salinger successfully invoking copyright in order to stop the publication of biography about him and thereby preserve his privacy). Further on this, see P. Samuelson, "Privacy as Intellectual Property", 52 *Stanford Law Review* 1125 (1999).

[53] Paris Court of Appeal, *Assoc. Le Réseau Voltaire pour la liberté d'expression v. Sté Gervais Danone*, 30 April 2003; French Supreme Court, *Sté Esso v. Greenpeace France*, 8 April 2008; French Supreme Court, *Associations Greenpeace France et Greenpeace New-Zealand v. la Société Areva*, 8 April 2008. On these cases, see C. Geiger, "Trade Marks and Freedom of Expression – The Proportionality of Criticism", 38(3) *IIC* 317 (2007).

[54] See e.g. the ex parte order of the Tribunal de Grande Instance de Paris, 25 May 2008 (requesting an artist to seize the use of the painting critical of the modern culture of consumerism which incorporated representation of the Louis Vuitton bag).

[55] On the social function of property in general and intellectual property in particular, see C. Geiger, "The Social Function of Intellectual Property Rights, or how Ethics can Influence the Shape and Use of IP Law", in: G.B. Dinwoodie (ed.), *Intellectual Property Law: Methods and Perspectives* (Edward Elgar, Cheltenham/Northampton, 2014), p. 153. See also C. Sganga, *Propertizing European Copyright: History, Challenges and Opportunities* (Cheltenham, UK/ Northampton, MA, Edward Elgar, 2018), in particular Chapter 5 "The Social Function of Copyright as Property Right" at 191 et seq.; and C. Sganga and S. Scalzini, "From Abuse of Right to Copyright Misuse: A New Doctrine for EU Copyright Law", 48(4) *IIC* 405 (2017).

[56] Opinion of Advocate General Szpunar in *Funke Medien NRW*, [62]-[63]. Questions can also be posed with regards to the current initiative of the European legislature to restrict text and data mining (TDM) by confining it to the sphere of copyright exceptions with, moreover, a limited scope of applicability (the proposed mandatory TDM exception is to apply exclusively to research organisations and for the scientific research purposes, other limited use of TDM options being only voluntary) (Articles 3 and 3a of the Proposed Directive on copyright in the Digital Single Market, COM/2016/0593 final - 2016/0280 (COD),

expression precludes a Member State from invoking its copyright "in order to prevent the communication to the public, in the context of a debate concerning matters of public interest, of confidential documents emanating from that Member State. That interpretation does not prevent the Member State from applying, in compliance with EU law, other provisions of its domestic law, including those relating to the protection of confidential information."[57]

Conclusion

To sum up, the Advocate General's opinion in *Afghanistan Papers* case is a very important and welcome step forward towards full taking into account of fundamental rights, including media freedom in the EU, which includes subjecting copyright to the same checks and tests that any other restriction on freedom of expression has to undergo in a democratic society. What is less welcome is the Advocate General's somewhat ambiguous position as to whether the right to freedom of expression can "open up" the closed catalogue of copyright "exceptions and limitations" of Article 5 InfoSoc. This uncertainty regarding when exactly freedom of expression can serve as an external limitation on copyright law was reinforced recently by two other opinions of the Advocate General Szpunar in *Pelham and Spiegel Online* cases[58] in which precisely this question was posed on the possibility of using freedom of expression as a further exception beyond the existing list in EU copyright law. From one hand, judicial application of freedom of expression (bypassing the legislature) as an external

Brussels, 14 September 2016, with amendments adopted by the European Parliament on 12 September 2018). One may ask whether activities that TDM involves should fall within the scope of copyright in the first place and whether subjecting TDM to the exclusive right corresponds to copyright's social function together with its goal of facilitating expression. For the interesting ideas on this issue, see M. Borghi and S. Karapapa, "Non-display Uses of Copyright Works: Google Books and Beyond", 1(1) *Queen Mary Journal of Intellectual Property* 21 (2011); and A. Drassinower, *What's Wrong With Copying?* (Cambridge, Mass: HUP, 2015) (in particular as it concerns the concept of non-use). For a discussion on the proposed TDM exception, see C. Geiger, G. Frosio and O. Bulayenko, "Text and Data Mining in the Proposed Copyright Reform: Making the EU Ready for an Age of Big Data?", 49(7) *IIC* 814 (2018).

[57] Opinion of Advocate General Szpunar in *Funke Medien NRW*, [66].

[58] Opinion of Advocate General Szpunar *in Pelham and Others;* and Opinion of Advocate General Szpunar in *Spiegel Online*.

exception to copyright on top of the InfoSoc list was characterised in one of those opinions as detrimental to the project of copyright harmonization.[59] On the other, the Advocate General explicitly allowed such application "in exceptional cases", explaining in two of the opinions that this would be the case when the "essence of a fundamental right" is at stake.[60] It is to be hoped that the Court of Justice will endorse the Advocate General's approach in *Afghanistan Papers* (while clarifying any potentially confusing points) and not adopt, as it has frequently done in the past, a more cautious position by only allowing the interpretation of copyright law's internal rules in the light of freedom of expression or by adopting a seemingly overly-restrictive position of the Advocate General on *Pelham and Spiegel Online* cases. An external freedom of expression limitation on copyright is crucial for allowing to address all the legitimate uses that are emerging but that are not subject to an existing limitation. In the long run, in order to improve transparency, this increasing use of freedom of expression to limit copyright provides strong grounds for the development in Europe of an open-ended exception to copyright codifying the factors used by the European Court of Human Rights, in the spirit of other open-ended limitations such as the US fair use clause but fully compatible with the European legal order.[61] As it was very rightly pointed by the Advocate General, "if it became apparent that there were systemic shortcomings in the protection of a fundamental right vis-à-vis copyright, the validity of copyright would be affected".[62] Thus, the application of a fundamental rights scrutiny to copyright can only in the long run strengthen the legitimacy of its legal framework and its public acceptance.[63]

[59] Opinion of Advocate General Szpunar in *Spiegel Online*, [63].

[60] Opinion of Advocate General Szpunar in *Pelham and Others*, [94], [98]; and Opinion of Advocate General Szpunar in *Spiegel Online*, [62], [64], [71].

[61] See on this C. Geiger and E. Izyumenko, "Towards a European 'Fair Use' Grounded in Freedom of Expression", Paper presented at the 12th Annual Conference of the EPIP Association (European Policy for Intellectual Property), University of Bordeaux, France, 5 September 2017 (publication forthcoming in 2019 in the CEIPI Research Paper Series).

[62] Opinion of Advocate General Szpunar in *Funke Medien NRW*, [40].

[63] See in this sense C. Geiger, "'Constitutionalizing' Intellectual Property Law? The Influence of Fundamental Rights on Intellectual Property in Europe", 37(4) *IIC* 371 (2006); "Copyright's Fundamental Rights Dimension at EU Level", in: E. Derclaye (ed.), *Research Handbook on the Future of EU Copyright* (Cheltenham, UK/ Northampton, MA, Edward Elgar, 2009), p. 27; "Implementing Intellectual Property Provisions in Human Rights Instruments: Towards a New Social Contract for the Protection of Intangibles", in: C. Geiger (ed.), *Research Handbook on Human Rights and Intellectual Property* (Cheltenham, UK/ Northampton, MA, Edward Elgar, 2015), p. 661.