

Two Constitutional Cultures, Technological Enforcement and User Creativity: the Impending Collapse of the EU Copyright Regime?

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Abstract

In Pelham, the Court of Justice and the German Federal Constitutional Court reached diametrically opposing conclusions on the relevance of freedom of art in copyright law. The different stances a speculative prediction – they can have immediate consequences for the predictable challenges against the new platform liability regime, and its associated dangers of wide-spread filtering and blocking. The article discusses the numerous constitutional implications with specific attention given to the respective interests affected by the new regime (authors, exploiters, users, platforms) in light of the divergent approaches from the perspective of what appears to be two rather conflicting constitutional cultures: specific perceptions of fundamental rights and proportionality under German law versus an approach tending to emphasise market integration under the EU legal order. Recent assertions by the German Constitutional Court redefining the division of competences between national and EU law permit the prediction of a disturbing future collision course between the two systems, with potentially massive implications for EU copyright law by and large.

Keywords

Copyright Law - Platform Liability - Freedom of Art - Fundamental Rights - German Constitutional Law - EU Legal Order

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Introduction

The deadline for implementing the DSMD¹ has passed. Upload filters will become reality. The passionately debated Article 17² DSMD now imposes liability on certain platforms for acts of communication to the public committed by users, and liability can only be avoided by showing “best efforts” in making illegal content unavailable. The provision was premised on the previous jurisprudence by the Court of Justice, in which it was held that the right of communication to the public (Article 3 EUCD)³ could extend to acts such as manufacturing and distributing devices permitting access to illegal content, and to operators of illegal file sharing platforms. Consequently, the relevant safe harbour provision for host providers (Article 14 E-Commerce Directive⁴) is repealed, and other elements applicable under (national) rules on secondary or (in Germany) disturbance liability concepts⁵ – in particular, knowledge and control over content (an area largely unharmonized in the EU) – no longer apply for those platforms covered under Article 17 DSMD.⁶ Instead, showing best efforts in removing illegal content is the only way to escape liability. The policy objective underscoring Article 17 DSMD is disturbingly simplistic: copyright exploiters had identified a value gap: platforms would, by and large, profit massively from unauthorised uses. Technological measures thus safeguard exploiter’s existing distribution channels from disruptive competition.

This contribution addresses, centrally, the question of constitutionality of the new liability regime⁷ in light of the opposing decisions by the German Federal Constitutional Court (BVerfG) and the Court of Justice for the European Union as reached in the *Pelham* (also well known as the “Metal on Metal”⁸) litigation respectively⁹, a dispute entailing and raising countless problematic concerns

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¹ 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, 17.5.2019, Official Journal of the European Union L 130/92.

² Previously Article 13 Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market, COM/2016/0593 final - 2016/0280 (COD).

³ 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, Official Journal L 167, 22.6.2001, pp. 10 – 19 (hereinafter: EUCD).

⁴ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market OJ L 178, 17.7.2000, pp. 1–16.

⁵ See Hoeren/Yankova, *The Liability of Internet Intermediaries – The German Perspective*, 43 (2012) IIC 501.

⁶ Article 17 (6) and Recital 66 DSMD. Article 17 DSMD, inter alia, does not apply to platforms with a turnover of less than EUR 10 million, and “of which the average number of monthly unique visitors in the Union does not exceed 5 million”.

⁷ See further – beyond copyright – van der Sloot, “Welcome to the Jungle: The Liability of Internet Intermediaries for Privacy Violations in Europe” 6 (2015) JIPITEC 211.

⁸ The defendant had copied a sound snippet from the recording “Metall auf Metall” by German electronic music pioneers Kraftwerk, released on the album “Trans Europa Express” (first released in Germany 1977 (KlingKlang/EMI Electrola 1 C 264-82306). They integrated that sound into a recording by German Hip Hop artist Sabrina Setlur, released in 1999. The background to Kraftwerk’s recording – which is that of a moving train – is described in Flür, *Kraftwerk: I was a Robot* (London: Music Sales Ltd. 2017), 69 et seq.

⁹ BVerfGE 142, 74 ; Case 476/17 - Pelham GmbH and Others v Ralf Hütter and Florian Schneider-Esleben, ECLI:EU:C:2019:624. There exist, in total, eleven decisions in this litigation, which commenced in 1999. The preceding litigation will not be discussed here in detail.

between strong property protection and freedom of communication, and espousing entirely different perceptions on the status of fundamental rights under domestic German and EU secondary copyright law. In short, the BVerfG asserted that, as a matter of freedom of art is guaranteed under Article 5 (3) of the German Basic Law, music sampling can be permissible notwithstanding any property right in sound recordings and that courts needed to achieve a proportionate assessment via an analogous application of the free use principle (Article 24 (1) of the German Authors Right Act, now repealed).

The Court of Justice held that the free use clause was incompatible with the closed list approach as regards limitations and exceptions under Article 5 EUCD.¹⁰ The free use clause had consequently been repealed in Germany following the implementation of the DSMD. The position adopted by the BVerfG paves, ultimately, the way for this court to secure to itself the competence, along with other recent decisions unrelated to copyright law. The opposing decisions in *Pelham*, consequently, give reason to believe that the BVerfG might discard Article 17 DSMD as unconstitutional alongside much wider assertions affecting the future relationship between German constitutionality perceptions and the EU legal order as a system much based on economic principles and market integration. The decisions therefore are highly relevant from a constitutional perspective. Both address the conflict between creativity and technological control, and between an open system of decision making and the alleged closed list as regards exceptions under Article 5 EUCD.

1. Article 17 DSMD: Liability, Enforcement and Creativity

Article 17 DSMD will, undisputedly, incentivise platforms to adopt technological solutions so as to avoid liability, which will ultimately include upload filters and other forms of algorithmic monitoring of content.¹¹ The most critical consequence of the new liability regime – the prospect of liability for potentially prohibitive damage payments¹² – will incentivise platforms to, ultimately, strategically collude with exploiters so as to avoid that consequence. Article 17 DSMD therefore reduces access to works and, more importantly, creates an indubitable menace to creativity. Technological control, it is feared, will stifle and perhaps eliminate cultural participation and creativity at the expense of individual author and user interests.¹³ Certainly, algorithmic enforcement cannot distinguish between permitted uses and evident infringement¹⁴. The presence of protected subject matter, however small or commercially immaterial, will be sufficient to trigger automated blocking and removal. Even where users, as the case may be, are given the right to challenge technological eradication of uploaded content, for example on the grounds of the rights to engage in a transformative, referential or otherwise creative re-use of protected material, a chilling effect can still follow since any such complaints resolution mechanism – which may well result in liability for damages – necessitates the disclosure of personal data.¹⁵ The continued

¹⁰ Recital 32 EUCD (“This Directive provides for an exhaustive enumeration of exceptions and limitations to the reproduction right and the right of communication to the public”).

¹¹ See Frosio, “The Death of ‘No Monitoring Obligations: A Story of Untameable Monsters’” 8 (2017) JIPITEC 199.

¹² Husovec, “Remedies First, Liability Second”, in: Frosio (ed.), *The Oxford Handbook of Online Intermediary Liability* (Oxford 2019), 92, 94 et seq.

¹³ See AG Saugmandsgaard Øe, 28.7.2020, Opinion in Joined Cases C-682/18 Frank Peterson v Google LLC and C-683/18 Elsevier Inc. v Cyando AG, ECLI:EU:C:2020:586. In its final judgement, the Court of Justice did not refer to fundamental rights, see Joined Cases C-628/18 and C-683 Frank Peterson v Google LLC and Elsevier Inc. v Cyando AG, ECLI:EU:C:2021:503.

¹⁴ Burk, *Algorithmic Fair Use*, 86 (2019) University of Chicago L. Rev. 283.

¹⁵ See generally Peter Yu, *Digital Copyright Enforcement Measures and their Human Rights Threats*, in: Geiger (ed.), *Research Handbook on Human Rights and Intellectual Property* (Cheltenham 2015), 455, 457.

applicability of relevant statutory exceptions such as for parody, pastiche, caricature and quotation under the EUCD¹⁶ becomes relegated to symbolic law-making.

In the context of – existing and predictable – constitutional challenges¹⁷, therefore, the status apportioned to these exceptions, and the wider notion of freedom of art as a fundamental right underpinning access and participation in new communicative spheres becomes pivotal.¹⁸ The central question is whether, from a constitutional perspective, the collateral damage that is done to creativity can be justified as a tolerable side effect in light of an overpowering need to legally safeguard and secure technological enforcement options.¹⁹

Obviously, resorting to an “unjust enrichment” topos hardly provides a satisfactory justification. The implications of Article 17 DSMD are not constrained to aspects of legitimacy of the more immediate interests of platform operators and commercial exploiters of copyright, but of course extend to those of authors and users²⁰. From a constitutional perspective, these intricate relationships require a legislative choice of whose interests will take precedence in light of the plethora of fundamental rights at stake. Here, two perspectives can be taken. First, an approach that emphasises, generally, the economic function of copyright under a “high level of protection” standard²¹, and second an approach that highlights the function of copyright, in a more ideational sense, as an instrument to facilitate access and creativity. This is why the categorisation of creative re-uses in the context of user generated content²² is so crucial²³ in the context of the new liability regime, in particular as regards the status and perception of user creativity beyond statutorily defined exceptions to copyright. The BVerfG has shown that – as will be discussed²⁴ – freedom of art depends on a holistic and open-ended balancing exercise, and in turn this assertion opens the view towards a more general insight: that *de minimis* uses function as important preconditions for socially and culturally desirable participation.²⁵

¹⁶ Article 17 (7) DSMD, referring to the exceptions for quotations and parodies, pastiches and caricature under Articles 5 (3) (h) and 5 (3) (k) EUCD respectively. See further Quintais/Frosio/van Gompel/Hugenholtz/Husovec/Jütte/Senfleben, “Safeguarding User Freedoms in Implementing Article 17 of the Copyright in the Digital Single Market Directive: Recommendations From European Academics” SSRN (2019), <https://ssrn.com/abstract=3484968>.

¹⁷ Republic of Poland v European Parliament and Council of the European Union, Action brought on 24 May 2019, <<http://curia.europa.eu/juris/document/document/document.jsf?text=&docid=216823&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=8371710>>. The challenge seeks annulment of Articles 17(4)(b) and Article 17(4)(c) DSMD.

¹⁸ See Wielsch, *Zugangsregeln: Die Rechtsverfassung der Wissensteilung* (Tübingen 2008), 7 (noting also that, from a legislative perspective, user freedoms and property rights have equal status).

¹⁹ AG Saugmandsgaard Øe – whilst generally confirming the constitutionality of Article 17 DSMD – also opined that the salient exceptions must remain available, and that preventive blocking affecting such legitimate uses would constitute a violation of fundamental rights; accordingly, the decision over the legitimacy of such uses can neither be made through a subsequent redress mechanisms to be initiated by users, nor are platforms to adjudicate on the permissibility through private dispute resolution mechanisms. See Case C-401/19, *Poland v Parliament and Council*, ECLI:EU:C:2021:613 (Opinion).

²⁰ In the past, in Germany platform operators had always been successful in disputes with copyright right holders since the requisite knowledge criterion had been found to be absent. The details of the mechanisms under German tort law concerning intermediary liability are outside the scope of this contribution. See Ohly, “Urheberrecht in der digitalen Welt – brauchen wir neue Regelungen zum Urheberrecht und zu dessen Durchsetzung?” (2014) NJW Beilage 50.

²¹ EUCD, Recital 9.

²² See generally Hoffmann/Klass, *The Reference as Part of the Art Form: A Turning Point in Copyright Law?* (2017) *Media in Action: Interdisciplinary Journal on Cooperative Media*, 31.

²³ Geiger/Frosio/Izyumenko, “Intermediary Liability and Fundamental Rights”, in: Frosio (ed.), *Oxford Handbook on Online Intermediary Liability* (Oxford 2019), pp. 140 et seq.

²⁴ See *infra*, 4.

²⁵ See *infra*, 5.2.

The divergent positions as regards the permissibility of music sampling and the relevance of freedom of art, as asserted by the BVerfG and the Court of Justice respectively, mark the last frontier in the constitutional test of interest balancing. Ultimately, as will be seen, the constitutionality of Article 17 DSMD under EU law may hinge on the central notion of the term “exception” under secondary law, as opposed to a much wider perception of freedom of communication as a fundamental right that underpins copyright law. In that latter sense, copyright is perceived not as closed system regulating, on the basis of a normatively complete and consistent set of rules, a one-dimensional collision of interests between right holders and users, but as a regulatory framework premised predominantly on incentivising creativity, a principle that would immediately, and drastically, “correct” the exploiter-biased patterns of argument that underscore Article 17 DSMD. The permissibility of de minimis uses, as highlighted in *Pelham*, thus has a constitutional dimension, and this is relevant for platform accessibility. The implications of the position adopted by the BVerfG, and its robust insistence on the relevance of fundamental rights – above and beyond copyright law – exceeds the old debate of whether fundamental rights may be used as an external defence to copyright infringement by far. The traditionally strained relationship between the two courts might escalate the debate to new pinnacles as both reflect entirely contradictory points of departure, instantaneously exposing rather differing perspectives as to what the central and most fundamental function of copyright, by should be, and whose interests – authors, users, exploiters, platforms – should accordingly be considered as the central point of reference.

In the EU, the intersection between fundamental rights and copyright has, over time, become increasingly prominent. One reason was the coming into force of the EU-Charter on Fundamental Rights following the Lisbon Treaty²⁶, but even before that the Court of Justice had recognised proportionality as a central tenet of EU law in general.²⁷ Its jurisprudence, in copyright law and beyond, clearly shows a departure from a rigid understanding solely oriented towards market integration aims²⁸, including the protection afforded to platforms under the freedom to conduct a business²⁹ as well as in cases where copyright enforcement and privacy concerns collide. Similarly, the Court of Justice has taken a rights-based approach with regard to written exceptions and has elevated relevant exceptions to the status of (subjective) rights.³⁰

However, and this became very clear following the *Pelham* decision by the Court of Justice, secondary law imposes limits to such judicial freedom³¹, with an immediate effect on the conceptualisation of creativity and access to culture. Article 17 DSMD, overall, negates fundamental rights implications if monolithically premised on the protection of “right holders” (exploiters). The constitutional analysis would thus equate the principled protection of exploiter interests with a constitutionally opaque notion of a legislative obligation to protect commercial privileges under the IP clause in Article 17 (2) EU-Charter, including the alleged rights of exploiters as both owners of (proprietary) producer rights and as licensees of authors’ rights. There is a dense and convenient pattern of argument for stronger and monopolistic protection of commercial

²⁶ The relevant jurisprudence started with Case C-275/06, *Productores de Música de España (Promusicae) v Telefónica de España SAU*, ECLI:EU:C:2008:54.

²⁷ Christoffersen, in: Geiger (ed.), *Research Handbook on Human Rights and Intellectual Property* (Cheltenham 2017), pp. 19 et seq.

²⁸ Sanga, “The Fundamental Rights Saga in EU Copyright Law: Time for the Boundary-Setting Season?” (2019) *Medien und Recht International* 56.

²⁹ Case C-70/10, *Scarlet Extended NV v Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM)*, para. 43, ECLI:EU:C:2011:771; Case C-314/12, *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft mbH*, ECLI:EU:C:2014:192, para. 61.

³⁰ Case 469/17, *Funko Medien NRW GmbH v Bundesrepublik Deutschland*, ECLI:EU:C:2019:623; Case 516/17, *Spiegel Online GmbH v Volker Beck*, ECLI:EU:C:2019:625.

³¹ See *infra*, 3.2.4.

interests that is deeply ingrained in the overall normative hierarchy and the underlying policy objectives as (implicitly) formulated during the gestation of the EUCD. The EUCD is predominantly premised on a speculation³² that a “high level” of protection should be assured³³ so as to incentivise the copyright industries to adopt (then) new online business models. Predominantly, this private ordering concept³⁴ was to be achieved through legally protecting technological protection measures.³⁵ Obviously, these privileges are perpetuated under Article 17 DSMD. The EUCD and the DSMD exceptions and limitations therefore have been marginalised.³⁶

2. Proportionality and the Medium of Money: Paying Authors under the First German Draft

In Germany, Article 17 DSMD has finally been implemented³⁷ in a manner closely mirroring its wording. The final text is a result of a radical political turn that ultimately eradicated the initial licensing solution. The German government was well aware of the problematic implications of Article 17 DSMD, and declared that filtering and blocking solutions should be avoided.³⁸ Proportionality, of course, is a central principle of German constitutional law, and freedom of communication occupies a particularly elevated position in the constitutional objective order of values.³⁹ Consequently, the draft proposal on implementing Article 17 DSMD⁴⁰ attempted to relativize the strong reliance on commercial privileges. The suggested solution relied principally on the “medium of money”: a general yet rather speculative promise of collective and statutory licensing solutions. Platforms would have escaped liability where they could demonstrate “best efforts” in seeking and agreeing licenses with right holders, a solution flanked by the introduction of a new extended collective licensing schemes⁴¹ covering platform uses (which was kept) so as to ease the availability of permissions, and to enhance compensated uses in general. Authors, not other right holders, would be compensated by platform operators (via collecting societies) for licenses agreed with platforms, as well as for certain defined de minimis (“technically verifiable”) uses and for uses falling within the remit of the pastiche exception (“technically non-verifiable uses”).

³² Westkamp, “Code, Copyright, Competition: The Subversive Force of Para-Copyright and the Need for an Unfair Competition based Re-Assessment of DRM Laws after Infopaq” 58 [2011] 2 *Journal of the Copyright Society of the USA* 601.

³³ EUCD, Recital 9.

³⁴ Cahir, *The Structure of Control – Communication Systems and Copyright Law*, in: Westkamp (ed.), *Emerging Issues in Modern Intellectual Property: Trade, Technology, Market Freedom, Essays in Memory of Herchel Smith* (Cheltenham 2007), 73.

³⁵ Article 6(1) EUCD. See Dusollier, *Electrifying the Fence: the Legal Protection of Technological Measures for Protecting Copyright*, (1999) 6 *European Intellectual Property Review* (EIPR) 285; Westkamp, *Code protection, end users and fair use: Mutations of the Copyright Nexus Debate* (2009) 4 *Computer Law Review International* (CRI) 104; Westkamp, “Code, Copyright, Competition: The Subversive Force of Para-Copyright and the Need for an Unfair Competition based Re-Assessment of DRM Laws after Infopaq” 58 [2011] 2 *Journal of the Copyright Society of the USA* 601, 631 et seq.

³⁶ Cf. Article 6 (4) EUCD (only some limitations and exceptions can be rendered enforceable where TPMs are applied).

³⁷ Urheberrechts-Diensteanbietergesetz [UrHR-DaG], (Copyright Service Provider Act 2021), in force from 1.8.2021.

³⁸ Erklärung der Bundesrepublik Deutschland zur Richtlinie über das Urheberrecht und verwandten Schutzrechte im Digitalen Binnenmarkt, insbesondere zu Artikel 17 der Richtlinie, https://www.bmjv.de/SharedDocs/Downloads/DE/News/PM/041519_Protokollerklärung_Richtlinie_Urheberrecht.pdf?__blob=publicationFile&v=1.

³⁹ Ever since BVerfGE 7, 198 – Lüth. Translation is available from <https://germanlawarchive.iuscomp.org/?p=51>.

⁴⁰ Referentenentwurf des Bundesministeriums der Justiz und für Verbraucherschutz, Entwurf eines Gesetzes zur Anpassung des Urheberrechts an die Erfordernisse des digitalen Binnenmarktes [2.9.2020], https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/RefE_Urheberrecht.pdf?__blob=publicationFile&v=7.

⁴¹ (New) Article 51 of the German Collecting Societies Act, which has been kept.

In the ensuing debate, right holders took offence, especially aiming at the new *de minimis* “exception”. It was argued that even smallest snippets might have commercial value, and that in any case the *de minimis* clause violated EU law following the closed list principle under Article 5 EUCD⁴², and that a “*sui generis*” approach would not rescue the new clause - given that Article the DSM did (arguably) not provide a legislative basis for proportionality deliberations outside of the salient exceptions⁴³, and that the EUCD would not allow “new” exceptions.⁴⁴ Subsequently, the final text as adopted transformed the best effort principle back so as to comply with the text of Article 17 DSM⁴⁵, and consequentially platforms now avoid liability predominantly where technological control mechanisms have been applied.⁴⁶ Ultimately, users may still rely on the parody, pastiche and caricature exception, and authors will still have a direct claim against platforms for such uses; however, it is very arguable that a chilling effect will follow and that the central provisions for transformative or referential uses will become symbolic at best, since right holders may challenge any use flagged as permissible via complaints procedures platforms shall institute⁴⁷. Users therefore not only face disclosure of their personal data, but more worryingly claims to damage payments. In essence, the final text thus disregards the pertinent intersection between *de minimis* uses and freedom of art in the context of user creativity⁴⁸, which leads directly to the intricacies as stressed that may be extrapolated from the approach taken by the BVerfG in *Pelham*.

The changes between the first draft and the final text may seem technical and minor at first glance, but overall this is not true. The final version of the new law reinstates technological enforcement opportunities as its central tenet, and materially reduces any incentive for right holders to license. The potential income for authors for permitted uses is drastically reduced, and instead platforms and users face exposure to claims for damages.⁴⁹

It is still worthwhile to briefly analyse the first draft proposal in the context of legislative choice. The first draft was almost revolutionary. It departed from a solution concentrating on the collision of interests between right holders and platforms. It contained a number of features that would shift the focus centrally towards the respective positions of authors and users. In particular, the draft avoided, at least speculatively, any technological enforcement by reinventing the best effort criterion under Article 17 DSM from a norm carrying an obligation to filter towards an obligation

⁴² Rosati, “The legal nature of Article 17 of the Copyright DSM Directive, the (lack of) freedom of Member States, and why the German implementation proposal is not compatible with EU law” (2020) IP Kitten Blogspot, <<https://ipkitten.blogspot.com/2020/08/the-legal-nature-of-article-17-of.html>> (16.12.2020).

⁴³ Article 17 (7) DSM, which relates only to parody, pastiche, caricature, and quotations.

⁴⁴ Article 17 (7) DSM. See further Hofmann, “Plattformregulierung im Lichte des Unionsrechts. Kommentar zum Diskussionsentwurf des BMJV v. 24.6.2020 zu einem Zweiten Gesetz zur Anpassung des Urheberrechts an die Erfordernisse des digitalen Binnenmarktes” (2020) Zeitschrift für Urheber- und Medienrecht (ZUM) 665, 666; Stieper, Das Verhältnis der verpflichtenden Schranken der DSM-RL zu den optionalen Schranken der InfoSoe-RL, (2020) GRUR 1.

⁴⁵ See also European Commission, Targeted Consultation Addressed to the Participants to the Stakeholder Dialogue on Article 17 of the Directive on Copyright in the Digital Single Market (27.7.2020), <https://ec.europa.eu/digital-single-market/en/stakeholder-dialogue-application-article-17-directive-copyright-digital-single-market>. See further Leistner/Metzger, The EU Copyright Package: A Way Out of the Dilemma in Two Stages, (2017) 48 IIC 381.

⁴⁶ The *de minimis* rule has partially survived in the final text, but now the provision (Article 10 of the Copyright Service Providers Act) no longer constitutes an exemption but a rebuttable presumption of legitimacy. Right holders may therefore challenge the permission to use small parts. In addition, the new proviso excludes any use of commercially valuable portions of works and subject matter, and does importantly not apply to commercial users.

⁴⁷ The final text foresees both internal complaints procedure mechanisms and the establishment of external bodies. Access to courts is guaranteed (Articles 13-15 of the Copyright Service Providers Act).

⁴⁸ See *infra*, 6.3.

⁴⁹ See Husovec, “Remedies First, Liability Second”, in: Frosio (ed.), The Oxford Handbook of Online Intermediary Liability (Oxford 2019) 92, 94.

on platforms to negotiate licenses. It thereby also emphasised that the fundamental insight that both interests (authors and users) are complementary rather than antagonistic, in keeping with the basic function of copyright law as a precondition for creativity and free communication.⁵⁰ Any residual claim based on a loss of potential income in the context of the constitutional right to property had been resolved through the introduction of statutory licenses for the benefit of authors. The addition of (collective) statutory licenses, including both *de minimis* uses and parodies et al⁵¹, injects a logical and most central element into that system of proportionality: first, the prospect of new sources of income eradicates reliance on the constitutional right to property from the perspective of authors, and, similarly, also excludes arguments based on market conflicts. Second, the availability of income to authors would have (in the absence of a compulsory licenses solution) motivated authors’ association to exert pressure on exploiters to concurrently engage in licensing negotiations with platforms. Under these conditions, ruling out technological enforcement, the copyright industry would fare better accepting licensing solutions. From a more theoretical angle, the concept was fundamentally premised on reducing the complexity in assigning, also with respect to a constitutionally sound choice, an equal weight to the various interests; the proposal clearly exposed that, for instance, the freedom to conduct a business⁵² as a fundamental right upon which platforms relied successfully in the past. That fundamental right can thus be reconstructed as a right subservient to user interests, and thereby as serving communicative freedom and creativity to the highest degree possible under the strictures of DSM. The draft further reflected that exploiter interests are subservient to those of authors as regards the distribution of income.⁵³

Article 17 DSM, in contrast, establishes a normative preference for code-based solutions safeguarded, it may be argued, by Article 17 (2) EU-Charter. Thereby, the provision creates a normative hierarchy that permits the conclusion of a legislatively tolerable “collateral damage” for creativity, especially as regards the common reliance on property rights of producers.⁵⁴ However, solutions that ignore less intrusive mechanism (such as remunerating authors⁵⁵), arguably violate fundamental rights for being disproportionate, and would obviously cast much doubt on whether Article 17 DSM could pass constitutional scrutiny. Both strands of reasoning are reflected in the respective decisions in *Pelham* – and much depends here on whether a commercial or a constitutional, a domestic or an EU perspective is adopted.

3. *Pelham*, Property and Freedom of Art

The decisions in *Pelham* can be contrasted on many levels. In short, the BVerfG was concerned with domestic perceptions of freedom of art, whilst the Court of Justice sought to maintain the consistency of the EU legal order. The fundamental conflict thus is between an open system of

⁵⁰ Netanel, Copyright and a Democratic Civil Society 2 (1996) 106 Yale L.J. 283.

⁵¹ The final text maintained that authors will receive payment for parody, pastiche and caricature, which represents a slight extension from the initial draft.

⁵² Article 16 EU-Charter and Article 12 of the German Basic Law.

⁵³ See *infra*, 4. For a discussion on author/exploiter conflicts see Westkamp, “The ‘Three-Step Test’ and National Decision Making in Europe: European Copyright Law Between Approximation and National Decision Making”, 56 (2008) 1 J. Cop. Soc. USA 1, 55 et seq.; Case C-572/13, Hewlett-Packard Belgium SPRL v Reprobel SCRL, ECLI:EU:C:2015:750, paras 36 et seq.; Case C-277/10, Martin Luksan v Petrus van der Let, ECLI:EU:C:2012:65; BVerfG (2010) GRUR 999, 1002 – “Printers and Plotters”; BVerfG (2006) Neue Juristische Wochenschrift (NJW) 596, 598 – Xavier Naidoo.

⁵⁴ Ladeur, Kunstfreiheit und geistiges Eigentum in digitalen Netzwerken. (2016) Zeitschrift für Geistiges Eigentum (ZGE/IPJ) 447.

⁵⁵ Senffleben, “Bermuda Triangle – Licensing, Filtering and Privileging User-Generated Content Under the New Directive on Copyright in the Digital Single Market” (2019) SSRN Electronic Journal, DOI: [10.2139/ssrn.3367219](https://doi.org/10.2139/ssrn.3367219), p. 1.

assessment and market integration concerns.⁵⁶ For the Court of Justice, the recognition of fundamental rights still depends on what secondary law permits, and it only permits certain proscribed uses for particular purposes – there is no solution as regards a more comprehensive understanding of the general status of freedom of art in the EU legal order, i.e. beyond individual disputes. Therefore, the opposing decisions raise numerous questions as regards the relationship between national and EU law, and more specifically as regards the status of exploiter rights and the treatment of referential and transformative uses under rather different conditions: an open, constitutionally informed assessment versus a system that insists on supremacy and market integration.

3.1 Freedom of Art as an Open Clause: A View from German Constitutional Law

In *Pelham* the BVerfG conducted a classical fundamental rights analysis under national constitutional law⁵⁷ and concluded that courts must demonstrate, in assessing the conflict between the property right in sound recordings and freedom of art, recognition of the specific status of freedom of art as a fundamental right in the context of a proportionality assessment, having specific regard to the use of works in a specific genre (such as hip hop). The decision reiterates, therefore, once more that constitutional law requires copyright norms to be assessed adaptively.⁵⁸

Notably, the BVerfG neither asserted that freedom of art takes precedence in all cases concerning the use of snippets for the purpose of music sampling, nor did the court establish a new exception to copyright. However, the court stressed the importance of the right to freedom of art as a mechanism to correct, potentially, the effects of over-emphasising the status of producer rights under the constitutional right to property, a contention that immediately raises uncomfortable questions as regards the function of neighbouring producer rights in general and the rationale of these rights as a foundation for rebutting freedom of speech concerns in the context of uses on platforms. The basic contention of the BVerfG thus can be described as demanding nothing more than the recognition of the relevance of freedom of art in a cultural sub-genre, and so the court emphasised the need for a proportionality assessment applicable, in theory, to any dispute where freedom of speech is implicated. For that reason, it was irrelevant whether the dogmatics of copyright law permitted such balancing; the BVerfG left it to the judiciary to apply, if necessary, the free use principle under (then) Article 24 (1) of the Authors Right Act by way of analogy.⁵⁹

Thus, freedom of art, as a (subjective) right, qualifies the right to property, and would arguably always trump that right where the commercial impact upon the right holders market is minor, that is, where the use in question does not create substitution for the original in economic terms. A further important point is that the BVerfG did not, in compelling courts to balance the interests through a proportionality assessment, pre-establish any specific criteria. This means that the interests of authors, commercial and non-commercial, remain of course relevant. In short, the decision provides a framework that is highly relevant in the context of platform liability. It shifts – particularly as far as the debate over transformative or referential uses is concerned – the focus predominantly to the legitimate expectations of both authors and users and, most importantly, relegates commercial interests to one aspect in the assessment rather than perpetuating a

monolithic understanding of copyright as property. The final conclusion is that in terms of constitutional law there exists no qualitative difference between the work and the alleged copy: creative reuses are afforded the same degree of protection as any other form of creativity resulting in what copyright doctrine coins as a work. Constitutional law thereby disables doctrinal strictures in EU copyright law: the inherent automatism under copyright law – the formalistic reasoning in terms of a work/infringement dichotomy and a resultant “rule and exception” relationship – is insignificant from the perspective of constitutional values. Freedom of art is given the status of an equal right in the framework of an objective order of values.⁶⁰ The *Pelham* decision, consequentially, eradicates the causal relationship and inherent differentiation between work (original) and copy in the sense of an axiomatic dominance of protected subject matter over limited and purpose-bound uses, and consequentially eliminates the conventional normative hierarchy in copyright. The point of departure in the assessment is set as a uniform and holistic notion of creativity as the central function of copyright law. But the Court of Justice would not endorse that approach.

3.2 Property, Producer Rights and the Court of Justice

The response by the Court of Justice was to set clear limits on any notion of an extended freedom of art approach that goes beyond the closed list principle in Article 5 EUCD, and in doing so implicitly rejected any notion of subjective user rights. Under a more generalised reading, the court thereby accentuated the basic assertions leading to a high level of protection principle. The decision, as regards Article 13 EU-Charter, shows a rather constrictive and overall flawed conceptual approach. Some proportionality deliberations have been made, though, which resulted in an awkward new principle of perceptibility as the guiding distinction between permitted and prohibited music sampling.

3.2.1 The Perceptibility Solution and the Status of Producer Rights

The Court of Justice, of course, is bound to safeguard uniformity and market integration objectives.⁶¹ Unsurprisingly, it rejected of freedom of art as a fundamental point of departure. Instead, the court reinstated secondary copyright law as the guiding principle – since the EUCD contained a closed list of exceptions, the free use provision that the BVerfG had wanted to employ as a vehicle for a proportionality assessment was declared as incompatible with EU law. Creative uses not covered by one of the salient exceptions are, the Court of Justice concluded, impermissible because such approach would defy a uniform understanding of the reproduction right, as applied to producers of sound recordings. Instead, the court found a different solution in that the rights in sound recordings are subject to perceptibility, much in the sense of a compromise solution not just between the interests of the parties, but probably more so to leave some degree of protection to freedom of art. The perceptibility standard raises more questions than it answers and, more critically, appears to introduce an alien criterion that – as regards producer rights – seems devoid of meaning and persuasiveness, especially so because the “perceptibility” solution was obviously chosen as an escape route from an assessment that would have raised questions as

⁵⁶ See Hugenholz, “Is Harmonization a Good Thing? The Case of the Copyright Acquis”, in: Pila/Ohly (eds.) *The Europeanization of Intellectual Property Law* (Oxford 2013), pp. 57, 63 et seq.

⁵⁷ Mimler, ‘Metall auf Metall’ – the German Federal Constitutional Court Discusses the Permissibility of Sampling Music Tracks, 7 (2017) 1 *Queen Mary Journal of Intellectual Property* 119.

⁵⁸ BVerfG (2010) GRUR 999, 1002 – “Printers and Plotters”.

⁵⁹ On the misguided application of the free use clause to investment rights in *Pelham* see Wielsch, *Kunst ist mehr als nur Investition: zum Sampling-Urteil des BVerfG*, (2016) *VerfBlog*, <https://verfassungsblog.de/kunst-ist-mehr-als-nur-investition-zum-sampling-urteil-des-bverfg/>, DOI: [10.17176/20160601-134453](https://doi.org/10.17176/20160601-134453).

⁶⁰ BVerfGE 7, 198 – Lüth. See also BVerfGE, 120, 274, 303 et seq. – Online Searches (asserting that the dangers of technological development and its potential for surveillance must be sufficiently recognised and balanced by the legislator, and that constitutional law must fill in any gaps in protection); BVerfGE 65, 1, 43 – Population. Census (highlighting the dangers of surveillance as creating a psychological barrier to the free development of one’s personality, which famously resulted in the formulation of a new fundamental right to informational self-determination under Article 2 of the German Basic Law).

⁶¹ Article 19 (1) TEU.

to the function of the IP clause under Article 17 (2) EU-Charter⁶² with respect to, specifically, the rationale for protecting producer rights vis-à-vis competing claims to freedom of art.

The flaw in the perceptibility criterion is not only that it largely leaves open who the addressee of such test is supposed to be, and that therefore the conclusions that may be drawn can hinge on rather arbitrary considerations. The court's "escapism"⁶³ produces even more problems because it does not fit with rights that are granted solely to protect investments. Certainly, there is a discernible desire to create some balance and to avoid a generally absolute standard of protection, and – between the lines – some proportionality considerations are present so as to avoid a notion of absolute producer rights. One may assume that the court did not just refer to the simple audibility of a sound in another work, but that it, to some extent, permitted de minimis uses unless there was a certain danger of confusion. However, such danger cannot relate to an investment, only to the authors' personality embodied in the original *work*. The court, presumably, established a somewhat curious notion that music sampling can detrimentally impact certain non-economic concerns of authors rather than producers.⁶⁴ But obviously it is an ill-suited concept when applied to commercial interests in investments in sound recordings. In Germany, that probable intention of the Court of Justice to design some space for creativity, within the boundaries of the closed list, had the opposite effect in the context of platform liability, where that fundamental concept protecting insubstantial parts ultimately led to the abolition of the de minimis exception under the first draft.

3.2.2 "Perceptibility" and the Licensing Prerogative

More precarious, then, is a different contention that may be developed in favour of producer interests: that perceptibility is to be understood as meaning that producers may object on the basis of a danger of confusing the listener as to the existence of a permission or license (i.e. an unfair competition based claim to "false endorsement"), which indeed would result in cementing the bias towards exploiter rights by introducing an all-embracing prerogative – of course, licensing markets for music samples do exist, and accordingly such type of confusion may be caused. If the mere opportunity to license is sufficient for establishing a right to property in constitutional terms, the result is a complete and wholesale derogation of user rights. Admittedly, and especially in UK jurisprudence⁶⁵, the notion of factual licensability in practice often provides a convenient pattern of argument in favour of exploitation rights based on property⁶⁶, and the same contention had been made in Germany which produced the most convenient argument in the *Pelham* litigation saga – that the investment rationale underpinning rights in sound recordings would automatically

⁶² See further Husovec, *The Essence of Intellectual Property Rights Under Article 17(2) of the EU Charter*, 20 (2019) 6 *German Law Journal* 840.

⁶³ A different escape route had previously been formulated by the German Supreme Court, asserting that the defendant could escape liability by technically recreating the sampled sound. See BGH (2013) GRUR 614 – "Metall auf Metall II". The last decision by the Supreme Court in this matter referred the perceptibility issue back to the Higher Regional Court as a matter of fact. BGH, I ZR 115/16, 30.4.2020 – Metall auf Metall IV, <https://openjur.de/u/2230139.html>.

⁶⁴ Which seems to rely upon similar restrictions on the right to parody in some member states, for example in the judiciary on the parody exception under Article L. 122-5-4 of the French Code de la propriété intellectuelle (CPI). See Lucas-Schloetter, *Kreative Referenzkultur und Urheberrecht in Frankreich*, (2019) *Zeitschrift für Medienrecht und Medienwissenschaft (UFITA)* 99, 101.

⁶⁵ See J. Griffiths, 'Fair dealing after *Deckmyn* – the United Kingdom's Defence for Caricature, Parody & Pastiche', in: Richardson/ Ricketson (eds.), *Research Handbook on Intellectual Property in Media and Entertainment* (Cheltenham 2017) 64 (discussing the implications of previous UK jurisprudence on the new parody exception (Sec. 30A (1) CDPA 1988)).

⁶⁶ Westkamp, *Referenz und Transformation im britischen Copyright Law*, (2019) *Zeitschrift für Medienrecht und Medienwissenschaft (UFITA)* 41, 52 et seq.

and absolutely extend to any snippet of recorded sound.⁶⁷ Obviously, that line of reasoning eradicates any reliance on conflicting *rights*, and further eliminates any obligation to even consider mitigating concerns under a proportionality assessment, as is otherwise often required as a central tenet of EU law.⁶⁸ It would be at this juncture that the divergences between the Court of Justice and the BVerfG as regards the constitutionality of Article 17 DSMD become most observable. A clear exposition of the function of producer rights under the constitutional property clause within the equilibrium of interests.

3.2.3 "Licensability" as Property

That investigation would probably have yielded uncomfortable conclusions, because the mere licensability of "snippets" hardly says anything about the function of producer rights from a constitutional point of view.⁶⁹ Licensability is a result of a property right but not the precondition for its existence. The near circular argument that orbits around the property notion in this regard can easily be confuted: the function of neighbouring rights was, historically, only to prevent, speculatively, the economically undesirable consequences of mass "piracy" and to prevent straight copies from entering the market – not because producers had fundamental rights that would oblige the legislator to introduce specific neighbouring rights, but because permitting trade in infringing copies would reduce and potentially eradicate the motivation to invest in the first place, a contention that shows that producer rights were contingent on the protection of authors – since, of course, authors' income depended on marketability. There is broad consensus that digitisation has changed that perception given the proliferation of highly diverse interests.⁷⁰ In my suffice here to reiterate that strong producer rights and ideational interests of authors can conflict, and that wide-spread filtering is a solution that benefits commercial interests without incorporating authors' interests in participation in culture. Thus, the general obligation of the legislator to provide for property rights protection⁷¹ as regards the investments made by certain exploiters is limited at least where these rights are not exercised in line with author's interests.⁷² Where, for example, conflicts arise as to the allocation of payments, the interests of authors commonly take precedence⁷³, a proposition that corresponds to a more exact understanding of the normative hierarchy that exists as between author's and exploiter's interests.⁷⁴ Ultimately, investment protection in the context of neighbouring rights requires justification, in that the alleged copy economically serves as a substitute.

3.2.4. Closed List and Technological Control: the Status of Exploiter Rights

In sum, the approach taken by the Court of Justice in *Pelham* sets in motion a debateable pattern of argument that is based on the adage that "what is worth copying is worth protecting", but which

⁶⁷ As criticised by Hoeren, *Sounds von der Datenbank – Zum Schutz des Tonträgerherstellers gegen Sampling*, in: Schertz/Omsels, *Festschrift für Paul W. Hertin zum 60. Geburtstag* (Munich 2000), 113, 128 et seq. (arguing that the scope of rights in sound recordings should not exceed the scope afforded to music authorship).

⁶⁸ See Christoffersen, in: Geiger (ed.), *Research Handbook on Human Rights and Intellectual Property* (Cheltenham 2017), 19.

⁶⁹ Hugenholz, "Neighbouring Rights are Obsolete" 50 (2019) *IIC* 1006; Hoeren, *Sounds von der Datenbank – Zum Schutz des Tonträgerherstellers gegen Sampling*, in: Schertz/Omsels (eds.), *Festschrift für Paul W. Hertin zum 60. Geburtstag* (Munich 2000), 113, 128 et seq. As regards the function of subjective right see further Jürgen Schmidt, *Zur Funktion der subjektiven Rechte*, (1971) *Archiv für Rechts- und Sozialphilosophie (ARSP)*, 383 et seq.

⁷⁰ See Elkin-Koren, *Copyright in a Digital Ecosystem*, in: Okediji, *Copyright in an Age of Limitations and Exceptions* (Cambridge 2017), 132.

⁷¹ See Hufen, *Staatsrecht II: Grundrechte* (8th ed., Munich 2019) § 38 para. 15, p. 690 et seq.

⁷² BVerfG (2006) *Neue Juristische Wochenschrift (NJW)* 596, 598 – Xavier Naidoo.

⁷³ Case C-572/13, *Hewlett-Packard Belgium SPRL v Reprobel SCRL*, ECLI:EU:C:2015:750, paras 36 et seq.

⁷⁴ See Case C-277/10, *Martin Luksan v Petrus van der Let*, ECLI:EU:C:2012:65. See also BVerfG (2006) *Neue Juristische Wochenschrift (NJW)* 596, 598 – Xavier Naidoo.

now includes the possibility to rely on code-based enforcement as a right in itself. The DSMD perpetuates the basic idea that the high level of protection to be afforded to “right holders” includes control over access and use where technological measures have been applied (Article 6 (1) EUCD), and the rationale for technological protection is identical under both Article 6 EUCD and Article 17 DSMD, that is, to safeguard online business models through facilitating direct contracts with consumers⁷⁵ and, later, through safeguarding these business models from disruptive competition instigated by platforms. Both provisions thereby fashion an implicit normative hierarchy – secondary law imputes, and reinforces, an understanding of absolute control, which can then be effortlessly integrated into the constitutional protection of property, a position that may additionally cement the bias towards commercial interests in that a conflict with a normal exploitation (Article 5 (5) EUCD) is alleged. Thus, producer rights sit atop of that hierarchy, and it can easily follow from such perception that both Articles 6 EUCD and Article 17 DSMD are based upon the identical principle of proprietary protection that engulfs any “subject matter”, however insubstantial or economically irrelevant. The next step in that line of argument is similarly effortless: claims to *other* interests can be maintained so as to achieve some fair balance on paper – Article 6 (4) EUCD contains some exceptions and limitations that can be enforced where TPMs had been applied. In practice, this hardly happens⁷⁶, but more importantly, under Article 6(4) EUCD, TPM protection excludes reliance on any exception that permits culturally significant uses, thus disregarding, for example, the right to quote and the right to parody. In any case, no limitation or exception under Article 5 EUCD can be enforced vis-a-vis services.⁷⁷ Article 17 DSMD follows, in this regard, the same principle – that potentially conflicting interests of users and authors can be dispensed with without creating intra-systemic inconsistencies, both as regards the consistency of secondary law as such but, more importantly, the overall consistency of the EU legal order.

Today, there are very dissimilar views on the function of producer rights, whether derived from statutory ancillary rights or resultant from licensed author rights. Producer rights are correctly understood as being devoid of any particular societal function⁷⁸ that could reasonably underpin arguments based upon constitutional protection.⁷⁹ It is here that the *Pelham* decision leaves a large gap in the future assessment of how the divergent interests relate to each other, since necessarily the eschewal of the Court of Justice to engage with the fundamental rights dimension of the dispute provides one of the central arguments that can be raised in favour of widespread technological control. The tenacity of the licensability argument has, as mentioned, led to the abolishment of the *de minimis* rule previously foreseen in the first German proposal (because “snippets can be commercially valuable”). Yet again, the apodictic exclusion of any claim to fairness outside of the salient exceptions reinforces notions of property rights as constitutional guarantees⁸⁰ afforded to exploiters irrespective of whether authors might fare better under a less intrusive solution such as wide-spread licensing.

Producer rights are, following the *Pelham* decision, misunderstood in their function. At closer inspection, a function-oriented analysis will immediately disqualify any of the attitudes that are conventionally voiced to support “strong” producer prerogatives. Again, the perhaps most

⁷⁵ Westkamp, “Code, Copyright, Competition: The Subversive Force of Para-Copyright and the Need for an Unfair Competition based Re-Assessment of DRM Laws after Infopaq” 58 [2011] 2 Journal of the Copyright Society of the USA 601, 623 et seq.

⁷⁶ Akester, “Technological Accommodation of Conflicts between Freedom of Expression and DRM: The First Empirical Assessment SSRN (2009), <https://ssrn.com/abstract=1469412>.

⁷⁷ Article 6(4)(4) EUCD.

⁷⁸ Hugenholtz, “Neighbouring Rights are Obsolete,” 50 (2019) IIC 1006.

⁷⁹ Luhmann, “Zur Funktion der subjektiven Rechte,” in: Luhmann, *Ausdifferenzierung des Rechts – Beiträge zur Rechtssoziologie und Rechtstheorie* (2nd ed., Frankfurt am Main 2015; originally published 1970), 360.

⁸⁰ See also de Beer, “Constitutional Jurisdiction Over Paracopyright Laws,” in: *In the Public Interest: The Future of Canadian Copyright Law* (2005) Irwin L.J. 89.

imperative consequence of the German licensing model in terms of a constitutional assessment would have highlighted such function of the (subjective) right as being subservient to authors interests. In essence, the rejection of freedom of art, and any other mechanisms that may be employed under national law to concretise that fundamental guarantee by the Court of Justice, is quite simply a consequence of strictures imposed by the EUCD itself. The autonomous concept underlying the notion of reproduction, and the constricted status of exceptions as pertaining to a set of predefined purposes is a direct result not of interpreting secondary copyright law but of establishing meta-rules so as to demarcate areas of competence.

The exclusion of the fundamental rights dimension then causes further inconsistencies. Certainly, to recap, the BVerfG considered *any* creative reuse a priori permissible, subject to an incremental development of parameters and criteria to be adopted by way of proportionality and value judgements. Structurally, no right automatically takes precedence. The criteria will of course depend on the relative strength of the interests. In *Pelham*, the claim to property solely reflected the commercial interest. However, the claimants’ pursuit was, at least speculatively, rather different, motivated by a claim to artistic integrity. In that context, the conceptual approach taken by the BVerfG, insisting on proportionality, permits further observations. It illustrates four important aspects: first, that the interests at stake in *Pelham* are, in reality, not of a commercial but of an ideational nature; second, that copyright disputes must, as a matter of constitutional law, include proportionality deliberations; third, that – based on these assertions – proportionality requirements cannot, very arguably, be subject to market integration aims, thus potentially reversing the normative hierarchy between EU and national law. Fourthly, the approach by the BVerfG also demonstrates that the rejection of freedom of art by the Court of Justice is inconsistent with its own jurisprudence where commercial interests are taken out of the equation.

4. Artistic Integrity and Open Assessments: Transformative Use, Freedom of Art and the Evolution of Value Judgements

4.1 Openness and Ideational Interests: From *Deckmyn* to *Pelham*

Captivatingly, both the *Deckmyn* decision⁸¹ and the decision by the BVerfG in *Pelham* display a structurally identical pattern of decision making. In *Deckmyn*, the Court of Justice recognised a wide-ranging space for parody, subject only to discrimination. Both decisions therefore allow a broad choice of criteria, which may be based on considerations as to the respective qualitative of speech, rather than following from a pre-determined property/exception architecture. There is a profound advantage: an incremental development of rules and principles can much more easily respond to social and technological change. Indeed, in *Deckmyn*, the Court of Justice arguably proposed nothing else but a classical and open-ended constitutional proportionality test: that the right to parody is limited only by conflicting rights emanating from personal dignity, and that commercial rather than commercial prerogatives are irrelevant. If so, an awkward question as regards the closed list principle arises: if such open-ended structure is applicable to the salient exceptions under Article 5(3)(k) EUCD, then the court admits that the central feature that describes parody (humour or mockery), pastiche (tribute) and caricature (distortion) – *reference through transformation* – is an immediate reflection of freedom of art, directly applicable to any copyright dispute but subject predominantly to proportionality requirements – and, of course, reference requires the identifiability of the work, or style, to which such reference is made. It is then a different question whether each of these elements can meaningfully be construed individually and in isolation, as the Court of Justice seems to purport. But aimlessly following the

⁸¹ Case C-201/13, *Johan Deckmyn und Vrijheidsfonds VZW v Helena Vandersteen*, ECLI:EU:C:2014:2132.

dictionary meaning appears imprudent. "Parody" or "pastiche" may have a specific connotation in literary or cultural studies, but these have little to say about the criteria that should apply in a balancing exercise, and their respective weight in light of constitutional value judgements. Much, therefore, speaks for a holistic understanding, proximate to the transformative use element as employed in the US-American fair use test⁸², an approach certainly commensurate with the obligations to recognise freedom of art under Article 13 of the EU-Charter. Freedom of art already has its place in the closed list, and it is immaterial whether such conclusion is reached via a direct application of Article 13 EU-Charter, or an extensive reading of "pastiche"⁸³. If so, Article 5(3)(k) EUCD is to be understood as a broad general clause, an immediate reflection of Article 13 of the EU-Charter, and could easily have been applied by way of analogy to music sampling.

4.2 Integrity and Personality Rights: Fairness Criteria outside the Property Topos

This advance towards such amplified constitutional sensitivity mirrors the structure of decision making typically adopted in cases where personality or privacy interests conflict with other fundamental rights such as media and information freedom. Here, a multiplicity of parameters and criteria, on both sides of the dispute, can be developed. As regards the law on general personality rights, such as the right to one's own image⁸⁴, a distinction is usually made between the commercial appropriation of personality aspects and cases that affect (only) ideational interests. In cases of commercial appropriation, the defendant cannot, as a rule, rely on freedom of communication. But even where an image is used for the commercial gain of a third party – and where the claimant can usually rely on a strong level of legal protection allowing him to object to commercially motivated uses, such as for advertising purposes – the system remains open so as to integrate freedom of speech concerns, for example where the objectionable advertisement contains political or social comment.⁸⁵

The comparison with general personality rights also highlights that where (as it was in the *Pelham* case) a commercial impact is virtually non-existent, the assessment shifts to an open standard so as to reduce complexity via a binary and dialectic evaluation; the conventional categorisation found in copyright law, that is, the axiomatic distinction between the notions of work and exceptions then becomes irrelevant. The focus thus shifts towards a much more precise and detailed assessment of interests, and these interests are understood as being on a par and of equal weight. Therefore, the distinction between permissible uses that fall within a written exception and *de minimis* uses that do not is rendered obsolete. In the case of music sampling, the use of freedom of art as a point of departure thereby circumvents the categorical hierarchy that the given architecture of copyright proscribes and thus avoids a "box ticking" exercise without predetermining the outcome.

Much as in the case of parodies or pastiches of literary works, the openness of the argumentative structure permits numerous criteria to be developed incrementally. In *Pelham*, for example, the principal motivation of the claimants was very probably not to profit from the sample but to object to a use on the basis of their perceived violation of artistic integrity, and a claim based upon such notion of artistic integrity would immediately have removed the case from scrutiny under EU

⁸² § 107 US Copyright Act 1977.

⁸³ Döhl, The Concept of "Pastiche" in Directive 2001/29/EC in the Light of the German Case *Metall auf Metall*, in: (2017) 2 *Media in Action: Interdisciplinary Journal on Cooperative Media* 37; European Copyright Society (2017); Opinion on Reference to CJEU in Case C-476/17, *Hutter v Pelham*, <https://europeancopyrightsociety.org/portfolio/opinion-on-reference-to-cjeu-in-casac-476-17-hutter-v-pelham>.

⁸⁴ Personality rights are protected under Article 23 of the Artistic Copyright Act (image rights) and Article 823 (1) of the German Civil Code (protection of the general personality right under the tort clause).

⁸⁵ BGH (2007) GRUR 139 – Lafontaine.

law.⁸⁶ Thus, what the claimants effectively pursued is an objection to a use in a genre the claimants did not approve, and the central proposition here is whether they could, on balance, rely on a *negative* freedom of art claim as a specific, and, as far as can be discerned, rather novel concretisation of their collective general personality right: a right to object on the basis of maintaining the sonic integrity and the character of the sounds as being unique and, historically, revolutionary – the *Pelham* dispute, in reality, displays a collision between two claims to freedom of art.

These deliberations promote a clearer perspective. The approach taken by the BVerfG is closer to an understanding of copyright law as an open system where "fairness", much as in the historical perception of the US fair use clause⁸⁷, represents the basic norm. It highlights that constitutional obligations to protect user participation rights do not hinge upon an anachronistic and formalistic dichotomy between "work" and "copy". How these interests are realised under an open assessment standard⁸⁸, and whether statutory copyright provides usable mechanisms or not (such as a new *de minimis* rule category, free use as under the former Article 24 of the German Authors Right Act, or by way of applying Article 13 EU-Charter directly), is largely irrelevant. In contrast, the Court of Justice predominantly has to rely on the structure of secondary law which is, overall, based on opaque notions of property, a dedicated hierarchy between "subject matter" and exception and an undisclosed and problematic nexus between a high level of protection and market integration aims.

The Court of Justice, in contrast, precludes any meaningful development of its own "open" jurisprudence with regard to *de minimis* uses copyright: to recap, the court has clearly asserted that copyright must be balanced against third party rights in applying the EU-Charter, in addition to creating a novel status of written exceptions as (subjective) rights of users.⁸⁹ Thereby, written exceptions are approximated to a fair use standard. Here, the dichotomy between work and copy is relinquished. Yet, even despite the breadth of the *Deckmyn* decision, national courts may, following Article 5 EUCD, constrain the right to parody or pastiche further, for example, by applying the three-step test under Article 5 (5) EUCD.⁹⁰

Conversely the BVerfG ensures that formalistic thinking, deeply embedded in the architecture of copyright⁹¹, is incapacitated. There is, consequentially, no predefined hierarchy in the treatment of creativity as a societal objective, and no underlying sense of parasitism where two creative efforts must be balanced. Transformative or referential uses of copyright works are no longer subject to a perception of cultural inferiority that must generally be considered as parasitic and, therefore, as *exceptions* in that word's literal meaning. The BVerfG averts such understanding of copyright law and establishes and reconstructs the respective rights; both the copyright work and its referential recreation are treated as equal forms of communication, rather than as property.

4.3 Interim Conclusion: Different Copyright Architectures and the Closed List Principle

⁸⁶ See also Opinion AG Szpunar, Case 476/17 - *Pelham GmbH and Others v Ralf Hütter and Florian Schneider-Esleben*, ECLI:EU:C:2018:1002, para. 87.

⁸⁷ Patry, A Few Observations about the State of Copyright Law, in: Okediji (ed.), *Copyright Law in an Age of Exceptions and Limitations* (Cambridge 2015), pp. 85, 91.

⁸⁸ For a full discussion on the application of the fair use clause see Rinkerman, *Sampling Unleashed? Migrating Visual Art Fair Use Principles into the Music Space* (2014) SSRN, <https://ssrn.com/abstract=2540345>

⁸⁹ Case 469/17, *Funke Medien NRW GmbH v Bundesrepublik Deutschland*, ECLI:EU:C:2019:623; Case 516/17, *Spiegel Online GmbH v Volker Beck*, ECLI:EU:C:2019:625.

⁹⁰ Jütte, *The Limited Effects of Fundamental Rights on Copyright Exceptions*, (2019) 16 *Medien und Recht International* (M&R Int.) 52.

⁹¹ See Elkin-Koren, *Copyright in a Digital Ecosystem*, in: Okediji (ed.), *Copyright in an Age of Limitations and Exceptions* (Cambridge 2017), p. 132, 156 et seq.

In sum, the BVerfG is much closer to an understanding of fairness as a central tenet, considering that the court did not place much emphasis on how copyright could resolve such conflicts, and it was probably irrelevant that copyright law had no statutory mechanism to deal with freedom of art but the ill-fitting free use clause. The important conclusion is, arguably: the state is obliged to protect creativity through freedom of art and communication guarantees irrespective of any perceived normative hierarchy as may be perceived from lower ranking law such as copyright, and that includes secondary EU copyright law. The BVerfG has – way above and beyond the issues concerning sampling – re-established the public interest as being on a par with any commercial or ideational interest. That insight necessitates a clear analysis of the function of each right and interest so as to provide persuasive justifications from a constitutional point of view. The BVerfG does not accept the notion of an axiomatically proscribed dichotomy between work and copy, and between right and exception. Instead, copyright protection is perceived as an adaptable and open system. The approach deconstructs the entire architecture underpinning the EUCD and DSM. In essence, the BVerfG has hit the weakest spot in EU copyright law: that the closed list approach in itself is unconstitutional because it impedes a meaningful and rational evolution of the law, and that economic objectives necessarily are obsolete in the balancing exercise.⁹²

In contrast, the Court of Justice retains the conventional approach. Exceptions are treated as limited immunities to a predominant rule that assumes protectability and thereby assigns property, a conclusion realised via the right of reproduction as a fully harmonised concept of EU law. This reinforces the misconceived work/copy and property/exception dichotomies and, more importantly, renders fundamental rights a function of anachronistic integration aims via policy objectives derived from secondary law. The approach taken by the Court of Justice is misguided in other respects as well: the impact on market integration aims is, if anything, minimal. The Court of Justice has, probably most importantly, missed the opportunity to clarify the relationship between secondary law and the charter rights. With regard to the predictable constitutional challenges, that insistence on the limits imposed by an enumeration of permitted uses shifts the focus away from central fairness and proportionality considerations and reinforces an understanding of a general precedence of and preference for exploiter rights as property rights under, potentially, Article 17 (2) of the EU-Charter, in contrast to its own line of reasoning.⁹³ The key to that reasoning can be found in previous jurisprudence: fundamental rights are subject to the conditions set by the framework of the EU legal order⁹⁴.

5. A Strained Relationship: Constitutionality of Article 17 DSM

The divergent approaches in *Pelham* will have direct consequences on how the new regime under Article 17 DSM will be assessed in terms of constitutional law. For the BVerfG, the decisive question will be the openness of the system to accommodate proportionality as a fundamental prerequisite for the law to react to changes in communicative sensible spheres, and the constitutional test will predominantly focus on the rights of authors and users. Typical dogmatic categorisations – such as whether copyright law may recognise a *de minimis* exception, or whether fundamental rights can be applied as external defences, are irrelevant.

⁹² See also BVerfG (2008) GRUR 999, 1000 – Printers and Plotters.

⁹³ Which allows the conclusion that Article 17 (2) EU-Charter must be construed in the broader framework of primary law; see Case C-70/10, *Scarlet Extended NV v Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM)*, para. 43, ECLI:EU:C:2011:771; Case C-314/12, *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft mbH*, ECLI:EU:C:2014:192.

⁹⁴ Opinion of the Court (Full Court) of 18 December 2014, Case Opinion 2/13 - Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms Compatibility of the draft agreement with the EU and FEU Treaties, ECLI:EU:C:2014:2454.

5.1 Article 17 DSM and the BVerfG: A Prediction

The approach adopted by the BVerfG in *Pelham* creates numerous strands for a more inclusive recognition of fundamental rights. Without expressly saying so, many of the considerations that can logically follow from the decision were reflected in the first German draft on implementing Article 17 DSM. In *Pelham*, the “practical concordance” test relegates the rights of both exploiters (property) and platforms (freedom to conduct a business) to their proper location within the matrix, which is precisely what the first draft proposal in Germany would have achieved. Both rights can then be perceived as functional in the sense that both actors are to be considered as agents and intermediaries.⁹⁵ Platforms can rely upon the freedom to conduct a business clause not only because, in general, excessive filtering obligations can become burdensome, but because such obligations reduce the incentive to invest and innovate at the expense of freedom of communication and ultimately to the detriment of users and authors.⁹⁶ *De minimis* uses can be integrated into a balancing test because they have no commercial impact, and reliance on freedom of art can be extended to more general freedom of communication concerns. Therefore, the focus in the constitutional analysis with regard to Article 17 DSM would primarily, and correctly, lie on the collisions between author and user interests. At this stage, access by and large becomes a necessary precondition for maintaining creative freedom: the first German proposal and its prevalent assurance of collective licensing solutions, coupled with new sources of income to remunerate authors, including for “*de minimis*” uses, would have achieved that equilibrium. The draft proposal evidences that the “medium of money” is a workable instrument not only so as to avoid mass filtering as such, but as the only legislative that is commensurate with constitutional standards as the least intrusive solution. The political outcome in Germany, which was very much a consequence of exploiters finding fault in the allegedly “excessive” *de minimis* exception and its alleged incompatibility with secondary law, is a direct consequence of the *Pelham* decision as predicated on the market prerogative to protect any licensing opportunity.

Further, the BVerfG implicitly demands that, because proprietary and technological copyright protection impedes communication⁹⁷, courts must demonstrate an awareness that the constitutional implications have been recognised. As mentioned, this is not a matter of finding the right mechanism in copyright statutes or doctrine, but a matter of open standards that guide the judge, methodically, towards intricate questions concerning the function of subjective rights and their respective weight.⁹⁸ The BVerfG, in essence, posits that the resolution of conflicting interests must be made exclusively within the legal system, and it is that assertion that would immediately disqualify any solution based on technological control as unconstitutional and disproportionate, because only the system of fundamental rights itself can allocate rights and apportion the relevant weight to each interest.

⁹⁵ Luhmann, „Zur Funktion der subjektiven Rechte“, in: Luhmann, *Ausdifferenzierung des Rechts – Beiträge zur Rechtssoziologie und Rechtstheorie* (2nd ed., Frankfurt am Main 2015) (originally published in 1970), 360, 367

⁹⁶ For a comprehensive discussion see Wu, *The Curse of Bigness: Antitrust in the New Gilded Age*, New York 2018 *passim*.

⁹⁷ See Teubner, *Societal Constitutionalism: Alternatives to State-Centered Constitutional Theory?*, in:

Joerges/Sand/Teubner, *Constitutionalism and Transnational Governance*, Oxford 2004, 3, 5.

⁹⁸ See, on the function of rights, Luhmann, „Subjektive Rechte: Zum Umbau des Rechtsbewußtseins für die moderne Gesellschaft“, in: Luhmann (ed.), *Gesellschaftsstruktur und Semantik (Band 2)* (Frankfurt am Main 1981) pp. 45 et seq.; Luhmann, „Zur Funktion der subjektiven Rechte“, in: Luhmann, *Ausdifferenzierung des Rechts: Beiträge zur Rechtssoziologie und Rechtstheorie* (2nd ed., Frankfurt am Main 2015), p. 360, 367. Luhmann insightfully demonstrates that rights relating to property, at a highly abstract level, are malleable in giving the lawmaker extensive choices. Thus, the equilibrium to be struck, for example between landlord and tenant with regard to the rights to terminate the lease, has little to do with constitutionally informed balancing or indeed justice as such, but can be fully justified based on legislative objectives of (housing) market regulation.

The BVerfG thus categorically refuses to accept EU law where communicative freedoms are subjected and subordinated to mechanisms such as the closed list principle under Article 5 EU CD that predominantly serve harmonisation aims, and would arguably also reject any reliance upon a high level of protection for the benefit of exploiter rights, especially so where legal reasoning is removed and replaced with technological control. Technological decision-making directly collides with the need for a continued openness of the legal system because it impedes the adaptability of the legal systems and the need to adjust any legal rule that protects information to changing social and technological realities. Artificial intelligence may, with much trepidation, sometime in the future be able to detect certain permissible uses⁹⁹, but computer code cannot mirror constitutional dynamics. If the elasticity of the legal system is eradicated through technological control, and if the right to one's free development of personality is so significantly impeded through surveillance so as to produce wide-spread deterrence, the violation of constitutional guarantees is obvious.

5.2 Conditions for Participation: Self-Determination and Surveillance

At this juncture, the nexus between self-determination, free development of one's personality and communicative freedom in the context of platform liability becomes obvious. As mentioned, users may well, even where the uploaded content is permissible and has been flagged as such, be dragged into disputes with right holders, and thus be subjected indirectly to surveillance measures and threats to privacy. Right holders will (and do) pursue aggressive policies targeting each and any user¹⁰⁰, and platforms may enjoy them so as to avoid liability. All this is not new – right holders have, of course, strategically targeted users ever since the advent of the internet, so as to achieve a maximum discouraging effect.¹⁰¹ If so, the dissuading consequence of Article 17 DSMD is to reduce what is available on platforms irrespective of whether the content in question constitutes a straightforward copy, whether the use may be covered under an exception, or whether no copyright infringement has occurred at all. If access to platforms as culturally valuable communicative fora is socially desirable, participation must be guaranteed and deterrence prevented, and such objective necessitates a certain degree of accepting copyright infringement. The liberty to use small parts, accordingly, is an imperative precondition for participation. It is directly linked to creativity, as the BVerfG has shown, but is also linked to more extensive freedom of communication concerns – for example, in the context of educational videos, for which Article 17 (7) DSMD makes no provision at all. Without such freedom, the very initial condition for participation is eradicated as threats of infringement remove confidence and motivation.

Thus, the assertions of the BVerfG as regards freedom of art can be stretched to broader freedom of communication rights, ultimately inferred from the right to self-development of one's personality. This conclusion is unavoidable, and obviously counter arguments based on commercial licensability are untenable. The (subjective) rights of users must therefore be exercisable without imposing a psychological barrier, and these corollaries can readily be inferred from the *Pelham* decision itself. In conclusion, the potential to deter not only creativity but possibly any motivation to participate on platforms would, following the fundamental assertion made by the BVerfG in its ground-breaking population census decision¹⁰², be sufficient to disqualify Article

⁹⁹ See Burk, Algorithmic Fair Use, 86 (2019) University of Chicago L. Rev. 283, 289 et seq.

¹⁰⁰ See Rinkerman, Sampling Unleashed? Migrating Visual Art Fair Use Principles into the Music Space, SSRN (2014), <https://ssrn.com/abstract=2540345>.

¹⁰¹ Katyal, Privacy vs. Piracy, 7 (2004-2005) Yale J.L. & Technology 222; Penney, Privacy and Legal Automation: The DMCA as a Case Study, 22 (2019) Stan. Tech. L. Rev. 412; Peter Yu, Digital Copyright Enforcement Measures and their Human Rights Threats, in: Geiger (ed.), Research Handbook on Human Rights and Intellectual Property (Cheltenham 2015), 455, 459.

¹⁰² BVerfG 1 BvR 209/83, BVerfGE 65, 1, 43; see Hornung/Schnabel, Data Protection in Germany I: The Population Census Decision and the Right to Informational Self-Determination, (2009) Computer Law and Security Review (CLRS) 84.

17 DSMD: a system that is designed to shatter the confidence of users by exposing them to threats of damages and litigation has exactly the effect that the BVerfG has denounced as incompatible with the right to development of one's personality. Again, the first German draft sought to avoid exactly that situation in allowing "technically verifiable" de minimis uses. The *Pelham* decision, in this regard, is a first instalment – an exercise that sets, albeit subtly, the scene for constitutional complaints that will challenge Article 17 DSMD.

6. The Court of Justice, Copyright and the Primacy of the EU Legal Order

The tendency in the Court of Justice's ruling in *Pelham* to maintain judicial control very arguably leads to an entirely different approach when the constitutionality of Article 17 DSMD is challenged. It is certainly unfortunate that the Court of Justice did not see itself in a position to "elevate" the general permissibility of referential or transformative uses to the status of fundamental rights, as it very arguably did, as discussed, in the case of parody. The effect is a direct collision course. The Court of Justice appears willing to sacrifice elementary conditions for a future evolution and malleability of the EU copyright system, and the principal motivation of maintaining the "closed list" principle as regards exceptions and limitations and the need for its uniform application obviously stems from a continuous orientation towards the aim of an "ever closer union", as the most fundamental objective transgressing EU law-making and its orientation towards market integration.¹⁰³ It thereby established a collision clause as a strict demarcation line between national constitutional law and secondary law and effectively disallows arguments for a continued constitutional pluralism. Thus, under secondary law, proportionality may be dispensed with unless proscribed through specific permitted purposes. Both the EU CD and DSMD contain a plethora of references from which a fundamental principle of a high level of protection can be extrapolated. This "high level" can easily integrate technological enforcement prerogatives. The closed list principle, under that reading, can be understood in a broader sense: accordingly, the closed list not only serves harmonisation purposes, but falls in line with the apparent purpose of the high level tenet, which is to create and improve market integration through strong control rights protected as fundamental freedoms under primary law.¹⁰⁴

6.1 Market Integration and Platform Liability

That line of reasoning results in two possible conclusions. As regards the relevance of freedom of art and communication, the fundamental rights factor can easily be subjected to predominant (digital) market integration aims and thus permit exploiters to rely on protection under primary EU fundamental freedom laws as regards the freedom of services in particular. At this juncture, complex and critical questions as regards the relationship between fundamental freedoms and the rights under the EU-Charter emerge, which raise questions of how conflicts between these two bodies of primary law are resolved as a matter of normative hierarchies in EU law in general. The debate surrounding this conflict within the EU legal order cannot be presented here comprehensively¹⁰⁵, and it suffices to state that many commentators have identified a certain debateable tendency in the jurisprudence of the Court of Justice, that is, an inclination to over-emphasise fundamental freedoms, economic principles and the integrity of the EU legal order. As

¹⁰³ Article 1 (2) TEU.

¹⁰⁴ Conversely, private defendants in copyright disputes cannot invoke the fundamental freedom to provide services or the rules on competition law so as to surpass secondary copyright rules, see Case C-403/08, Football Association Premier League Ltd and Others v QC Leisure and Others and C-429/08 Karen Murphy v Media Protection Services Ltd, ECLI:EU:C:2011:631.

¹⁰⁵ See, comprehensively, de Vries, Balancing Fundamental Rights with Economic Freedoms According to the European Court of Justice 9 (2013) 1 Utrecht Law Review 169.

a consequence, the status of fundamental rights is subjected to a balancing test under which fundamental rights become an undesirable obstacle to market integration aims.¹⁰⁶ The second conclusion automatically follows: if exploiters can rely on fundamental freedoms, the property clause in Article 17 (2) EU-Charter sets the primary point of departure for the constitutional assessment. Article 17 (2) EU-Charter does not give absolute protection whatsoever¹⁰⁷, but necessarily the weight assigned to exploiter rights is abstractedly greater where Article 17 (2) EU-Charter is pitted primarily and only against the right of platforms under Article 16 EU-Charter, precisely the approach the Court of Justice has so far adopted.¹⁰⁸

Consequently, the latitude in the assessment is considerably narrowed, and the decisive considerations then, concern predominantly the degree to which the imposition of filtering and/or monitoring obligations is overly burdensome. To be fair, the Court of Justice referred to user rights, including freedom of expression¹⁰⁹ and privacy¹¹⁰, but these considerations were not decisive, and the relevance of these rights remains open.¹¹¹ Users still have (subjective) rights under written exceptions, but freedom of communication cannot be invoked by internet users beyond the closed list.¹¹² Article 17 DSMD will, of course, render obsolete many of the arguments that platforms have successfully raised in the past, both as regards freedom to conduct a business and the safe harbour provision. Now, the “best effort” condition under Article 17 DSMD leads to tacit collusion between exploiters and platforms, as is intended.¹¹³ In sum, the new obligations almost coerce the Court of Justice to accept the detrimental effects that proactive filtering will have on freedom of art and communication - as a tolerable collateral damage with minor implications in light of the high level of protection objective, and that conclusion follows precisely from the stance the court adopted in *Pelham*.

6.2 Cooperation or Conflict? Article 17 DSMD and two Constitutional Cultures

The collisions that have emerged following the *Pelham* thus exceed copyright law issues by far. The lack of acceptance of a slightly more liberal approach by the Court of Justice now means that the closed list principle is cemented, a position that will make it extremely difficult for the Court of Justice to reintegrate concerns over freedom of art and speech when deciding on the constitutionality of Article 17 DSMD, notwithstanding the plethora of arguments that can be raised in favour of strong exploiter rights. The stance adopted by the BVerfG in *Pelham*, in view of a potential constitutional challenge against the new Copyright Service Providers Act under national law, is diametrically opposed to EU legal order arguments: the rights to be balanced are those of authors and users, with a strong emphasis on (1) freedom of art and communication, (2) the dangers of technical surveillance and (3) more general constitutional observations with regard to the interface between technological enforcement and the dangers that a “code as code” solution brings about for the capacity of the legal system – as a system of communication - to develop.

¹⁰⁶ See further Itzcovich, Legal Order, Legal Pluralism, Fundamental Principles. Europe and its Law in Three Concepts, (2012) 18 (2012) European Law J. 358.

¹⁰⁷ Case C-70/10, Scarlet Extended NV v Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM), ECLI:EU:C:2011:771, para. 32.

¹⁰⁸ *Ibid.*, para. 46.

¹⁰⁹ Article 11 EU-Charter.

¹¹⁰ Article 8 EU-Charter.

¹¹¹ See, critically, Mylly, The Constitutionalization of the European Legal Order: Impact of Human Rights on Intellectual Property in the EU, in: Geiger (ed.), Research Handbook on Human Rights and Intellectual Property (Cheltenham 2014), 103, 115.

¹¹² See Fischer-Lescano, Der Kampf um die Internetverfassung (2014) Juristenzeitung (JZ) 965 (discussing the complexities associated with constitutionalising „user rights” as reflections of claims to freedom in relation to internet governance).

¹¹³ Recital 62 DSMD.

Consequently, the rights of exploiters and platforms must be considered as subservient to those of users and authors.

In conclusion, the point of departure as adopted by the BVerfG will cause, if generalised, radical regime collisions between national constitutional law and the EU legal order. It is to be expected that the BVerfG will not accept a situation where freedom of art and communication is stifled, and especially not where complex decisions affecting freedom of speech are executed in the context of private dispute resolution mechanisms by platform employees whose decision-making tendency principally depends on their employers’ strategy to avoid liability.¹¹⁴ The BVerfG will also not consent to any solution that subordinates an understanding of fundamental rights in accordance with national constitutional law to an impervious preference for primary EU law and market integration aims or, for that matter, an obscure preference for “property” protection designed to reallocate unjustified enrichments under a simplistic policy to bridge a value gap - especially not given that freedom of communication has always been considered the central fixation point in the “objective order of values” under domestic constitutional law.¹¹⁵

6.3 Constitutional Pluralism, Strategic Decision Making and Copyright Policy: A new Collision Course

The *Pelham* controversy thus impressively demonstrates the potential for a sweeping conflict not only between the BVerfG and the Court of Justice, but between divergent constitutional orders. The very same collision re-emerges now in the context of Article 17 DSMD, and – way above and beyond that issue – the potentially divergent approaches to questions of constitutionality in copyright can have far-reaching consequences for the entire system of secondary copyright law and its capability to co-exist with national constitutional principles of an unprecedented magnitude: ultimately, the opposing views expressed predominantly strategic decision making – to secure as much competence as possible. A bifurcated approach would follow.

It is of note that the BVerfG’s *Pelham* decision at no point discusses Article 5 EUCD as such. Assumingly, this is no coincidence. Ignoring any obligation to follow EU law allowed the court to clarify the intersection between copyright law and constitutional law, also with a view to Charter rights. The BVerfG sent a clear signal to the Court of Justice that secondary law and uniformity of interpretation have little impact on domestic guarantees and the continued applicability of proportionality principles. It is maybe also not a coincidence that the *Pelham* decision came shortly before the court adopted a new approach that noticeably seeks to rebalance the relationship between national constitutional guarantees and the principle of the primacy of the EU legal order afresh, a stance that has always been rejected by the Court of Justice who demands absolute primacy of EU law.¹¹⁶ One may speculate that the confrontational course the BVerfG adopted is a deliberate move to regain control precisely over the new liability concept under Article 17 DSMD, all the more so since the mutually exclusive views exhibited by the two courts respectively will make a cooperative dialogue¹¹⁷ almost impossible.

¹¹⁴ See, with regard to the constitutional impermissibility of subsequent ex post dispute resolution mechanisms AG Saugmandsgaard Øe, Case 401/19, Republic of Poland v European Parliament and Council of the European Union, ECLI:EU:C:2021:613, paras. 180 et seq.

¹¹⁵ BVerfGE 7, 198 – Lüth.

¹¹⁶ Since Case C-6/64, Costa v E.N.E.L. [1964] ECR I 1251, 1269. See Ludwigs/Sikora, Der Vorrang des Unionsrechts unter Kontrollvorbehalt des BVerfG (2016) Europäisches Wirtschafts- und Steuerrecht (EWS) 121.

¹¹⁷ Cf. generally Tridimas, The ECJ and the National Courts: Dialogue, Co-operation, and Instability, in: Chalmers/Arnulf (eds.), Oxford Handbook of European Union Law, Oxford 2015, 403.

Indeed, the confrontations in *Pelham* are not singular occurrences in the relationship between the two courts. The BVerfG now adopts a highly critical view on the supremacy of the EU legal order, and changed its jurisprudence on the relationship between national constitutional law and EU law drastically. In recent decisions, unrelated to copyright law, the BVerfG fervently reclaimed competence over the interpretation of fundamental rights, including the rights under the Charter¹¹⁸, thus asserting that the court would no longer be content with a mere control of identity between domestic and EU fundamental rights¹¹⁹ to be, in detail, interpreted by the Court of Justice.

Moreover, the court affirmed a shift from its previous accommodating approval of the primacy of the EU legal order¹²⁰ as regards, specifically, the status of proportionality: the BVerfG now blatantly refuses to follow the Court of Justice¹²¹ where it considers its decisions *ultra vires*.¹²² This is the case where the EU, in the opinion of the BVerfG, does not satisfactorily explicate if and how proportionality deliberations had been undertaken - for example, where the considerations of the Court of Justice appear unintelligible or arbitrary, or where, more importantly, proportionality assertions based on fundamental rights are absent.¹²³ It is especially deficient, according to the BVerfG, for the Court of Justice or other organs of the EU to merely conduct an assessment relating to the reasonability of EU measures.¹²⁴

Academic commentary (unrelated to copyright law) had already identified the cause for that development as, precisely, the recurrent propensity in EU legislation and the related jurisprudence of the Court of Justice to over-emphasise integration aims over fundamental rights¹²⁵, often coupled with a shrewd tendency to increasingly secure competences through extending the realms of autonomous interpretation, that triggered the BVerfG to retort.¹²⁶ Unsurprisingly, the emphasis the Court of Justice places upon market integration objectives and uniform interpretation¹²⁷ results in a decision-making program where fundamental rights can easily become submerged and subjected to higher ranking economic policy objectives¹²⁸. The BVerfG implicitly exposed the “closed list” principle as the fundamental flaw in secondary copyright law. The court identified the “closed list” argument as devoid of substance, its function limited to that of a convenient collision clause for the Court of Justice to exercise control over any constellation concerning the potential

impact of fundamental rights upon secondary law principles.¹²⁹ The court will have been fully aware when considering the *Pelham* case that its own approach is non-compliant with Article 5 EUCD, and that the BGH would feel obliged to present the case to the Court of Justice for preliminary ruling. The *Pelham* case, with its innumerable intricacies, provided a most suitable opportunity for the BVerfG to, almost perfidiously, provoke a decision of the Court of Justice that would, expressly, exclude fundamental guarantees from the canon of EU copyright law. The Court of Justice thus could only react through adopting its peculiar “perceptibility” solution – any direct answer to the question of how freedom of art relates to copyright would have necessitated some statement on competences, the degree of harmonisation and, most worryingly from the perspective of uniform interpretation, on the relationship between national constitutional law and the rights under the Charter¹³⁰, deliberations at a level of inquiry at which the conventional apodictic assertions of autonomous interpretation and references to full harmonisation would no longer have credibly worked.

Now, the BVerfG can regain control, and can do so by referring to both domestic constitutional rights as well as the rights under the charter. It may lead back to the previous licensing solution as the least intrusive means as a focal point. The Court of Justice will have to accept such re-establishment of constitutional plurality. In turn, and to regain competence over copyright the Court of Justice is forced to emphasise fundamental rights and proportionality, and thus to bring the jurisprudence of the Court in Justice in line with domestic perceptions on fundamental right guarantees. In case the Court of Justice finds that Article 17 DSMD is compliant with fundamental rights, the BVerfG may still declare such decision as non-binding. The probable effect of such essentially confrontational dialogue may well be an incremental realignment away from economic considerations.

7. Conclusion

The new liability regime establishes a system of enforcement generating an overabundance of constitutional challenges. Its major flaw lies in misconceiving the intersection between technological enforcement and surveillance, its impact on socially and culturally desirable user behaviour, and automated decision making on the hand with an exaggerated bias towards commercial rights and economic integration aims. Technological solutions contravene fundamental principles of copyright law as a body of rules that predominantly aims to foster creativity.

The two opposing decisions in *Pelham* signal a disturbing inclination for EU copyright law in general. It is rather obvious that Article 17 DSMD will not pass constitutional scrutiny before the BVerfG, and, if the provision is challenged before that court, it can be expected that freedom of art and communication, and proportionality requirements more generally, will provide the focus of the constitutional assessment as regards producer rights and their function in particular. That analysis would unveil severe weaknesses in the customary reliance on property arguments, and the pyramidal architecture of secondary copyright that places commercial privileges and technological control on top. If the BVerfG, in keeping with its current approach to increase the density of control over fundamental rights and the proper execution of proportionality standards, concludes in favour of communicative freedoms the effects will inevitably transgress Article 17 DSMD. It can cause the entire architecture of secondary copyright law to collapse.

¹¹⁸ BVerfG (2020) Neue Juristische Wochenschrift (NJW) 1647 – Right to be Forgotten I. The BVerfG here refers to its *Pelham* decision (BVerfGE 142, 313, 345). The BVerfG asserts that European, international and other supranational catalogues of fundamental and human rights can serve as inspiration for domestic interpretation, but that there exists no principle that the BVerfG is bound to adopt a deviating interpretation of open constitutional norms from international or European decision making instances.

¹¹⁹ BVerfGE 126, 286 - Honeywell.

¹²⁰ BVerfGE 126, 286, 294 - Honeywell.

¹²¹ Case C-493/17, Proceedings brought by Heinrich Weiss and Others, ECLI:EU:C:2018:1000.

¹²² BVerfG (2020) Neue Juristische Wochenschrift (NJW) 1647. See further Grimm, “A Long Time Coming”, 21 (2020) 5 German Law Journal 944 = doi:10.1017/glj.2020.55; Nettesheim, Das PSP-Urteil des BVerfG: ein Angriff auf die EU?, (2020) Neue Juristische Wochenschrift, 1631.

¹²³ Nagy, “The Diagonality Problem of the EU Rule of Law and Human Rights: Proposal for an Incorporation à l’européenne”, 21 (2020) 5 German Law Journal 838, 842 et seq. = doi:10.1017/glj.2020.44.

¹²⁴ BVerfG (2020) Neue Juristische Wochenschrift (NJW) 1647, para. 53 – Right to be Forgotten I.

¹²⁵ Conway, *The Limits of Legal Reasoning and the European Court of Justice*, (Cambridge 2012), passim; Conway, *Conflicts of Competence Norms in EU Law and the Legal Reasoning of the ECJ*, (2010) German Law Journal 966.

¹²⁶ Grimm, “A Long Time Coming”, 21 (2020) 5 German Law Journal 944, 947 = doi:10.1017/glj.2020.55

¹²⁷ On the relationship between the collision clauses in Articles 51-53 EU-Charter and fundamental freedoms see Case C-399/11, *Melloni v Ministerio Fiscal*, ECLI:EU:C:2013:107, paras. 55 et seq.; Case C-617/10, *Åklagaren v Hans Åkerberg Fransson*, ECLI:EU:C:2013:105, paras. 45 et seq.

¹²⁸ Evident in the approach taken in: Opinion of the Court (Full Court) of 18 December 2014, Case Opinion 2/13 - Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms Compatibility of the draft agreement with the EU and FEU Treaties, ECLI:EU:C:2014:2454; see, critically, Nettesheim, “Anmerkung”, (2016) *Juristenzeitung* (JZ) 424.

¹²⁹ Which may then easily extend to non-harmonised areas such as authors’ personality or moral rights, as the *Deckmyn* decision amply demonstrates. See Rosati, *Just a Laughing Matter? Why the Decision in Deckmyn is Broader than Parody* 52 (2015) 5 *Common Market Law Review* 511.

¹³⁰ See Kingreen, in: Callies/Ruffert, *EUV/AEUV, Kommentar*, (Munich 2018), Art. 53 EU-Grundrechtcharta, para. 4.