

5. ECTA Articles

Copyright and Freedom of Expression: A Balance of Interests



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TODAY'S WORLD IS DEFINED BY INSTANT COMMUNICATION AND GLOBAL INFORMATION FLOW. AGAINST THIS FAST-PACED BACKDROP, HOW MUCH CONTROL SHOULD CREATORS OF COPYRIGHTED WORKS HAVE, AND HOW FAR DOES THE PUBLIC'S RIGHT TO ACCESS AND SHARE INFORMATION EXTEND? COPYRIGHT LAW AFFECTS NOT ONLY THE CONSTITUTIONALLY PROTECTED INTERESTS OF THE AUTHOR, BUT ALSO CONFLICTING INTERESTS OF THIRD PARTIES BASED ON OTHER FUNDAMENTAL RIGHTS, SUCH AS FREEDOM OF EXPRESSION AND FREEDOM OF (I.E., PUBLIC ACCESS TO) INFORMATION. THIS ARTICLE EXAMINES THE BALANCE BETWEEN COPYRIGHT PROTECTION AND FREEDOM OF EXPRESSION ACROSS TWENTY-FIVE JURISDICTIONS,¹ ILLUSTRATING HOW LEGISLATION AND CASE LAW RECONCILE THESE COMPETING RIGHTS.

FUNDAMENTAL LEGAL PRINCIPLES

On an international level, EU Member States and Switzerland, along with Turkey, the US, Peru, Pakistan and India, are parties to conventions recognising the fundamental right to (i) property (including intellectual property);² and (ii) freedom of expression or freedom of (public access to) information.³ The UAE and Saudi Arabia are not parties to conventions recognising freedom of expression and information, but they do recognise intellectual property as a fundamental right.

On a constitutional level, copyright is recognised in some countries as a

¹ Austria, Belgium, Bulgaria, Croatia, Denmark, Estonia, France, Germany, Hungary, India, Ireland, Italy, Netherlands, Pakistan, Peru, Poland, Portugal, Saudi Arabia, Slovenia, Spain, Sweden, Switzerland, Turkey, UAE, US.

² Berne Convention for the Protection of Literary and Artistic Works, Universal Copyright Convention, Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human-Rights) (not adopted by Pakistan, Peru, US), Charter of Fundamental Rights of the European Union (not adopted by Peru, Switzerland, Turkey, US), Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).

³ European Convention on Human Rights (not adopted by Pakistan, Peru, US), Charter of Fundamental Rights of the European Union (not adopted by Peru, Switzerland, Turkey, US), International Covenant on Civil and Political Rights (ICCPR).



FREEDOM OF EXPRESSION AS A DEFENCE?

fundamental right (often understood as part of the general constitutional right to property),⁴ though not in all surveyed countries.⁵ Freedom of expression and freedom of information, however, are acknowledged in all twenty-five jurisdictions, including the UAE and Saudi Arabia. On a national legislative level, the balance between copyright protection and freedom of expression is most evident in copyright exceptions. In virtually all countries examined,⁶ national copyright laws provide for limitations that are based directly or indirectly on the fundamental rights of freedom of expression or right to information:

- i. In the EU, Art. 5 (3)(c), (d), (f), (j), and (k) of the Infoc Directive⁷ provide exceptions in cases of press reproduction, quotations, use of political speeches, exhibition or sale of artistic works, and parody, with slight variations in implementation among Member States;⁸
- ii. Among the non-EU countries, similar exceptions exist in national laws, such as the exceptions to freedom of parody, freedom of quotation, or permitted private use.

In some jurisdictions, courts assume that with the statutory exceptions to copyright protection, legislation has regulated situations of conflict between fundamental constitutional rights by seeking to balance the existing conflicting interests.⁹ This position is in line with the principle established by three judgments delivered by the Grand Chamber of ECJ in 2019:¹⁰ it ruled that the balance between copyright and freedom of expression having been struck by the Infoc Directive¹¹ – which defines exceptions to copyright prerogatives (e.g. parody, quotation) – excludes the possibility of copyright exceptions that are not provided for in the text.

In those legal systems where defendants cannot directly invoke their fundamental right to freedom of expression or information in copyright litigation,¹² the courts will generally weigh the interests involved when determining whether a legally regulated exception to copyright has been complied with: to that extent only, they will take into account the fundamental rights of the defendant.

There are other jurisdictions where a defendant may directly assert his fundamental right to freedom of expression or information to an alleged copyright infringement. This is the case in Austria,

Bulgaria, Croatia, Denmark, France, Hungary, Ireland, the Netherlands, Poland, Sweden, Turkey and US.

Even if no case law was reported specifically in relation to this balance of interests, the judges are likely to follow the case law of the ECtHR,¹³ which is considered relevant in national courts (e.g. in Bulgaria, Croatia, Ireland, the Netherlands, Poland and Turkey). When balancing competing interests such as copyright and freedom of expression or information, judges will generally take into consideration the proportionality criteria set out in Art. 10-2 of the ECHR: Is the restriction on freedom of expression provided for by law? Is it necessary? Does the restriction serve a legitimate purpose? Is it proportionate in relation to the intended protection of copyright?

According to the guidelines of the Austrian Supreme Court of Justice,¹⁴ freedom of expression or public access to information can therefore prevail as long as (i) it cannot be exercised – or can only be exercised to an inadequate extent – without infringing the copyright, (ii) the statements are not untrue or defamatory, and (iii) the economic and other legitimate interests of the author are not undermined.

In Denmark,¹⁵ the Supreme Court decided

that the balancing of the two fundamental rights depends not only on whether it is necessary to use a copyrighted work to convey a message, but also whether it is necessary to interfere with the freedom of expression of the press in order to protect the copyright holders' copyrights: it decided that the value of the Little Mermaid statue as a national symbol was decisive for its use and therefore held that such use did not go beyond what is allowed under Art. 10 ECHR. Where there is significant public interest in the information, the assessment of the fundamental rights in presence may lead to different solutions. In Hungary¹⁶ copyrights are interpreted strictly and the general view is that the right of access to data of public interest cannot be restricted, even if the work in question is protected by copyright. A restriction is only possible in the context of use and copyright can only constitute a limitation on the right of dissemination. In Sweden¹⁷ the interest in freedom of expression may outweigh copyright when there is a strong public interest and the work is of significant political, historical or social importance, but with a limited application as this mainly concerns criminal liability and not civil claims for compensation by the author. In France, since a landmark ruling in 2015,¹⁸ copyright has been weighed against

freedom of expression or public access to information on an almost systematic basis, e.g., in the presence of transformative graphic works¹⁹ as well as clips for political campaigns using copyrighted works.²⁰ Such analysis does not correspond to a new exception to copyright and is therefore in line with ECJ's decisions of 2019. When a party invokes a freedom protected by the ECHR, the judge is required to carry out a review to ensure that the interference with freedom of expression based on copyright protection is proportionate. For example, when the use of a previous work by a transformative artist is not necessary to the exercise of his artistic freedom, copyright protection constitutes a proportionate interference and will prevail over his freedom of expression;²¹ on the other hand, when a protected work is reproduced for the legitimate purpose of informing the public, convicting the defendant would constitute a disproportionate infringement of his freedom of expression, contrary to Art. 10 of the ECHR.²²

Such an evolution – based solely on case law – tends to bring the regime applicable in certain countries closer to the American 'fair use' regime. In the US, courts will look at the four elements of fair use, i.e. (i) purpose and character of the use, including whether the use is of a commercial nature or is for nonprofit educational purposes, (ii) nature of the copyrighted work, (iii) amount and substantiality of the portion used in relation to the copyrighted work as a whole and (iv) effect of the use upon the potential market for or value of the copyrighted work.

However, there actually exists a fundamental difference between the two mechanisms because they do not operate at the same level, 'fair use' being provided for within the Copyright Act itself, whereas Art. 10 ECHR works as an external limitation on copyright but they both provide for a rigorous test to strike the right balance between freedom of expression and the need to protect the prerogatives of a copyright holder.

CONCLUSION

The comparative review of twenty-five jurisdictions demonstrates that the relationship between copyright and freedom of expression remains an evolving field of law, shaped by constitutional principles, legislative frameworks and judicial interpretation at the national and international level. Nevertheless, almost all legal systems reviewed broadly seek to strike a balance between these competing interests.

Although the doctrinal foundations differ (e.g. statutory exceptions, constitutional balancing, ECHR proportionality assessments or the US fair-use doctrine), the underlying objective remains consistent in all jurisdictions: ensuring that copyright protection does not unduly restrict democratic values, public discourse, or access to information. Jurisdictions that allow broader judicial balancing increasingly converge toward outcomes comparable to those produced under fair use, even if the legal mechanisms (yet) differ. ◀

⁴ Austria, Croatia, France, Germany, India, Switzerland.

⁵ Not recognised in Netherlands, Spain, UAE, Saudi Arabia, Pakistan, Denmark, Hungary and Belgium.

⁶ With the exception of UAE, Saudi Arabia and Pakistan.

⁷ 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.

⁸ Spain, Bulgaria, and Estonia have not implemented paragraph (j), Sweden has additionally not adopted paragraph (k), while Belgium has not implemented paragraph (c).

⁹ Namely in Belgium, Germany, Slovenia and Switzerland. See Decision of the Supreme Court of Slovenia no. III Ips 119/2015 of 24 January 2017; Decision of the Swiss Federal Supreme Court BGE 131 III 480 of 22 June 2005.

¹⁰ ECJ 29 July 2019, cases C-469/17, C-476/17 and C-516/17.

¹¹ 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.

¹² Such as in Germany or Switzerland.

¹³ ECtHR (5th section), *Ashby Donald and others vs. France*, 10 January 2013 36769/08.

¹⁴ ECtHR (5th section), *Ashby Donald and others vs. France*, 10 January 2013 36769/08.

¹⁵ https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Justiz&Dokumentnummer=JIR_20010612_OGH0002_00400800127_01G0000_002.

¹⁶ Supreme Court of Denmark BS-24506/22-HJR, 17 May 2023.

¹⁷ Metropolitan Court of Budapest P.23.481/2018/6.

¹⁸ Supreme Court of Sweden NJA 2020 s. 293.

¹⁹ Supreme Court of France, 15 May 15, 2015, 13-27.391.

²⁰ Court of Appeal of Paris, 17 December 2019, 17/09695.

²¹ Paris Court of First Instance, 23 January 2025, 22/03349.

²² Court of Appeal of Paris, 17 December 2019, 17/09695.

²³ Nanterre Court of First Instance, 31 May 2022.