

Digital Rights Management - The End of Collecting Societies?, Stämpfli Publishers, Berne, Juris Publishers, New York, Bruylant, Brussels, Ant. N. Sakkoulas, Athens, 2005 (edited together with Carlo Govoni/Michael Girsberger/Mira Nenova).

Copyright and Access – a Human Rights Perspective

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Introduction

Copyright has traditionally been perceived as a catalyst for intellectual freedom.² One of the most famous statements in support of this view originates from the Supreme Court of the United States. In *Harper & Row* the Supreme Court held in 1985:

«... it should not be forgotten that the Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas».³

The assumptions on the relation between copyright and free speech underlying the judgment of the Supreme Court seem to have changed remarkably since 1985. Due to an evolution towards digital networked environments, the possibility to control inputs to creation and communication have increased dramatically. As Julie Cohen puts it: «[a] combination of technology and strengthened legal protection enables vendors of digital content to exert tighter control over access to and use of that content...».⁴ Legal protection of

¹ The author would like to thank Walter Dillenz and Franz Zeller for valuable information and Ruth Aregger, Monika Dommann, Michael Girsberger, Carlo Govoni, Maya Hertig and Mira Nenova for their comments on earlier drafts of this paper. The support of the Mercator Foundation Switzerland in the preparation of the study is gratefully acknowledged.

² JULIE E. COHEN, 2001: Information Rights and Intellectual Freedom, in VEDDER (ed.), *Ethics and the Internet*, Antwerp 2001, pp. 11-32, at p. 20.

³ U.S. Supreme Court, *Harper & Row v. Nation Enterprises*, 471 U.S. 539 (1985), at paragraph III. B.

⁴ COHEN, 2001, *supra* note 2, at p.11.

copyright considerably increased with the establishment of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs) in 1995, as one of the three pillars of the World Trade Organisation (WTO).⁵ Because of the unique dispute settlement system of the WTO which secures binding and enforceable Panel and Appellate Body Decisions, it became possible to enforce high standards of copyright protection on a multilateral level effectively. In regard to technological developments, the crucial step is the advent of Digital Rights Management Systems (DRMs).⁶ DRMs will empower owners of cultural content to exclude users from access to (protected and unprotected) cultural information or grant access to it on a conditional base (e.g. that consumers pay for use of content). Intellectual freedom not only requires access to information but - prior to this - knowledge about the existence of information: «The rules governing information ownership and access must enable individuals to identify and locate relevant or desired information, and must facilitate informed decisions about whether to read further».⁷ Thus, to the extent that DRMs inhibit individuals from browsing information directly, such a technology has a negative impact on intellectual freedom.

In the old days of the analogue world it was technically impossible to prevent consumers of protected content from making private copies of books, sound recordings or video tapes. The pragmatic response to that problem was the application of systems of collective rights management:⁸ Statutory law allows the making of private copies on the condition that users pay a levy on blank audio and video tapes (eventually including CDs, DVDs and other recently

⁵ The others being the General Agreement on Tariffs and Trade (GATT) and the General Agreement on trade in services (GATS).

⁶ We are still at the beginning of a process of rapid development and improvement of DRM systems. As the European Commission notes in a recent report, global and interoperable technical infrastructure on DRM systems is not yet established, mainly due to a lack of common standards. Nonetheless, DRM systems are considered by the Commission to be «crucial for the development of new high volume, low transactional value business models, which include the pricing of access, usage, and the service itself, subscription models, reliance on advertising revenue, credit sales or billing schemes». See European Commission, Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee, The Management of Copyright and Related Rights in the Internal Market, 16 April 2004, COM(2004) 261 final, at paragraph 1.2.5.

⁷ COHEN, 2001, *supra* note 2, at p. 14.

⁸ For a comparative historical account of this step, see DIRK J.G. VISSER, 1996: Copyright Exemptions Old and New, in HUGENHOLTZ (ed.), *The Future of Copyright in a Digital Environment*, The Hague 1996, pp. 49-56, at pp. 49-51.

developed storage equipment) or photocopy machines.⁹ Collecting societies, i.e. associations of writers, artists, musicians, filmmakers, etc., are usually mandated by governments to collect these levies from users and to distribute them to the right holders.¹⁰ Further rights administered collectively include activities such as communication to the public and cable retransmission of broadcasting programmes, public lending or artist's resale right.¹¹ Collecting societies operate under a double statutory law constraint serving the public interest.¹² First, in relation to right holders, they are requested to administer all rights falling into their area of activity.¹³ Second, in relation to users, they are obliged to grant exploitation rights or authorisations to any person requesting them, on equitable conditions in respect of the right they administer.¹⁴ Thus, collecting societies function as intermediaries between creators (or derivative right holders) and users. Government supervision serves further to prevent possible abuses, where they enjoy a *de facto* or *de jure* monopoly position.¹⁵ Accordingly, the collective rights management system manages to equalise conflicting interests in a constitutionally balanced manner and promotes intellectual freedom.

⁹ See JANE GINSBURG/YVES GAUBIAC, 1998: Private Copying in the Digital Environment, in KABEL/MOM (eds.), *Intellectual Property and Information Law - Essays in Honour of Herman Cohen Jehoram*, The Hague etc. 1998, pp. 149-155, at pp. 149 f.

¹⁰ On the functions of collective management of rights, see European Commission, *The Management of Copyright and Related Rights in the Internal Market*, *supra* note 6, at paragraph 3.1.

¹¹ European Commission, *The Management of Copyright and Related Rights in the Internal Market*, *ibid.*, at paragraph 3.1.2. See also MIHÁLY FICSOR, 2002: *Collective Management of Copyright and Related Rights*, Geneva 2002, at pp. 37-93.

¹² For the situation in Germany, see JÜRGEN BECKER, 1994: *Verwertungsgesellschaften als Träger öffentlicher und privater Aufgaben*, in BECKER/LERCHE/MESTMÄCKER (eds.), *Wanderer zwischen Musik, Politik und Recht: Festschrift für Reinhold Kreile zu seinem 65. Geburtstag*, Baden-Baden 1994, pp. 27-51, at pp. 43-44.

¹³ See e.g. Article 44 of the Swiss Copyright Act (Urheberrechtsgesetz), 9 October 1992, *Systematic Collection of Swiss Law*, SR 231.1.

¹⁴ See e.g. Articles 11(1) and 12 of the German Copyright Administration Act (Urheberrechtswahrnehmungsgesetz), 9 September 1965, BGBl. I 1294. See also THOMAS DREIER, 2001: *Balancing Proprietary and Public Domain Interests: Inside or Outside of Proprietary Rights?*, in COOPER DREYFUSS/LEENHEER ZIMMERMAN/FIRST (eds.), *Expanding the Boundaries of Intellectual Property: Innovation Policy for the Knowledge Society*, Oxford/New York 2001, pp. 295-316, at p. 301, footnote 14 and accompanying text. Under § 46 of the Swiss Copyright Act equitable terms are secured by tariffs negotiated with users associations and approved by public authority.

¹⁵ FICSOR, 2002, *supra* note 11, at pp. 144-146.

Under the conditions of the new digital environment it is being questioned whether systems of collective rights management continue to be necessary.¹⁶ Since users can eventually be prevented technically from having unconditional access to information, rights which traditionally have been exercised on a collective basis will now be administered individually.¹⁷ In a global digital environment allowing the effective technical protection of information, large content producers will acquire copyrights derivatively from creators and exploit them directly as licensees. Consequently, the digital turn will lead to a concentration of the power to control access to cultural information in the hands of large transnational media groups.¹⁸ Moreover, since media groups, including Time Warner, Vivendi/Universal, News Corporation, Walt Disney, Bertelsmann, Sony, etc., operate under conditions of competition, the old constitutionally balanced system is replaced by the law of the market. These developments lead to an asymmetry in the relation between producers and users of cultural information and raise the question whether the constitutional legitimacy of copyright advocated by the U.S. Supreme Court in *Harper & Row* is still guaranteed.

We may distinguish two challenges to intellectual freedom in a digital environment: those regarding flows of information directed to individuals and those concerning flows from and about individuals.¹⁹ The focus of this article will be on information flows to and from individuals as protected mainly by the freedom of expression and information as a human and constitutional right. Due to space restrictions, flows of information about individuals, i.e. issues of privacy protection will not be treated herein.

Since copyright and free speech are both constitutionally protected values, we will first look, in Section 2, at the constitutional foundations of both freedoms. Section 3 will then proceed with an analysis of the case law of the Strasbourg authorities and selected European courts' rulings on the relationship between

¹⁶ See e.g. ERWIN ARKENBOUT/FRANS VAN DIJK/PETER VAN WIJCK, 2004: Copyright in the Information Society: Scenarios and Strategies, in *European Journal of Law and Economics*, 2004, pp. 237-249, at p. 242.

¹⁷ FISCOR, 2002, *supra* note 11, at p. 97, mentions the right of communication to the public as an example.

¹⁸ See YOCHAI BENKLER, 2001: A Political Economy of the Public Domain: Markets in Information Goods versus the Marketplace of Ideas, in COOPER DREYFUSS/LEENHEER ZIMMERMAN/FIRST (eds.), *Expanding the Boundaries of Intellectual Property: Innovation Policy for the Knowledge Society*, Oxford/New York 2001, pp. 267-292, at pp. 273 f., 291.

¹⁹ COHEN, 2001, *supra* note 2, at p. 12.

freedom of expression and information and copyright. Since none of the existing judgments deals explicitly with problems directly caused by the new digital environment, Section 4 will explore what may be deduced from existing jurisprudence in view of the new problems arising from DRMs and look at solutions for balancing the two conflicting interests which were introduced by the legislator in fields where conflicts between exclusive rights and access to information arose. In Section 5, finally, we will ask, from the perspective of human rights, what the future of collecting societies in the digital environment may be.

1. Copyright v. Access as a Conflict of Human Rights

If one looks at textbooks and monographs on human rights issues, one notices that reflections on conflicts of free speech and copyright hitherto are almost completely absent. Only recently have scholars and courts started to take into consideration the possibility of such a conflict.²⁰ In the realm of intellectual property law, however, the balancing between proprietary and other interests is not novel and is usually achieved in a framework of rights and exceptions.²¹

²⁰ For recent investigations on the subject, see BERNT P. HUGENHOLTZ, 2001: Copyright and Freedom of Expression in Europe, in COOPER DREYFUSS/LEENHEER ZIMMERMAN/FIRST (eds.), *Expanding the Boundaries of Intellectual Property: Innovation Policy for the Knowledge Society*, Oxford/New York 2001, pp. 343-363, at pp. 344, 351 f. (comparative perspective); SANDRO MACCIACHINI, 2000: *Urheberrecht und Meinungsfreiheit*, Bern 2000 (focussing on Swiss law), FRANK FECHNER, 1999: *Geistiges Eigentum und Verfassung*, Tübingen 1999 (on German law); YOCHAI BENKLER, 1999: Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain, in 74 *New York University Law Review* (1999) 354, in particular at pp. 386-390 (for an overview of the leading literature on the topic in U.S. law); and JAN M. DE MEIJ, 1998: Copyright and Freedom of Expression in the Swedish Constitution: An Example for The Netherlands?, in KABEL/MOM (eds.), *Intellectual Property and Information Law - Essays in Honour of Herman Cohen Jehoram*, The Hague 1998, pp. 315-322 (on the situation in Sweden compared with the Netherlands). For older studies, see HERMAN COHEN JEHORAM, 1983: The Freedom of Expression in Copyright and Media Law, in *GRUR Int.* 1983, pp. 385-389, at pp. 385 ff. and MARTIN LÖFFLER, 1980: Das Grundrecht auf Informationsfreiheit als Schranke des Urheberrechts, in *Neue Juristische Wochenschrift* 5/1980, at pp. 201-205.

²¹ See FRANÇOIS DESSEMONTET, 1998: Copyright and Human Rights, in KABEL/MOM (eds.), *Intellectual Property and Information Law - Essays in Honour of Herman Cohen Jehoram*, The Hague etc. 1998, pp. 113-120, at pp. 113 ff. For the discussion in Germany, see in particular GISELA WILD, 1999: §97, in SCHRICKER (ed.), *Urheberrecht, Kommentar*, second edition, Munich 1999, at paragraphs 20-25; HAIMO SCHACK, 2001: *Urheber- und Urhebervertragsrecht*, Tübingen 2001, at paragraph 487; FERDINAND MELICHAR, 1999: Vor §§ 45 ff., in SCHRICKER (ed.), *Urheberrecht, Kommentar*, second

As the analysis of selected case law in the following Sections will show, some courts now seem to be willing to interpret exceptions from copyright in the light of freedom of expression and information. One of the main reasons for this new interest of «copyright courts» in human rights may be that traditional copyright doctrine seems incapable of resolving virulent conflicts which result from a radical *commercialisation of information*.²² In the information society copyright has become a precondition for the functioning of most businesses trading digital products such as music, films, video games, etc. From the perspective of consumers, however, copyright in a digital environment (especially the Internet) is often experienced as an instrument primarily used to exclude users from information which was freely accessible before.²³ This experience is in sharp contrast with the idea of «free culture»²⁴ which for a long time has been promised by influential promoters of the Internet. Referring to human rights while interpreting copyrights and exceptions thereof may be thus perceived as a *re-constitutionalisation* of the distinction between access to and exclusion from information in the digital age.

1.1. The Human Rights Basis of Copyright

In an international context the term «copyright» is often used to refer to both the civil law and the common law approach to exclusive rights. It is important, however, to stress the traditionally considerable differences between the two schools of thought.²⁵ Whereas in the continental, civil law tradition an open definition of *droit d'auteur* with a limited catalogue of exceptions is applied,²⁶ the Anglo-Saxon, common law concept operates a narrow definition of copyrights with a wide scope for a variety of exceptions and limitations in the

edition, Munich 1999, at paragraph 16 and GERHARD SCHRICKER, 1999: § 51, in SCHRICKER (ed.), *Urheberrecht, Kommentar*, second edition, Munich 1999, at paragraphs 8 f.

²² For a theoretical critique, see YOCHAI BENKLER, 2001: *Siren Songs and Amish Children: Autonomy, Information, and Law*, in 76 *New York University Law Review* (2001) 23, in particular at pp. 57-72.

²³ See JANE GINSBURG, 2002: *How Copyright Got a Bad Name for Itself*, in *Columbia Journal of Law and the Arts*, vol. 26 (2002), pp. 61 ff., at pp. 61-67.

²⁴ LAWRENCE LESSIG, 2004: *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity*, New York 2004.

²⁵ See DREIER, 2001, *supra* note 14, at p. 298.

²⁶ ANDRE LUCAS, 1998: *Droit d'auteur et numérique*, Paris 1998, at p. 173, referring to ALAIN STROWEL, 1993: *Droit d'auteur et copyright. Divergences et convergences*, Bruxelles et Paris 1993, at pp. 144-147.

realm of the *fair use doctrine*.²⁷ However, with the adoption of the TRIPs Agreement, which introduces an enforceable standard for intellectual property rights protection among the 148 Members of the WTO,²⁸ the differences between the two traditions are fading.²⁹ Because of this convergence of the two approaches,³⁰ and due to the fact that this study is focussing on the situation in Europe, we may refrain from elaborating on this distinction in more detail.

As regards global human rights instruments, the basis for copyright protection is enshrined in Article 27(2) of the Universal Declaration of Human Rights (hereinafter, Universal Declaration)³¹ and in Article 15(1)(c)³² of the UN Covenant on Economic, Social and Cultural Rights (CESCR).³³ Article 27(2) of the Universal Declaration provides that «everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author». Interestingly, this provision does not speak of copyright but of rights resulting from creations of which the right holder is the author. From this, one may deduce that it is the creator who deserves the protection by human rights in the first place. Since the Universal Declaration is not a treaty of public international law and has no legal force,³⁴ it is important to note that this provision was included with unchanged wording into Article 15(1)(c) of the CESCR, which is a binding legal instrument. Although most Articles of the CESCR have no direct effect,

²⁷ HUGENHOLTZ, 2001, *supra* note 20, at p. 352; MICHEL M. WALTER, Comment on *Wahlkampf* Judgment of the Supreme Court of Austria, *medien und recht*, 1/2002, at pp. 30 f.

²⁸ The Agreement on Trade Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs) was adopted in 1994 as part of the Uruguay Round Multilateral Trade Agreements and is an integral part of the Agreement establishing the World Trade Organisation.

²⁹ For a similar interpretation, see DREIER, 2001, *supra* note 14, at p. 303.

³⁰ CYRILL P. RIGAMONTI, 2001: *Geistiges Eigentum als Begriff und Theorie des Urheberrechts*, Baden-Baden 2001, at p. 82.

³¹ G.A. Res. 217A, U.N. Doc. A/810 (1948).

³² «The States Parties to the present Covenant recognize the right of everyone [...] to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author».

³³ The United Nations, International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force 03.01.1976.

³⁴ See IAN BROWNLIE, 1998: *Principles of Public International Law*, fifth edition, Oxford 1998, at pp. 574 f.

States are obliged, according to Article 2(1) CESCR, «to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures». Consequently, a group of experts, convened by the International Commission of Jurists, developed the so-called «Limburg Principles», where they take the view that those provisions of the CESCR, which cannot be made justiciable immediately, «can become justiciable over time».³⁵

On the European level, the European Commission of Human Rights explicitly acknowledges intellectual property rights in the realm of Article 1 of Protocol No. 1 to the European Convention of Human Rights.³⁶ Although constitutions of European Countries do not enshrine copyright explicitly,³⁷ it is broadly accepted in European legal doctrine that copyright enjoys a constitutional foundation.³⁸ Some legal orders, such as the German and the Swiss, distinguish between the economic and the moral elements of copyright: Whereas economic elements are protected by freedom of property (Article 14 of the German Grundgesetz³⁹ and Article 26 of the Swiss Constitution), the moral rights of the author fall under the constitutional provisions protecting human dignity or personality.⁴⁰

³⁵ See the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, U.N. Doc. E/CN.4/1987/17. See also ASBJØRN EIDE, 1995: Economic, Social and Cultural Rights as Human Rights, in EIDE/KRAUSE/ROSAS (eds.), Economic, Social and Cultural Rights, Dordrecht etc. 1995, pp. 21-40, at p. 39.

³⁶ Protocol I to the Convention for the Protection of Human Rights and Fundamental Freedoms of 20 March 1952. See e.g. *SmithKline and French Laboratories LTD v. the Netherlands*, Decisions and Reports, 66 (1990), at pp. 79 f.; MACCIACHINI, 2000, *supra* note 20, at p. 51; MARC E. VILLIGER, 1999: Handbuch der Europäischen Menschenrechtskonvention (EMRK), second edition, Zurich 1999, at paragraph 669 (with further references to case law of the Commission).

³⁷ By contrast, the U.S. Constitution grants copyright in Art. I, Section 8 U.S. in order to «securing for limited times to authors ... the exclusive right to their respective writings». See DREIER, 2001, *supra* note 14, at p. 299. The U.S. Supreme Court recognises copyright in the realm of Freedom of Speech, see *Harper & Row Publishers v. Nation Enterprises*, 471 U.S. 539 (1985), at 558.

³⁸ For Germany, see FECHNER, 1999, *supra* note 20, at pp. 186-191.

³⁹ See FECHNER, 1999, *supra* note 20, at pp. 192-255.

⁴⁰ See DREIER, 2001, *supra* note 14, at pp. 299 f. and FECHNER, 1999, *supra* note 20, at pp. 256-287.

Article 14 of the German Grundgesetz embeds the right to private property into a social responsibility («Sozialpflichtigkeit des Eigentums»). This limitation of property rights for the sake of the public interest also applies to copyright, as decided by the German Constitutional Court.⁴¹ Moreover, Article 14 GG is seen as the constitutional foundation of the collecting societies' social and cultural functions.⁴² Collecting societies are sometimes described as «self-help organisations» of artists, highlighting the principle of solidarity being their *raison d'être*.⁴³ This image derives partly from the fact that most collecting societies⁴⁴ reserve a percentage of their revenues⁴⁵ in order to subsidise some of their members.⁴⁶ The beneficiaries are usually

⁴¹ BVerfGE 31 (1971), at pp. 229 ff. (Kirchen- und Schulgebrauch) and BVerfGE 49 (1978), at pp. 382 ff. (Kirchenmusik). See HUGENHOLTZ, 2001, *supra* note 20, at p. 347; ERIC PAHUD, 2000: Die Sozialbindung des Urheberrechts, Bern 2000, *passim*; FECHNER, 1999, *supra* note 20, at pp. 240 f.; FELIX LEINEMANN, 1998: Die Sozialbindung des «Geistigen Eigentums». Zu den Grundlagen der Schranken des Urheberrechts zu Gunsten der Allgemeinheit, Baden-Baden 1998, at pp. 52-58.

⁴² See FERDINAND MELICHAR, 1996: Zur Sozialbindung des Urheberrechts, in ADRIAN/NORDEMANN/WANDTKE (eds.), Josef Kohler und der Schutz des geistigen Eigentums in Europa, Berlin 1996, pp. 101-111, at pp. 105-107; BECKER, 1994, *supra* note 12, at pp. 32 f. For a critical appraisal of this approach, see LEINEMANN, 1998, *ibid.*, at pp. 80-91 and FECHNER, 1999, *supra* note 20, at pp. 493-497.

⁴³ PAUL BRÜGGER, 1987: Kulturförderung und Verwertungsgesellschaften, in Schweizer Vereinigung für Urheberrecht (ed.), Festschrift zum 60. Geburtstag von Ulrich Uchtenhagen, Baden-Baden 1987, pp. 143 ff., in particular at pp. 145 and 147. On the spirit of solidarity reigning among collecting societies' members, see BECKER, 1994, *supra* note 12, at pp. 33 f.; MELICHAR, 1996, *supra* note 42, at pp. 106-108; FICSOR, 2002, *supra* note 11, at p. 20. For an account of the importance of collecting societies as promoters of creativity, cultural diversity and cultural identity, see European Commission, The Management of Copyright and Related Rights in the Internal Market, *supra* note 6, at paragraph 1.1.1.

⁴⁴ See MELICHAR, 1996, *supra* note 42, at p. 106.

⁴⁵ According to a well established rule of CISAC (Confédération Internationale des Sociétés d'Auteurs et Compositeurs), dating back to the years after the World War II, 10 percent of collecting societies' revenues may be reserved for social and cultural purposes. On the history of this rule, see MELICHAR, 1990: Der Abzug für soziale und kulturelle Zwecke durch Verwertungsgesellschaften im Lichte des internationalen Urheberrechts, in JÜRGEN BECKER (ed.), Die Verwertungsgesellschaften im Europäischen Binnenmarkt, Baden-Baden 1990, at pp. 47-61; BECKER, 1994, *supra* note 12, at pp. 33 f. For the implementation of the rule in Switzerland, see DENIS BARRELET/WILLI EGLOFF, Das neue Urheberrecht, second edition, Bern 2000, at paragraphs 6 and 7 on Art. 48(2) URG (Swiss Copyright Act).

⁴⁶ For an overview, see WIPO, 1990: Collective Administration of Copyright and Neighbouring Rights, Geneva 1990, at pp. 49 ff. On the question, whether such funds are in conformity with the national treatment obligation of the TRIPs Agreement, see

young artists/creators who have not yet had their career breakthrough (artistic funds), or artists/creators who - usually because of illness or accident - are not able to satisfy their needs (social funds).⁴⁷ Because of these functions the cultural and social funds of collecting societies have become crucial elements of cultural policy in many countries. These functions are particularly important in developing countries, «where frequently extra efforts are needed to strengthen creative capacity».⁴⁸ Their cultural relevance is also high in countries which are net importers of cultural content, because an efficient fulfilment of such functions «may contribute to the preservation of national cultural identity».⁴⁹

1.2. The Human Rights Basis of Access to Cultural Information

Article 19 of the UN Covenant on Civil and Political Rights (CCPR)⁵⁰ obliges Contracting States to protect freedom of expression and information. Paragraph 1 provides for a right to unlimited freedom of opinion which is interpreted as an absolute commitment of Contracting States to refrain from «brain washing», pharmaceutical manipulations of a person's consciousness or similar interventions. Freedom of expression as protected in paragraph 2 includes the freedom of everyone «to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice». Two consequences follow from this provision: First, the extent of protection of paragraph 2 is very broad, encompassing expressions of any kind regardless of their form, content or means of distribution.⁵¹ Second, freedom of expression of opinions and ideas is conceived as presupposing freedom to seek and receive information. Consequently, paragraph 2 is interpreted to include the

CHRISTOPH BEAT GRABER, 2003: Handel und Kultur im Audiovisionsrecht der WTO. Völkerrechtliche, ökonomische und kulturpolitische Grundlagen einer globalen Medienordnung, Bern 2003, at pp. 134 f. and 266-270.

⁴⁷ For a differentiated appraisal of the collecting societies' methods for financing their cultural and social commitments, see FICSOR, 2002, *supra* note 11, at pp. 149-154.

⁴⁸ FICSOR, 2002, *supra* note 11, at p. 21.

⁴⁹ FICSOR, 2002, *supra* note 11, at p. 22.

⁵⁰ The United Nations, International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force 23.03.1976.

⁵¹ MANFRED NOWAK, 1993: U.N. Covenant on Civil and Political Rights. CCPR Commentary, Kehl am Rhein etc. 1993, at paragraph 11 on Art. 19 CCPR.

right to get hold of any freely accessible information necessary for forming a person's opinion.⁵²

In contrast to the absolute right to freedom of opinion provided by paragraph 1, freedom of expression and information (as provided for in paragraph 2) is subject to the limitations listed further in paragraphs 2 and 3, which «are necessary for: respect of the rights or reputations of others [or] for the protection of national security or of public order (*ordre public*), or of public health or morals».

It should in the above context also be noted that the provisions of the CCPR have direct effect,⁵³ i.e., individuals may invoke them directly before national courts independently of the existence of statutory laws implementing these obligations.

As mentioned above, Article 15 CESCR provides for a human rights basis for the protection of author's rights. Moreover, Article 15 CESCR protects the right to take part in cultural life and to enjoy the benefits of scientific progress and its applications.⁵⁴ According to Article 4 CESCR rights can be subject to limitations which are determined by law and serve the purpose of promoting the general welfare in a democratic society. Since cultural expressions are often manifestations of cultural identity such information may provoke or offend third parties. The protection of the rights of others therefore seems principally to be a legitimate purpose of general welfare allowing the restriction of this freedom. The right to enjoy the benefits of scientific progress is not limited to natural or biological sciences, but also includes social sciences and the humanities.⁵⁵

Although the rights protected by Article 15 CESCR are more of a programmatic nature requiring implementation into national law, according to Article 2 CESCR and the Limburg Principles discussed above, Contracting States are obliged, within the limits of available resources, to achieve a

⁵² See SARAH JOSEPH/JENNY SCHULTZ/MELISSA CASTAN, 2000: *The International Covenant on Civil and Political Rights. Cases, Materials, and Commentary*, Oxford 2000, at pp. 387-389; ALBERTO ACHERMANN/MARTINA CARONI/WALTER KÄLIN, 1997: *Die Bedeutung des UNO-Paktes über bürgerliche und politische Rechte für das schweizerische Recht*, in KÄLIN/MALINVERNI/NOWAK (eds.), *Die Schweiz und die UNO-Menschenrechtspakte*, second edition, Basel etc. 1997, 155 ff., at p. 211.

⁵³ EIDE, 1995, *supra* note 35, at p. 22.

⁵⁴ ASBJØRN EIDE, 1995: *Cultural Rights as Individual Human Rights* in EIDE/KRAUSE/ROSAS (eds.), *Economic, Social and Cultural Rights*, Dordrecht etc. 1995, pp. 229-239, at p. 234.

⁵⁵ EIDE, 1995, *ibid.*, at p. 235.

progressively higher level of protection of this freedom. However, it is difficult to imagine any obligation of governments, regarding such access to information, which would not yet be covered by Article 19 CCPR.

On the European level, freedom of expression and information is protected by Article 10 of the European Convention of Human Rights (ECHR). Bearing in mind the binding nature of the Convention and the possibility to enforce judgments of the European Court of Human Rights, this provision is of particular importance as a common standard of protection in Europe regarding the free flow of information. Article 10 ECHR is framed in a way similar to Article 19 CCPR. It provides for a strong protection of the freedom «to hold opinions and to receive and impart information and ideas of all kind». Limitations of this freedom are only allowed on the condition, that they are prescribed by law, serve a legitimate aim and are necessary in a democratic society. Paragraph 2 provides a non-exhaustive list of legitimate aims including the interests of national security, territorial integrity or public safety, the prevention of disorder or crime, the protection of health or morals, the protection of the reputation or rights of others, preventing the disclosure of information received in confidence, maintaining the authority and impartiality of the judiciary. In addition, the last sentence of paragraph 1 authorises Contracting States to require the licensing of broadcasting, television or cinema enterprises.

1.3. *Interim Findings*

With an overall view to the human rights base of freedom of expression and information one may assert that both, Article 19 CCPR and Article 10 ECHR grant a right of the individual not only to express opinions but also to *seek* and *receive* information. The right to information is a prerequisite of the freedom of expression, since forming an individual's opinion presupposes the possession of the necessary information.

This *individual* aspect of freedom of expression and information is mirrored by the *institutional* aspect of the freedom.⁵⁶ Whereas the former stresses the

⁵⁶ GRABER, 2003, *supra* note 46, at p. 100. It is acknowledged in modern legal doctrine that human rights are not only individual defences against State interference, but enshrine a collective aspect (without thus becoming collective rights). See WALTER KÄLIN, 1994: Menschenrechtsverträge als Gewährleistung einer objektiven Ordnung, in *Berichte der Deutschen Gesellschaft für Völkerrecht*, Bd. 33, Aktuelle Probleme des Menschenrechtsschutzes, Heidelberg 1994, pp. 9 ff., at pp. 27 f., 35 and EIBE RIEDEL, 1994: Gruppenrechte und kollektive Aspekte individueller Menschenrechte, in *Berichte*

rights of individual persons, the latter puts its accent on the general interest to freely exchange opinions and information in the public *discourse* (as an institution).⁵⁷ The institutional aspect of the freedom of information takes precedence over the individual one, since it is the precondition for individual freedom and the functioning of a democratic society.⁵⁸ The European Court of Human Rights put this as follows:

«Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for the development of every man and woman».⁵⁹

Thus, freedom of expression and information not only protects individual rights but provides the basis for public discourse in order to foster free intellectual debate in a society. The institutional level of both Article 10 ECHR and Article 19 CCPR has been recognised in the jurisprudence of the European Court of Human Rights,⁶⁰ and in opinions of the Human Rights Committee.⁶¹

Because human rights are conceived as obligations of the State the question arises whether private undertakings which - by the use of DRMs - technically restrict access to information are subject to these provisions. The answer requires, in a first step, a distinction between information protected by copyright and unprotected information.

In the former situation it is a national copyright statute which allows the right holder to exclude unauthorised parties from access to content. Restrictions of

der Deutschen Gesellschaft für Völkerrecht, Bd. 33, Aktuelle Probleme des Menschenrechtsschutzes, Heidelberg 1994, pp. 49 ff., at pp. 74, 79.

⁵⁷ CHRISTOPH BEAT GRABER, 1996: Rundfunkaufsicht am Scheideweg zwischen «Silicon Valley» und «Durcheinandertal», in *medialex* 3/1996, pp. 135-142, at pp. 139 f.

⁵⁸ For an early discussion of the relationship between individual and institutional aspects of the freedom of expression and the importance of the freedom in democratic societies, see COHEN JEHOAM, 1983, *supra* note 20, at pp. 386-388.

⁵⁹ European Court of Human Rights, 25 March 1985, *Barthold v. Germany*, Series A no. 90, paragraph 58, with reference to European Court of Human Rights, 7 December 1976, *Handyside v. United Kingdom*, Series A no. 24, at paragraph 49.

⁶⁰ European Court of Human Rights, 24 November 1993, *Informationsverein Lentia v. Austria*, Series A no. 276, partially reprinted in *EuGRZ*, 1994, at p. 549.

⁶¹ See General Comment No. 10 Article 19 (Nineteenth Session, 1983), in *Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies*, 07/04/2000, HRI/GEN/1/Rev.4; Concluding Observations of the Human Rights Committee: *Lebanon*, 01/04/97, CCPR/C/79/Add.78., at paragraphs 24 ff.; Concluding Observations of the Human Rights Committee: *Italy*, 21/09/94, CCPR/C/79/Add.37; A/49/40, at paragraphs 4 f. See also GRABER, 2003, *supra* note 46, at pp. 104-107.

an individual's freedom of expression and information based on copyright serve a legitimate aim in the sense of Articles 19 CCPR and 10 ECHR, since they protect the «rights of others» (see below Section 3.1). Such restrictions are licit, provided that they respect the further conditions required by these provisions. It is important to recognise that it is the State as legislator who establishes and implements copyright statutes. From this perspective therefore, the limitation of access appears to be a consequence of State interference. Consequently, the question of the applicability of Articles 19 CCPR and 10 ECHR may be answered in the affirmative in regard to copyright protected information.⁶²

As far as unprotected information is concerned, the exclusion of third parties from access to information *prima facie* seems to result simply from the use of DRM technology without any involvement of copyright law or other State interference. However, recently amended copyright laws, such as the WIPO Internet Agreements or the EC Information Society Directive, require governments to provide adequate legal protection against circumvention of technological measures limiting access to information.⁶³ Consequently, amended copyright statutes will provide for the legal bases in order to protect technological measures allowing the exclusion of unauthorized users. Provided that such provisions will not exclude from coverage the circumvention of technological measures restricting access to unprotected information, it is possible, in my view, to identify a governmental interference also in this second situation.

2. The Conflict between Copyright and Freedom of Expression in European Case Law

⁶² On the human-rights-in-the-private-sphere-problem, see HUGENHOLTZ, 2001, *supra* note 20, at p. 345.

⁶³ See Art. 6(1) of Directive 2001/29/EC of the European Parliament and of the Council on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L 167/10, 22.06.2001; Articles 11 and 12 WIPO Copyright Treaty of 23 December 1996 and Articles 18 and 19 WIPO Performances and Phonograms Treaty of 23 December 1996. See comment on the respective provisions of the two WIPO treaties by FICSOR, 2002, *supra* note 11, at pp. 99 f.

2.1. Jurisprudence of the Strasbourg Institutions

Until the days of writing this text, no judgment concerning a conflict between the freedom of expression and information and copyright has been adopted by the European Court of Human Rights.⁶⁴ Although three judgments concern interferences with the freedom of expression and information of measures based on Section 78 of the Austrian Copyright Act (ACR), none of them fits the context of my research.⁶⁵ Section 78 ACR prohibits exhibiting or disseminating images of persons publicly.⁶⁶ Since this is an issue concerning the right of personality in general, there was no specific conflict between freedom of expression and copyright.

The European Commission of Human Rights has however adopted two interesting decisions of value to the present discussion.

The first, *De Geïllustreerde Pers N.V. v. The Netherlands*,⁶⁷ addressed the exclusive rights of the Dutch broadcasters in radio and television programme listings conferred by the national copyright act. Here, the question arose whether the refusal of the right holders to license copyright on this information to a publisher was in conflict with Article 10 ECHR. The Commission found that the broadcasters' copyright did not restrict freedom of

⁶⁴ European Court of Human Rights, 11 January 2000, *News Verlag GmbH & Co. KG v. Austria*, ECHR 2000-I, at paragraph 43; European Court of Human Rights, 26 February 2002, *Krone Verlag GmbH & Co. KG v. Austria*, Hudoc REF00003296 and European Court of Human Rights, Decision of inadmissibility of 25 May 2004, *Österreichischer Rundfunk v. Austria*, partly reproduced in *medialex* 2004, at pp. 168 f.

⁶⁵ In the first case the «News Verlag» complained that Court decisions based on Section 78 ACR prohibiting it from publishing the picture of a suspect in the context of reports on the criminal proceedings against him violated its right to freedom of expression, protected by Article 10 ECHR. Whereas in this case the Court decided for the «News Verlag», it declared inadmissible a similar complaint by the «Österreichische Rundfunk» in the third case because the national authorities did not impose a complete prohibition of publication but rather a conditional one. In the second case the «Kronen Zeitung» alleged that an injunction, based on Section 78 ACR, ordering it to refrain from publishing the picture of a politician, together with allegations about his sources of revenue, violated its right to freedom of expression, contrary to Article 10 ECHR.

⁶⁶ Section 78(1) Austrian Copyright Act reads as follows: «Images of persons shall neither be exhibited publicly, nor disseminated in any other way in which they are made accessible to the public, where the legitimate interests of the person in question or, in the event that they have died without having authorised or ordered publication, of a close relative would be injured».

⁶⁷ European Commission of Human Rights, *De Geïllustreerde Pers N.V. v. The Netherlands*, Report of the Commission of 6 July 1976, in *Decisions and Reports* No. 8 (1976), at pp. 5 ff.

expression and information and concluded that there was no interference with any of the rights protected by Article 10 ECHR.⁶⁸

In contradiction to standing jurisprudence of the European Court of Human Rights,⁶⁹ the Commission considered that the freedom under Article 10 ECHR to impart information

«is only granted to the person or body who produces, provides or organises it. In other words the freedom to impart such information is limited to information produced, provided or organised by the person claiming that freedom, being the author, the originator or otherwise the intellectual owner of the information concerned».⁷⁰

Due to this erroneous assessment of the scope of the freedom of information, the Commission came to the wrong conclusion that there was no interference with Article 10 ECHR since the applicant company was not itself the producer, provider or organiser of the information. In the view of the Commission, the question did not arise in this case whether the public was deprived of any specific information, because «every person in the Netherlands was able to inform himself about the forthcoming radio and television programmes through a variety of mass media representing various sections and tendencies of society».⁷¹

The second case, *France 2 v. France*,⁷² dealt with a television programme of France 2 (Antenne 2) on the reopening of the *Théâtre des Champs-Élysées* in Paris. In the course of the broadcast the camera focused on frescos of the French painter Edouard Vuillard for a total duration of 45 seconds. The holders of the painter's copyrights, acting through SPADEM, the French collecting society for the visual arts, successfully claimed for compensation before French courts. The *Tribunal de Grande Instance de Paris* rejected the claim, stating that the French copyright act recognised a right of short quotation which applied in the case at issue. The *Cour d'Appel* however

⁶⁸ European Commission of Human Rights, *De Geïllustreerde Pers N.V. v. The Netherlands*, *ibid.*, at paragraph 89. For a criticism of this decision see HUGENHOLTZ, 2001, *supra* note 20, at pp. 358 f. with further references to other critics; and MACCIACHINI, 2000, *supra* note 20, at p. 60.

⁶⁹ See e.g. European Court of Human Rights, 25 August 1998, *Jersild v. Denmark*, *Series A* nr. 298. See also VILLIGER, 1999, *supra* note 36, at paragraph 610.

⁷⁰ European Commission of Human Rights, *De Geïllustreerde Pers N.V. v. The Netherlands*, *supra* note 67, at paragraph 84.

⁷¹ *Ibid.*, at paragraph 86.

⁷² European Commission of Human Rights, *France 2 v. France*, App. No. 30262/96 (1997), Report of the Commission of 15 January 1997, Hudoc REF00004351.

reversed this decision and concluded that *France 2* could not successfully invoke the right for quotation, since pictures of the frescos were communicated to the public in their integrity. The *Cour de Cassation* confirmed this decision stating that the complete representation of a protected work was not covered by the right to make short quotations.

France 2 argued before the Strasbourg authorities that the decision of the *Cour de Cassation* neglected the right to briefly quote from copyright protected works and therefore violated freedom of expression as protected in Article 10 ECHR. The Commission held that the application of *France 2* was inadmissible since there was obviously no violation of Article 10 ECHR. The Commission first considered that the condemnation of *France 2* to compensate the right holders amounted to an «interference». It then stressed that this restriction on freedom of expression and information was «prescribed by law» and served «a legitimate aim» since it protected the «rights of others» in the sense of Article 10(2) ECHR. Rather surprisingly, as Hugenholtz has pointed out,⁷³ the Commission added, that it is normally not the task of the organs of the Convention to decide about conflicts between the freedom to impart information and the rights of the authors of the communicated information.

«[La Commission] rappelle également qu'il n'appartient normalement pas aux organes de la Convention de régler, au regard du paragraphe 2 de l'article 10 (Art. 10-2), les conflits susceptibles d'apparaître entre, d'une part, le droit de communiquer librement des informations et, d'autre part, le droit des auteurs dont les oeuvres sont communiquées».⁷⁴

This statement appears to be an *obiter dictum* since the Commission concluded that the copyright based condemnation of *France 2* was a restriction on freedom of expression and information which was «necessary in a democratic society».⁷⁵

⁷³ See HUGENHOLTZ, 2001, *supra* note 20, at pp. 359 f.

⁷⁴ European Commission of Human Rights, *France 2 v. France*, *supra* note 72.

⁷⁵ In the case *Aral v. Turkey*, the Commission found a complaint regarding an alleged violation of Art. 10 ECHR to be inadmissible. The complaint was brought before the Commission by two authors of cartoon stories who were prohibited to reuse their work as a consequence of the cession of the relevant copyrights to a publisher of a periodical. The Commission held that under such conditions any possible interference into the freedom of expression of the authors was legitimised by the exception in favour of the «rights of others» (Art. 10[2] ECHR). See European Commission of Human Rights, 14 January 1998, *Aral v. Turkey*, App. No. 24563/94 (1998), as referred to in MACCIACHINI, 2000, *supra* note 20, at p. 61, footnote 148.

2.2. Recent Developments in Selected National Jurisdictions

2.2.1. Germany

According to leading German doctrine and the case law of the *Bundesgerichtshof* (the German Federal Supreme Court), limitations of copyright protection must be interpreted narrowly.⁷⁶ In the *Lili Marleen I* judgment in 1985 the Bundesgerichtshof (BGH) held that freedom of expression and information, as protected by Article 5 of the German Grundgesetz (GG), did not provide a separate defence against copyright.⁷⁷ In the present case a weekly newspaper reported about a film project dedicated to the famous song «Lili Marleen». According to the BGH, the unauthorised reproduction of the entire text of the song in the report was a violation of the owner's copyright which could not be legitimised under freedom of press as protected by Article 5 GG. The Court recalled that the copyright limitations of the German Copyright Act must be seen as the result of a comprehensive legislative balancing, having already considered diverging constitutional interests of the press and the protection of copyrights.⁷⁸ The BGH dismissed the argument of the newspaper that the extraordinary historical importance of the song would legitimise the reproduction of its full text. However, the Court generally recognised that in exceptional cases further limitations may be considered because of unusually important information needs. This narrow interpretation was recently confirmed in the *CB-infobank I* judgment of the BGH.⁷⁹ The Court held therein that unauthorised reproduction of newspaper articles in a commercial research database cannot be allowed by information interests of the general public, since the copyright limitation provided for private copying (Article 53 German Copyright Act) must be interpreted

⁷⁶ SCHRICKER, 1999, *supra* note 21, at paragraph 8. See judgment of the Bundesgerichtshof of 16 January 1997 *CB-infobank I*, in GRUR 1997, pp. 459 ff., at p. 463. See however, most notably, the judgment of the German Constitutional Court (Bundesverfassungsgericht) of 29 June 2000 *Brecht gegen Heiner Müller*, 1 BvR 825/98, in *Gewerblicher Rechtsschutz und Urheberrecht* 2001, at pp. 149-152 (a judgment concerning the relationship between freedom of art and copyright and requiring a broad interpretation of the copyright limitation for quotations where artistic expression is concerned).

⁷⁷ Bundesgerichtshof (German Federal Supreme Court), 7 March 1985 *Lili Marleen I*, in GRUR 1987, at p. 34. See HUGENHOLTZ, 2001, *supra* note 20, at p. 355.

⁷⁸ Bundesgerichtshof, *Lili Marleen I*, *ibid.*, at p. 35.

⁷⁹ Bundesgerichtshof, *CB-infobank I*, 16 January 1997, in GRUR 1997, at pp. 459 ff.

narrowly.⁸⁰ According to the BGH, this limitation already considers that right holders are bound, in the exercise of their immaterial intellectual property, by the social responsibility clause (Sozialpflichtigkeit des Eigentums) as provided in Article 14 GG.

As Hugenholtz highlighted in a recent study, there are, however, a number of regional Court decisions in Germany, where copyright limitations were opened up on the basis of an interpretation taking into account freedom of expression and information.⁸¹ The first was the *Maifeiern* judgment, passed by the *Landgericht Berlin* (District Court) in 1960.⁸² The case was about a rebroadcast of images stemming from an East German news programme on a West German television channel.⁸³ In an *obiter dictum* the Landgericht held that even if the rebroadcast was not authorised by statutory exceptions for quotation it was allowed on the grounds of Article 5 GG.⁸⁴

Another example mentioned by Hugenholtz is the *Springer Press* judgment, pronounced by the *Kammergericht Berlin* (Court of Appeal) in 1968.⁸⁵ In that case, a Berlin periodical had reprinted caricatures of left-wing students which were first published in journals belonging to the Springer press without authorisation. With the reproduction of the cartoons the article wanted to critically document how the Springer Press stereotyped students involved in the 1968 unrests. The Court decided in favour of the periodical even though the German Copyright Act did not allow quoting protected works in their integrity in the press. The Court interpreted the pertinent provisions of the German Copyright Act in the light of Article 5 GG. According to the Kammergericht an integral reproduction of caricatures must be allowed under special circumstances, such as political debates, where the possibility to quote the political adversary is necessary.⁸⁶

In the *Terroristenbild* decision of 1977, the District Court of Berlin had to decide whether the unauthorised broadcast of four photographs of members of

⁸⁰ *Ibid.*, at p. 463.

⁸¹ HUGENHOLTZ, 2001, *supra* note 20, at p. 355.

⁸² Landgericht Berlin, *Maifeiern*, 12 December 1960, in GRUR 1962, at pp. 207 ff. See also WILD, 1999, *supra* note 21, at paragraph 24.

⁸³ SCHRICKER, 1999, *supra* note 21, at paragraph 8.

⁸⁴ Landgericht Berlin, *Maifeiern*, *supra* note 82, at p. 210. See also HUGENHOLTZ, 2001, *supra* note 20, at p. 355.

⁸⁵ Kammergericht Berlin, *Springer Press*, 26 November 1968, in UFITA 1969, at pp. 296 ff. See WILD, 1999, *supra* note 21, paragraph 24 and LÖFFLER, 1980, *supra* note 20, at pp. 204 f.

⁸⁶ Kammergericht Berlin, *Springer Press*, *ibid.*, at p. 300.

the *Bader Meinhof Gang* violated the copyright of the photographer.⁸⁷ The four pictures were originally published in the weekly journal «Der Spiegel». This newspaper was criticised in the broadcast as having played the role of a platform for the Bader Meinhof Gang. The Court found that the reproduction of the photographs as close-ups in the broadcast was no violation of the photographers' copyright since it was necessary for the broadcaster to defend its thesis about the role of «Der Spiegel». The Court said that a narrow interpretation of the provisions allowing quotation of the Copyright Act would be in violation of freedom of expression and information (Article 5 GG). Recalling the above mentioned judgment *Springer Press* rendered by the Kammergericht Berlin in 1968, the District Court Berlin stressed that it is one of the central aims of Article 5 GG to assure, especially in a political debate, that opinions of political adversaries can be quoted.

In the *Monitor* judgment in 1983 the Landgericht München decided⁸⁸ that a full reproduction of a photograph can be justified under Article 5 GG where it is used to cast a critical look at child-directed advertisements of pharmaceuticals.⁸⁹

Finally, in the *Berufungsschrift* decision of 1999, the *Oberlandesgericht Hamburg* (Court of Appeal) held that copyright - as far as its constitutional aspects are concerned - has to be balanced with other constitutional freedoms.⁹⁰ Freedom of expression and information - as protected in Article 5 GG - prevails over copyright if a balancing of interests leads to the conclusion that legitimate interests of the copyright owner are not endangered, and that supreme interests of the general public require a publication of protected information. In the case at issue, an attorney who had defended a dissident of the German Democratic Republic (GDR) in a proceeding before a court of the GDR, invoked copyright in order to prevent the publication of his copyright protected petition for appeal in a book about the role of the dissident in the legal regime of the GDR. The *Oberlandesgericht* ruled in benefit of the publisher arguing that public interests prevailed over the interests of the copyright owner, since the book dealt with an important part of the history of

⁸⁷ Landgericht Berlin, *Terroristenbild*, 26 May 1977, in GRUR 1978, at p. 108. See WILD, 1999, *supra* note 21, at paragraph 24 and LÖFFLER, 1980, *supra* note 20, at p. 205.

⁸⁸ Landgericht München, *Monitor*, 21 October 1983, in Archiv für Presserecht 1984, at pp. 118 ff. See also WILD, 1999, *supra* note 21, at paragraph 24.

⁸⁹ Landgericht München, *Monitor*, *ibid.*, at p. 119.

⁹⁰ Oberlandesgericht Hamburg, *Berufungsschrift*, 29 July 1999, in GRUR 2000, at pp. 146 f.

the GDR and the general public had a legitimate interest to have access to all details of the proceedings against the well-known dissident.⁹¹

In view of the above, one may conclude that most cases, where German courts derogated from narrow catalogues of copyright exceptions in the light of freedom of expression and information, «political speech» was treated in the sense of information which is of importance for the general public. This is true for the judgments *Maifeiern*, *Springer Press*, *Terroristenbild*, *Monitor*, and *Berufungsschrift*. In the case *Lili Marleen I*, the BGH held that the reproduction of an entire text may only be allowed in exceptional cases, where unusually important information is concerned. Although the BGH did not specify the notion of «important information», it is likely that it meant information of political relevance and thus implicitly presupposed a hierarchy between political and commercial speech. This hierarchy was confirmed in the *CB-infobank I* judgment, where the BGH did not allow the reproduction of newspaper articles because of the commercial nature of the database.

2.2.2. *France*

In France, where courts have been extremely hesitant to perceive copyright and copyright exceptions in the light of freedom of expression and information, the *Utrillo* case, a decision of 23 February 1999 of the *Tribunal de Grande Instance* (TGI) de Paris, has called for a lot of attention.⁹² In the latter, the TGI decided that a prohibition to report on paintings, with a larger range than allowed by the narrow quotation right provided by the French Copyright Act, violates freedom of expression and information in the sense of Article 10 ECHR. France 2 (Antenne 2), a French public service broadcaster, reported for a little over 2 minutes on an exhibition dedicated to the oeuvre of Maurice Utrillo, the famous French painter. The broadcast, after starting with images of the city of Lodève and its newly restored museum Fleury, continued with a short interview with the curator of the exhibition who commented on

⁹¹ *Ibid.*, at p. 147.

⁹² Tribunal de Grande Instance de Paris, *Utrillo*, 23 February 1999, in *Revue internationale du droit d'auteur*, nr. 184 (2000), at pp. 374 ff. with comment by ANDRÉ KÉRÉVER; also reproduced in *GRUR Int.* 3/2001, at pp. 252 ff. with comment by CHRISTOPHE GEIGER. For further comments, see JACQUES DE WERRA, 2001: Liberté de l'art et droit d'auteur, in *medialex* 3/2001, pp. 143-149, at p. 148, footnote 63 and HUGENHOLTZ, 2001, *supra* note 20, at pp. 357 f. This ruling was reversed by a decision by the Cour d'appel de Paris on 30 May 2001 which was subsequently confirmed by the Cour de Cassation on 13 November 2003. See http://lexinter.net/JPTXT2/reportage_sur_une_exposition_de_peintures.htm (10.12.2004).

the work of Utrillo. During that interview 12 paintings were briefly shown to the audience. France 2 claimed that this reproduction of Utrillo's paintings was covered by the exception provided by Article L.122.5 of the French Copyright Act, allowing short quotations. The Tribunal found that the narrow interpretation of this provision, which had governed legal doctrine in France so far,⁹³ was in violation of Article 10 ECHR. It is of particular interest to note that in this case the TGI applied Article 10 ECHR *directly*, recognising a right of the public to receive information and asserting that this right shall be conceived not only as a right to know but also as a right to see.

«Attendu que le droit du public à l'information doit être compris non seulement comme le droit de savoir mais aussi comme le droit de voir; qu'il en résulte qu'un fait dont le public doit être informé peut ainsi être traduit par des images qui sont nécessaires dans la mesure où elles fournissent un élément de connaissance».⁹⁴

The above interpretation conceives freedom of information as an institutional right, i.e. a right which is not limited to individual interests but includes interests of the general public as well.⁹⁵ In the view of the TGI the integral reproduction of the 12 paintings was necessary for the public, in order to get a better understanding of the exhibition. Accordingly, a requirement to receive prior authorisation by the artist would deprive parts of the public from obtaining knowledge of the existence of the event.⁹⁶

André Kéréver criticised this decision, arguing that it was wrong for the court to interpret the French Copyright Act in the light of freedom of expression and information in the sense of Article 10 ECHR.⁹⁷ According to his view there was no «interference by public authority» as required by Article 10 ECHR since it was the right holder who brought the case before the TGI. Moreover, Kéréver contests the Tribunal's assertion that requiring prior authorisation by the right holder would exclude parts of the public from the information. He stresses that the right holder is invoking his right in order to be remunerated for the reproduction.

⁹³ For this jurisprudence, see Cour de Cassation, *A2 c. SPADEM*, 4 July 1995, in *Revue internationale de droit d'auteur*, nr. 167 (1996), at pp. 263 ff. The latter judgment gave reason to the complaint before the European Commission of Human Rights which I discussed above in Section 3.1.2.

⁹⁴ Tribunal de Grande Instance de Paris, *Utrillo*, *supra* note 92, at p. 377.

⁹⁵ See above Section 2.2.

⁹⁶ Tribunal de Grande Instance de Paris, *Utrillo*, *supra* note 92, at p. 378.

⁹⁷ ANDRÉ KEREVER *Revue internationale du droit d'auteur*, nr. 184 (2000), at p. 385.

Kéréver's criticism is, at least partly, not justified. The required «interference of public authority» may be found in the fact that the requested prohibition of the broadcast was motivated on the grounds of the French Copyright Act, i.e. amounted to a governmental measure. In my view, the TGI did well to open up the narrow scope of the right for quotation, since the institutional aspects of freedom of information require that the general public has access to TV images if these are necessary for achieving knowledge of an important cultural event. The judgment, however, raises questions of proportionality, insofar as it does not consider whether France 2 would have been allowed, by the right holder, to reproduce the paintings in its broadcast if it had offered reasonable remuneration. Since broadcasting operates under the pressure of actuality, the danger exists that the requirement of the right holder's prior consent would delay the transmission unduly. However, if there is another viable solution to receive the required information in time rather than ignoring copyright completely, I take the view that freedom of expression and information should not prevail over copyright. I think that judges should be careful not to reduce the exclusive copyright to a mere claim for compensation, where this is avoidable.

Summarising the above outlined jurisprudence, one may note that French courts appear to be more hesitant than German ones to open up copyright exceptions in the light of free speech. The *Utrillo* decision of the TGI de Paris is the only judgment so far following such an approach. The TGI considered that cultural events can be of supreme importance for the general public. Thus, the public should not be deprived of TV images necessary to provide adequate information about the exhibition of an important painter. Since the judgment was ultimately reversed by the higher judicial authorities, it is of limited practical effect but nevertheless noteworthy since it paid special attention to the *institutional* aspects of freedom of information.

2.2.3. *Austria*

The development of the jurisprudence in Austria is particularly interesting. A series of judgments passed recently by the Supreme Court of Austria (*Österreichischer Oberster Gerichtshof*, OGH), changed the relationship between copyright and freedom of expression and information in Austrian Law in an almost revolutionary way.⁹⁸ Before this change, a judgment of the OGH of 1996 had held that freedom of expression did not legitimise

⁹⁸ For a concise overview, see WALTER DILLENZ, 2003: Österreich: Revolutionärer Wertungswandel im Urheberrecht, in *medialex* 3/2003, pp. 145 f.

interference into copyright protected rights in a way exceeding the free use exemptions defined in the Austrian Copyright Act itself.⁹⁹

The first step in the process of an eventually radical change was made in the judgment *Schüssels Dornen-Krone*, found by the OGH on 3 October 2000.¹⁰⁰ Under the title «Schüssels Dornen-Krone» the weekly newspaper «Falter-Stadtzeitung Wien» reported on a campaign of the «Neue Kronen Zeitung» aimed at hindering a coalition between two of the main Austrian political parties. The report included spread out facsimile reproductions of 5 original cover pages of different editions of the «Neue Kronen Zeitung», published between December 1999 and January 2000. The OGH first held that this reproduction was not covered by the narrow exception for reporting on events of topical interest, permitted by the Austrian Copyright Act.¹⁰¹ The latter exception allows exclusively reports on actual events and does not include reporting on newspaper articles. According to the OGH this exception must be distinguished from the exception for the use of copyright protected works in quotations. The quotation of pictures presupposes the reproduction of the whole picture requiring a broad free use exception. The OGH recalled that the Austrian Copyright Act allowed such broad free use exceptions for the quotation of pictures only for scientific publications.¹⁰² The Court considered the lack of an exception allowing the quotation of entire pictures to be a lacuna, which should be filled in the way of a broad interpretation of free use exceptions in the light of freedom of expression and information.¹⁰³ The OGH first generally acknowledged a constitutional tension between the protection of copyright (constitutionally granted as an aspect of freedom of property) and freedom of expression and information. The Court then interpreted the free use provisions of the Austrian Copyright Act as a human rights induced response to this tension. The conclusion was that a narrow interpretation of the right to quote pictures would be in violation of freedom of expression (and information), since the reproduction of a picture can be as necessary in an intellectual debate as the reproduction of parts of a text. According to the

⁹⁹ Austrian Supreme Court, 17 December 1997, *Head-Kaufvertrag*, in *medien und recht* 2/1997, pp. 93 ff., at p. 95. The ruling prohibited a newspaper to reprint a copyright protected contract for the sale of an important Austrian company in an article critical of the sale.

¹⁰⁰ Austrian Supreme Court, 4 October 2000, *Schüssels Dornen-Krone*, in *medien und recht* 6/2000, pp. 373 ff., with comment by MICHEL M. WALTER.

¹⁰¹ *Ibid.*, at p. 375.

¹⁰² *Ibid.*, at p. 376.

¹⁰³ *Ibid.*, at p. 376.

OGH, it was necessary for the «Falter»-newspaper to *integrally* reproduce the cover pages of the «Neue Kronen Zeitung» in order to allow readers to form their own opinion of the issue.¹⁰⁴ With this argument the Court implicitly stressed the importance of the institutional aspects of freedom of expression and information. The Court also considered that the economic damage caused by the quotation was small since the commercial value of the cover pages including the photographs was not hollowed out by their reproduction.

The next important element, leading to a new trade-off between copyright and free speech, was the judgment *Medienprofessor*, passed by the OGH on 12 June 2001.¹⁰⁵ The «Neue Kronen Zeitung» was again involved in that case, having presented a university professor in 16 articles as a commercially and scientifically incapable and possibly corrupt «Medienprofessor». The professor responded by scanning the articles including a portrait and putting them on his home page in order to document the campaign of the «Neue Kronen Zeitung». The OGH concluded that freedom of expression and information invoked by the professor clearly prevailed over the copyright based interests of the «Neue Kronen Zeitung».

In this judgment the OGH first recalled its two former judgments concerning conflicts of copyright and free speech and extensively reviewed the latest German and Austrian legal literature dealing with that topic. On the grounds of this analysis the OGH generally held that copyright can be opposed by freedom of expression and information as protected by Article 10 ECHR.¹⁰⁶

The OGH then found that the articles in question were protected by copyright and that their inclusion into the home page of the professor was in conflict with the reproduction right and the distribution right of the «Neue Kronen Zeitung». However, an absolute protection of these rights would have had the consequence of rendering impossible any public debate on the professor's claim to be the victim of the campaign by the «Neue Kronen Zeitung». In this context, the Court concluded that a full reproduction of the articles was necessary for the professor in order to defend his claim in the public discourse¹⁰⁷ and that the interest of the professor to take part in a public debate clearly prevailed over the purely economic interests of the newspaper.

¹⁰⁴ *Ibid.*, at p. 377.

¹⁰⁵ Austrian Supreme Court, 12 June 2001, *Medienprofessor*, in *medien und recht* 5/2001, at pp. 304 ff., with comments by ERNST SWOBODA and MICHEL M. WALTER.

¹⁰⁶ Austrian Supreme Court, *Medienprofessor*, *ibid.*, at p. 306.

¹⁰⁷ *Ibid.*, at p. 307.

The third judgment, *Wahlkampf*, regarding the question whether freedom of expression and information may expand the catalogue of free use exceptions in the Austrian Copyright Act was adopted by the OGH only a few months later, on 12 September 2001.¹⁰⁸ The OGH responded to the question positively referring to its two latest judgments in the matter, which were treated as if corresponding to a well-established jurisprudence.¹⁰⁹ The Court allowed the use of the photograph of a politician (found on her home page) as persiflage in e-mails distributed by the political adversary for the sake of a criticism campaign in the course of elections for the regional parliament of Vienna.

The fourth judgment on the issue was passed by the OGH on 29 May 2002.¹¹⁰ In the *Gedicht* (Poem) case, the OGH held that the unauthorised reproduction of a poem by Christina Busta, in the preface of a photography book (Bildband), was not justified in the light of its previous jurisprudence. In this case, the OGH stressed that the reproduction harmed commercial interests of the right holder, since reproductions of texts usually are only allowed on the condition of remuneration. The OGH found, that the present case did not justify a derogation of the copyright of the author of the poem since the applicant could not show that the free reproduction of the poem was the only way to exert his freedom of expression and information. If the permission of the author can be received against a reasonable remuneration, reference to freedom of expression is excluded from the outset. The judgment can, therefore, be interpreted as an *interim* halt in relation to the progressive recognition of free speech interests observable in the previous three judgments in the sense that it emphasises certain limits which have to be respected when expanding the statutory catalogue of free use exceptions.

The latest judgment concerning the conflict between copyright and freedom of expression and information so far, was adopted by the OGH in the *Passbild* (passport photograph) case on 24 June 2003.¹¹¹ As in the *Gedicht* case, the judgment confirmed that freedom of expression and information could only then prevail over copyright when this freedom cannot be exerted without interference into statutory copyrights. The «Neue Kronen Zeitung» had reproduced a passport photograph of a child who was the victim of a homicide without the permission of the author of the original photograph. For the Court

¹⁰⁸ Austrian Supreme Court, 12 September 2001, *Wahlkampf*, in *medien und recht* 1/2002, at pp. 30 f., with comment by MICHEL M. WALTER.

¹⁰⁹ See comment by WALTER, *ibid.*

¹¹⁰ Austrian Supreme Court, 9 April 2002, *Gedicht*, in *medien und recht* 6/2002, pp. 387 f.

¹¹¹ Austrian Supreme Court, 24 June 2003, *Passbild*, in *medien und recht* 5/2003, pp. 317 ff., with comment by MICHEL M. WALTER.

there was no necessity to reproduce the pass photo without prior permission and accordingly a violation of the photographer's copyright was found.

To summarise this novel jurisprudence, the Supreme Court of Austria confirmed on various occasions the Court's willingness to interpret the free use exceptions of the Austrian Copyright Act in the light of a constitutional balancing of copyright and freedom of expression and information. This new case law constitutes a paradigm shift in Austrian Copyright insofar as it moves away from the traditional doctrine which requested a narrow interpretation of the statutory catalogue of free use exceptions and towards the Anglo-Saxon free use doctrine.¹¹² Whereas the interest defended by copyright is considered to be mainly an economic one, freedom of expression and information protects the interests of persons wanting to intervene actively in a public discourse. In this inherent hierarchy between economic and political interests the latter prevail in cases where such participation would not have been possible without a violation of a right holder's exclusive rights. Although I agree with this hierarchy I nevertheless think that judges should be careful not to neglect the moral and thus non-economic component of copyright.

The integral reproduction of a picture was allowed in the case *Schüssels Dornen-Krone*, notwithstanding the fact that statutory law does not provide for such a far reaching exception, because it was deemed necessary to give the audience of a newspaper adequate information of a debate of high public interest. The *Media Professor* was permitted to put a number of newspaper articles in full length onto his homepage because this was necessary for the public to form its opinion on the professor's claim that he had been the victim of a campaign against him.

The arguments put forward in favour of public debate in these two cases demonstrate the weight the Court attributes to the institutional aspects of freedom of expression and information.¹¹³ More restrictively, the Court held in the *Passbild* judgment that a violation of the copyright of a person can be deemed necessary exclusively in cases where the reproduction of a work serves to criticise its author directly. This is an additive which is questionable in my view, since it leads away from the freedom to participate in a public discourse which was highlighted as a rationale for a strong protection of free speech interests.

¹¹² See MICHEL M. WALTER's comment, in *medien und recht* 1/2002, at pp. 30 f. See also DILLENZ, 2003, *supra* note 98, at p. 146.

¹¹³ See above Section 2.2.

On the other hand, a second limitation, which the OGH stressed in the *Gedicht* judgment and again in the *Passbild* judgment makes sense: there the Court made it clear that freedom of expression and information cannot prevail if the right holder permits the reproduction of the protected work on the condition of a reasonable remuneration. Dogmatically, the economic interests of the right holders were brought into consideration where the OGH tested the proportionality of the copyright violation. In the *Wahlkampf* case it examined whether the normal use of the work would be impaired because the commercial value of the work is being exhausted. The limit was reached in the *Gedicht* judgment where the OGH concluded that the economic interests of the editor of the poem were harmed by its reproduction.

3. Consequences for the Tension between Copyright and Freedom of Expression in the Digital Environment

The case law analysed in Section 3 shows a tendency in several national jurisdictions to open up narrow catalogues of copyright exceptions in the light of freedom of expression and information in order to constitutionally readjust the distinction between right and exception provided by copyright statutes. With a view to the division of power among institutions of the State, this readjustment means a shift in competence from the legislature to the judiciary. As Thomas Dreier stresses, such shifts may themselves be considered unconstitutional. According to Dreier «[b]alancing proprietary against public and other interests is a concern that should mainly be addressed by intellectual property legislation, by defining an adequate scope of protection including appropriate exceptions to the exclusive rights granted». ¹¹⁴ Thus, courts interfere with competences of the legislature when they override copyright statutes advocating the necessity of bringing them into conformity with constitutional or human rights.

It is true that copyright statutes were designed by legislature taking into account the constitutional setting.¹¹⁵ However, as society changes, situations

¹¹⁴ DREIER, 2001, *supra* note 14, at p. 316.

¹¹⁵ DREIER, 2001, *supra* note 14, at p. 310. Concerning the German copyright statute LÖFFLER, 1980, *supra* note 20, at p. 202, however rightly remarked, that interests of the general public were insufficiently represented in the legislative process, whereas interests of authors, interpreters, producers, publishers, electronic media, schools, churches, etc. found their way into the statute. The reason for that is, he explains, that the former groups were all supported by strong lobbies, whereas nobody defended the information access interests of the general public.

may occur where a conservative interpretation of a statute tied to the traditional meaning of its provisions would lead to unjust results. It is an established doctrine of constitutional law that historical interpretation of statutory law shall be complemented with systematic and teleological methods of interpretation. Thus, in a situation where a technology induced evolution of society alters the social effects of a statutory provision, the teleological method of interpretation is likely to become predominant. The judge requested to decide on a case brought before him will then have to find an interpretation which corresponds to the *telos* of the provision. In the absence of legislative action amending the statute to the new situation, the judge has to interpret the purpose of that provision in the light of the basic guarantees of the constitutional order.

The courts should, however, limit decisions which override statutory law only to cases where every other solution would not appear to be just. In such cases human rights can serve as parameters for structuring a re-balancing of interests involved in the light of constitutional vectors. In general, it should be the legislature which discusses and adopts legal rules. For the sake of legal certainty, rules should be agreed on before conflicts actually arise. Free speech should prevail, however, when certain effects of a copyright statute, which incurred through technological innovation unimagined by the historic legislature, prevent the general public or particular individual users from having access to certain information. As it has been stressed in Section 2.2 above, freedom of expression and information includes *inter alia* the right to seek information.¹¹⁶ Thus, in the digital environment of the Internet the right to seek information encompasses a right of the Individual to browse through important information.

What is *important information*? Interpreted in the framework of freedom of speech, I suggest considering as important such information which is indispensable for the individual's freedom to form his or her own opinion on events of political, social or cultural relevance. This assertion is confirmed by the case law of German, French and Austrian courts analysed in Section 3.2. The latter jurisprudence reveals furthermore that those courts tacitly presuppose a hierarchy between non economic and economic speech. It is important to note that this hierarchy is backed by the European Court of Human Rights, since the latter values political information as more important

¹¹⁶ On the right to seek information in a convergence environment, see MILTON MUELLER, 2004: Convergence: a Reality Check, in GERADIN/LUFF (eds.), *The WTO and Global Convergence in Telecommunications and Audio-Visual Services*, Cambridge 2004, pp. 311-322, at p. 322.

than commercial one.¹¹⁷ In its case law concerning Article 10 ECHR the Court defines the margin of appreciation of national governments narrowly where non-commercial speech is involved,¹¹⁸ whereas in cases of commercial speech the margin is wider.¹¹⁹ Thus, under Article 10 ECHR, political speech enjoys stronger protection than commercial speech.¹²⁰

However, judges balancing a conflict between political speech and copyright shall give the necessary weight to the moral aspect of the right of authors, which is of a non-economic nature. Furthermore, judges shall assure that the principle of proportionality is respected. As was demonstrated particularly in the judgments *Medienprofessor* and *Passbild* of the Austrian Supreme Court, a decision to override copyright should only be taken where the required information cannot be accessed through alternative and less intrusive means. If the copyright owner allows timely access to information on the condition of fair compensation, no action in favour of free speech is necessitated.

In cases where access to information is hindered by means of copyright legislation as such, a human rights induced overriding of narrow catalogues of exceptions from exclusive rights may be sufficient to assure the functioning of freedom of expression and information. This has been examined by national courts particularly in the cases discussed in Section 3.2.

The situation is, however, quite different where access to important information is blocked by technical rather than legal means. This is precisely the case of DRM systems since their use is not limited to content protected by copyright. An example in point is the right of quotation and criticism which is a basic prerequisite of any journalist's or scientist's work.¹²¹ This right should also be effectively protected under the conditions of DRM and access to the relevant information should not be prevented by technical measures. But

¹¹⁷ For a defence of a hierarchy between non-commercial and commercial information from the perspective of political economy, see BENKLER, 2001, *supra* note 18, at pp. 288-290.

¹¹⁸ European Court of Human Rights, 25 August 1998, *Hertel v. Switzerland*, ECHR 1998-VI, at pp. 2325 ff.

¹¹⁹ European Court of Human Rights, 20 November 1989, *markt intern Verlag GmbH and Klaus Beermann v. Germany*, Series A nr. 165; European Court of Human Rights, 23 June 1994, *Jacobowski v. Germany*, Series A no. 291 A.

¹²⁰ CHRISTOPH BEAT GRABER, 2005: Freedom of Expression and Unfair Competition: The Hertel Case and Beyond, Discussion Paper prepared for the 2nd Conference of the ASIL Project on International Trade and Human Rights, World Trade Institute, Bern, June 13/14, 2003, forthcoming.

¹²¹ See HUGENHOLTZ, 2001, *supra* note 20, at p. 354; MELICHAR, 1996, *supra* note 42, at p. 105.

access shall not be reserved for «professional communicators» only: In democratic societies everyone needs to have access to socially and politically important information in order to build his or her opinion as a citizen. Since seeking information is an essential aspect of freedom of expression and information, browsing for important information should generally not be inhibited in an environment of digital networks. As Julie Cohen phrased it: «the information that individuals want, or require to foster critical capacity and independence of manipulation, may be information they do not yet know about. Here, the rules governing information ownership and accessibility are vitally important».¹²² Legal rules therefore should create an environment in which information is accessible, and in which «the pathways of access [...] are flexible in accommodating searching and browsing».¹²³

Special attention should also be paid to the possibility that persistent access controls capable of metering (such as DRM technologies) might increase the information division between affluent people and those with low income. «For well-to-do individuals, the monetary costs of metered information access will be trivial. For others accustomed to a more varied framework of public and customary institutions designed to facilitate information access and use - public library patrons, used book purchasers, students, academic researchers, and so on - persistent access controls threaten to alter substantially the patterns of information flow».¹²⁴ It should be avoided therefore, that DRMs exclude hitherto privileged users such as schools, libraries or handicapped persons from access to information.¹²⁵ Finally, problems of competition law with human rights relevance arise where technical protection measures impair the development of enhanced services (e.g. electronic press bulletins or news clippings), which respond to a demand of certain audiences for specified or

¹²² COHEN, 2001, *supra* note 2, at p. 18.

¹²³ *Ibid.*

¹²⁴ *Ibid.*

¹²⁵ The German Constitutional Court on several occasions acknowledged that copyright protected works may be integrated, without permission, into collections dedicated for the use in schools, churches or other educational institutions, provided that the right holders are remunerated. See BVerfGE 31 (1971), 229 ff. (Kirchen- und Schulgebrauch) and BVerfGE 49 (1978), 382 ff. (Kirchenmusik). Art. 14 CESCR even recognises a duty of States to secure compulsory primary education free of charge. See RETO M. HILTY, 2003: Urheberrecht in der Informationsgesellschaft: «Wer will was von wem woraus?». Ein Auftakt zum zweiten Korb, in ZUM 2003, special issue, pp. 983-1005, at pp. 998 f.

selected information.¹²⁶ In all these cases a broad interpretation of copyright exceptions is not sufficient to secure access to information, and action of the legislature seems indispensable.

Law never precedes but always reacts on factual developments. Steps to be taken by legislature therefore will require a careful analysis of technological developments and an assessment of factual access limitations infringing important public interests. The question which public interests are important enough to call for State intervention will depend on economic analyses of market failures and on political judgments. If the legislature decides to become active, new legislation may choose similar structures as existing digital environment related regulations restricting exclusive rights for the sake of access to information. On the European level such legislation can be identified in regulations concerning: a) must carry rules; b) major event rules; and c) the trade-off between copyright and access in the Satellite Television Directive.

a) Must-Carry Rules: Cable operators in many countries are limited in their freedom of transmission by provisions of the national broadcasting legislation which contain obligations to transmit or re-transmit certain programmes.¹²⁷ In Switzerland, for instance, cable operators may be obliged to transmit certain Swiss programmes by the Federal Office of Communication (OFCOM). This obligation was already part of the Swiss Broadcasting Act of 1991 and is now provided for by Article 68 of the Draft for a new Broadcasting Act. The rationale of this interference in the property rights of the cable companies is to assure that broadcasters which contribute to public service goals are granted a privileged position regarding the (re)transmission of broadcasts in cable networks.¹²⁸ As far as these rules are designed to serve cultural interests of the general public (securing that cable networks broadcast programs of high quality on privileged positions) they can be interpreted as emanations of the institutional aspect of freedom of expression and information.

¹²⁶ See GINSBURG, 2002, *supra* note 23, at pp. 71 f. (commenting on the *Kelly v. Arriba* judgment of the Court of Appeal of the 9th Circuit); HILTY, *ibid.*, 2003, at pp. 998 f.

¹²⁷ For a detailed assessment of duties to transmit and retransmit under U.S., British and Canadian law, see WOLFANG HOFFMANN-RIEM, 1996: *Regulating Media. The Licensing and Supervision of Broadcasting in Six Countries*, New York/London 1996, at pp. 49 f., 76, 211 f., 295.

¹²⁸ See Communication (Botschaft) from the Swiss Federal Council to the Parliament concerning the Draft for a new Broadcasting Act of 18 December 2002, BBl. 2003, 1569, at 1636.

b) *Major Event Rules*: Both, the EC Television Directive (EC TV Directive)¹²⁹ and the European Convention on Transfrontier Television (ECTT)¹³⁰ of the Council of Europe protect access of the public to events of major importance for society. Two basic types of rules ensuring this scope are operative.¹³¹ The first type of rules is represented by Article 9 ECTT recommending its contracting parties to introduce a right to short reporting. This provision aims at avoiding the right of the public to information being undermined due to the exercise by a broadcaster of exclusive rights for the transmission of a major public event and the exclusion of other operators.

The second type of rules is composed of the lists embodied both in Article 3a of the EC TV Directive¹³² and in Article 9^{bis} of the ECTT. Both regulations aim at ensuring that important events are accessible to the broad public on free TV. To this end, Member States and Contracting States respectively are authorised to take measures to prevent the less affluent audience from being excluded from consumption because events of major importance are only available on pay-TV. The operators are obliged to respect the law of the receiving State which prescribes what qualifies as an event of major importance in the country in question.¹³³ For safeguarding transparency, both regimes oblige the individual State to draw up a list of events which are considered to be of major importance for the society and to determine the adequate measures to be taken, in case it makes use of such access rights. Once a year, the authorised committees publish a consolidated list in order to avoid disparities between the European Community provisions and the rules of the ECTT.¹³⁴ Both types of major event rules aim to secure access of the

¹²⁹ European Convention on Transfrontier Television, ETS No. 132 (05.05.1989), as amended by Protocol ETS No. 171 (01.10.1998).

¹³⁰ Council Directive 89/552/EC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, OJ L 298/23, 17.10.1989, as amended by Directive 97/36/EC of the European Parliament and of the Council, OJ L 202/60, 30.07.1997.

¹³¹ See CHRISTOPH BEAT GRABER, 2004: Audiovisual Media and the Law of the WTO, in GRABER/GIRSBERGER/NENOVA (eds.), *Free Trade versus Cultural Diversity*, Zurich 2004, pp. 15-65, at pp. 44 f.

¹³² See BEREND JAN DRIJBER, 1999: *The Revised Television Without Frontiers Directive: Is It Fit for the Next Century?*, in *Common Market Law Review*, vol. 36, 1999, pp. 87-122, at pp. 117 ff.

¹³³ *Ibid.*, at p. 119.

¹³⁴ See Report of the EC Commission of 26 July 2001, with an overview of the lists of Denmark, Italy, the United Kingdom and Germany, OJ C 208/25, 26.07.2001.

general public to certain programs and therefore correlate with the institutional aspect of freedom of expression and information.

In its Communication of 15 December 2003 about the future of European Regulatory Audiovisual Policy the European Commission also reviewed the major event rules of the EC TV Directive. It concluded «...that the issues at stake have to be dealt with in conjunction with copyright regulation. Three main questions have to be answered: to what extent does the copyright Directive provide an adequate solution through its 'fair dealing' provision? Do the general policy objectives at stake (pluralism of information sources, etc.) require the statutory definition of a 'right to access' for broadcasters and news agencies? What type of intervention should be provided for?». ¹³⁵ These questions will be addressed in the realm of the ongoing review of the EC TV Directive.

c) Satellite Broadcasting: Council Directive 1993/83/EEC on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission ¹³⁶ provides for a trade-off between the free flow of broadcast information and the exclusive rights of broadcasters. The purpose of the directive is to secure that the territoriality principle, which defines copyright jurisdiction, does not impair satellite based television broadcasting beyond national borders. ¹³⁷ To this effect the directive determines the copyright legislation of the State being exclusively applicable where the TV programme is originally transmitted. The application of the law of the State of origin extends beyond national borders to all Member States in which the signals are received. This principle avoids the cumulative application of several copyright laws within the footprint of the satellite. ¹³⁸ However, as the Commission points out in its recent report concerning the

¹³⁵ European Commission, Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions about the Future of European Regulatory Audiovisual Policy, COM(2003) 784 final, 15.12.2003, at paragraph 3.3.

¹³⁶ OJ L 248/15, 06.10.1993.

¹³⁷ On the situation before the enactment of the directive, see ROLF DÜNNWALD, 1990: Satellitensendungen und Leistungsschutzrechte im Europäischen Binnenmarkt, in BECKER/LERCHE/MESTMÄCKER (eds.), *Die Verwertungsgesellschaften im Europäischen Binnenmarkt*, Festschrift für Reinhold Kreile, Baden-Baden 1994, pp. 79-89 and MARCEL SCHULZE, 1990: Satellitensendungen und Urheberrechte im Europäischen Binnenmarkt, in BECKER/LERCHE/MESTMÄCKER (eds.), *Die Verwertungsgesellschaften im Europäischen Binnenmarkt*, Festschrift für Reinhold Kreile, Baden-Baden 1994, pp. 91-94.

¹³⁸ Recitals 14 and 15 of the Directive.

implementation of the directive, the practical problem arises, that viewers located within the footprint are often unable to get access to certain broadcasts.¹³⁹ The reason for this limitation of access is the encryption of the programmes and the fact that, in the absence of an economic interest on a certain territory, the responsible broadcasting organisation refrains from acquiring the necessary rights. The Commission clearly states in its report that such practices are against the purpose of the directive, which is to foster the principles of the freedom to receive and retransmit television programmes at Community level.¹⁴⁰ This is a goal which is backed by the institutional aspect of freedom of expression and information. In order to remedy the observed flaws the Commission wants to conduct research in order to determine «how to reconcile the different interests involved with the principle of free movement of television services».¹⁴¹

To summarise, one may suggest that courts should only envisage a free speech induced opening up of copyright exceptions in cases where such a far reaching interference into the competences of the legislature is necessary to secure access of the general public, or individuals in particular situations, to important issues. According to the jurisprudence of the European Court of Human Rights non-commercial (e.g. political) speech is considered to be more important than commercial speech. It is important however, that the principal of proportionality is respected and that copyrights are not hollowed out. In situations where legitimate claims for access cannot be executed by a court's ruling directly, legislative action is required if important general policy interests are involved. Must-carry rules are an example where the national legislature limits property rights of private cable companies in order to promote purposes of cultural policy. Recent announcements by the European Commission, to revue existing directives in order to secure access of the general public to programmes distributed by pay-TV or satellite channels, show that, because of technological development, a new balance between copyright and access must be re-negotiated in various fields. Most notably, all three initiatives rest on a foundation in the institutional aspect of freedom of expression and information.

¹³⁹ See European Commission, Report on the Application of Council Directive 93/83/EEC on the Coordination of Certain Rules Concerning Copyright and Rights Related to Copyright Applicable to Satellite Broadcasting and Cable Retransmission, COM(2002) 430 final.

¹⁴⁰ *Ibid.*, at paragraph 3.1.1.

¹⁴¹ *Ibid.*

4. The Future of Collecting Societies from a Human Rights Perspective

The idea of collective rights management originated in France at the end of the 18th century, when playwrights organised themselves as a pressure group, fighting against theatres for the recognition of their economic and moral rights.¹⁴² This movement led to the foundation of the *Bureau de législation dramatique* in 1777, which later was succeeded by the still functioning *Société des auteurs et compositeurs dramatiques* (SACD).¹⁴³ As a consequence of technological development in the course of time, new societies eventually came into covering every sector of artistic creation, including music, works of visual art, literary and dramatic works as well as audiovisual works, productions and performances.¹⁴⁴

Today, collecting societies offer important advantages to both members and users. For members they act as a trustee, who usually administers, monitors, collects and distributes the payment of royalties for all right holders represented by the society. Moreover, the organised power of a society assures its members an important bargaining position which can be used to defend old rights or to strive, if technological development makes this necessary, for the acknowledgment of new ones. The trade union-like spirit of solidarity, which was determining at the origin of the movement,¹⁴⁵ is still present in the social and cultural functions fulfilled by today's collecting societies. Users, on the other hand, gain from collecting societies since they operate as a one-stop-shop of licensing.¹⁴⁶ Collecting societies, with the help of a global network of contracts among sister societies, are usually capable of offering the worldwide repertoire of the right holders working in the field of artistic production represented by the respective society.¹⁴⁷ This system allows users, such as radio or TV broadcasters, Internet service providers, discotheques etc., to reduce transaction costs, since they may receive the necessary licenses,

¹⁴² For an illustrative account of the history of collecting societies, see FICSOR, 2002, *supra* note 11, at pp. 18 f., 57 f.

¹⁴³ FICSOR, 2002, *supra* note 11, at p. 18. See also *supra* DANIEL GERVAIS, The Evolving Role(s) of Copyright Collectives, part of the present publication.

¹⁴⁴ For a detailed analysis of collecting societies' main fields of activity, see FICSOR, 2002, *supra* note 11, at pp. 37-89.

¹⁴⁵ See FICSOR, 2002, *supra* note 11, at p. 20.

¹⁴⁶ European Commission, The Management of Copyright and Related Rights in the Internal Market, *supra* note 6, at paragraph 3.1.2.

¹⁴⁷ See FICSOR, 2002, *supra* note 11, at pp. 19 f.

allowing the use of a certain work, even in cross-border contexts, from one collecting society.¹⁴⁸

Given the foregoing, a reasonable question is: Will DRM technology eventually supersede the reason for which collecting societies were originally institutionalised within the legal order of many western countries?

As a consequence of the large number of users and right holders involved, collecting societies necessarily work with simplifications such as schematised assessments, e.g. of what was created and what was copied. Such simplified schemes have the advantage of being manageable at reasonable costs. But they also have disadvantages, the main flaw being that such a system often cannot assure that every user pays for exactly what he has used, nor can it assure that every right holder receives the exact equivalent of the economic value of his or her work.¹⁴⁹

One of the promises of the new DRM technology is to remedy this flaw, assuring that every user pays the true price of what he has used. The money will eventually be collected directly by the licensee who will take his own share and distribute the rest to the creators of the work on the basis of their individual contracts.

An open question is, however, whether this new technology will be to the advantage of creators. Mihály Ficsor takes the view that individual administration of rights will not necessarily be in the interest of owners of rights:

«It is, in principle, possible for some exceptionally well-known and popular authors and performers to choose an individual way. Experience shows, however, that, at least in the case of traditional forms of collective management, this kind of ‘dissidence’ and repudiation of the principle of solidarity may backfire and may be counter-productive not only for the community of creators but, in the long run, also for such ‘individualists’». ¹⁵⁰

¹⁴⁸ For an assessment of the existing agreements among collecting societies allowing cross-border licensing in the area of the European Union, see European Commission, *The Management of Copyright and Related Rights in the Internal Market*, *supra* note 6, at paragraph 1.2.4.

¹⁴⁹ For a discussion of the difficulty to find the right balance between administrative simplifications and costs of management, see FICSOR, 2002, *supra* note 11, at pp. 147-149.

¹⁵⁰ FICSOR, 2002, *supra* note 11, at pp. 97 f.

An obvious danger will be that creators - because of lacking compulsory copyright contract provisions in most countries¹⁵¹ - will be exposed, even more than today, to the power of the licensee (in the entertainment business usually big vertically integrated transnational enterprises). Right holders who operate «within less lucrative niche markets or who do not dispose of sufficient bargaining power» may therefore prefer to continue to rely on collecting societies for managing their rights efficiently.¹⁵²

A further concern of the creative community is that an eventual replacement of collective administration of copyrights by DRM systems¹⁵³ may lead to the termination of the social and cultural funds of collecting societies.¹⁵⁴ From a cultural diversity perspective, this is a negative consequence, since in times of a general cut-down on government expenses for cultural purposes, these funds have in many countries become a not negligible source for the promotion of art.¹⁵⁵ The termination of these funds would therefore probably have a negative impact on the independence of artists¹⁵⁶ and the diversity of artistic production.

Finally, as far as the interests of certain users (consumers or third parties such as libraries) are concerned, a wider availability of DRM systems and services can only bring additional value «if it contributes to the availability of

¹⁵¹ Germany is a counter example.

¹⁵² European Commission, *The Management of Copyright and Related Rights in the Internal Market*, *supra* note 6, at paragraph 3.1.2.

¹⁵³ According to recital 35 of the Directive 2001/29/EC of the European Parliament and of the Council of 22 May on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L 167/10, 22.06.2001, the Member States have to take into account the degree of use of technological measures when providing for compensation in the context of the private use exception as permitted under Article 5(2)(b) of that Directive. Some authors, such as HUGENHOLTZ/GUIBAULT/GEFFEN, 2003: *The Future of Levies in a Digital Environment*, 2003 (www.ivir.nl/publications/other/DRM%20Levies%20Final%20Report.pdf (22.08.2003)), at pp. iv, 44, 46, therefore claim to phase out levy systems in function of the availability of technical measures on the market place.

¹⁵⁴ For a discussion of this problem, see HILTY, 2003, *supra* note 125, at pp. 999 f.

¹⁵⁵ See BECKER, 1994, *supra* note 12, at p. 35; MELICHAR, 1996, *supra* note 42, at p. 111.

¹⁵⁶ See CHRISTOPH BEAT GRABER, 2005: *Der Kunstbegriff des Rechts im Kontext der Gesellschaft*, in B. COTTIER (ed.), *Liberté de l'art et indépendance de l'artiste*, (forthcoming) for a defence of the thesis that plurality of different sources serving to finance art is one of the best guarantees of artistic independence and should be considered as a major cultural policy goal of national governments. For an opposed opinion, see MANFRED REHBINDER, 2001: *Urheberrecht*, eleventh edition, Munich 2001, at paragraph 294.

protected content and facilitates the access of end-users to protected content». ¹⁵⁷ In the view of the European Commission this seems to be doubtful at the present stage.

If one looks at the future of collecting societies in an environment of DRM systems from a human rights perspective, one has to recall, that collecting societies serve, in the first place, to enforce individual rights of authors. As we have seen in subsection 2.1., this function is constitutionally granted in most legal orders by rights of property or personality. The social and cultural functions of collecting societies are, however, interpreted as a kind of «horizontal social clause» assuring solidarity among their members. ¹⁵⁸ Although it is disputed, e.g. in German copyright literature, whether the social and cultural funds operated by collecting societies may rely on the social clause of Article 14 GG, ¹⁵⁹ it seems clear to us, that they are an expression of a comprehensive and constitutionally balanced system of intellectual freedom and intellectual property. Recalling their importance for the promotion of cultural diversity ¹⁶⁰ these functions are preconditions for freedom of expression and information as an institutional right. From the institutional perspective a sufficiently diverse offer of cultural information is a prerequisite for individuals' capacity to form their free opinion on issues of cultural importance. ¹⁶¹ In the digital environment, vertically integrated enterprises tend to control both the production and distribution of content with the help of technology and copyright legislation. ¹⁶² Where corporate copyright owners threaten to outlaw alternative distribution structures, such as peer-to-peer networking, collecting societies might represent an intermediary, able to offer a fair trade-off between diverging interests.

The main function of collective rights management systems was traditionally to assure a certain balance between all major stakeholders involved, be it creators, licensees or users. This balance is endangered with the advent of DRMs: the European Commission held accordingly in its recent

¹⁵⁷ European Commission, *The Management of Copyright and Related Rights in the Internal Market*, *supra* note 6, at paragraph 1.2.5.

¹⁵⁸ See above Section 2.1.

¹⁵⁹ See LEINEMANN, 1998, *supra* note 41, at pp. 80-91; FECHNER, 1999, *supra* note 20, at pp. 493-497.

¹⁶⁰ See GRABER, 2005, *supra* note 156; BECKER, 1994, *supra* note 12, at p. 33; GERHARD SCHRICKER, 1992: *Urheberrecht zwischen Industrie- und Kulturpolitik*, in *GRUR* 1992, pp. 242-247, at p. 245.

¹⁶¹ See case law of the EGMR as quoted above in Section 2.2.

¹⁶² COHEN, 2001, *supra* note 2, at p. 18.

communication that «in their present status of implementation, DRM systems do not present a policy solution for ensuring the appropriate balance between the interests involved...».¹⁶³ The Commission therefore concludes rightly that a new copyright policy is required and that «DRM systems are not in themselves an alternative to copyright policy *in setting the parameters either in respect of copyright protection or the exceptions and limitations that are traditionally applied by the legislature*».¹⁶⁴

5. Conclusions and Recommendations

«The legislator in fulfilling his mandate enshrined in Article 14, paragraph 1, second sentence, GG of defining the limitations of intellectual property, is faced with the task of securing not only the individual interests of the right holder, but also of drawing the required limits to the individual interests and warranties in the interest of the public welfare. He shall bring into just equation and balance the constitutionally guaranteed requirement of a reasonable use of the creative accomplishment and the interests of the general public worthy of protection».¹⁶⁵

These wise words originate from the German Constitutional Court and date back to 1978. Notwithstanding the age of more than a quarter of a century, the above statement is indeed capable of providing general programmatic guidance for resolving the new conflicts between the individual proprietary interests and the general cultural, social and political interests arising in the digital environment.

As Section 3 demonstrated, court decisions, overriding copyright statutes for the sake of free speech, may be a suboptimal remedy because of two reasons:

¹⁶³ European Commission, *The Management of Copyright and Related Rights in the Internal Market*, *supra* note 6, at paragraph 1.2.5.

¹⁶⁴ *Ibid.* Emphasis added by the author.

¹⁶⁵ BVerfGE 49 (1978) 382 ff., at 394 (translation by the author). In the original version the text reads as follows: «Der Gesetzgeber steht bei der Erfüllung des ihm in Art. 14 Abs. 1 Satz 2 GG erteilten Auftrags, Inhalt und Schranken des geistigen Eigentums zu bestimmen, vor der Aufgabe, nicht nur die Individualbelange des Urhebers zu sichern, sondern auch den individuellen Berechtigungen und Befugnissen die im Interesse des Gemeinwohls erforderlichen Grenzen zu ziehen. Er muss den verfassungsrechtlich garantierten Anspruch auf eine angemessene Nutzung der schöpferischen Leistung und die schutzwürdigen Interessen der Allgemeinheit in einen gerechten Ausgleich und ein ausgewogenes Verhältnis bringen».

Firstly, when a court order is self executing, it distorts the balance of power between the institutions of the State. Because such a derogation of statutory law itself poses constitutional problems, it should be chosen under exceptional circumstances only. Secondly, in situations where access to information is limited via technical rather than legal measures, court decisions cannot provide a remedy since prior regulatory action of the political bodies would be necessary.

We are currently facing a technological revolution pervading all ramifications of social life. In such a process, decisions concerning technology are likely to become structural determinants of the economic and cultural development of the society. Thus, they are of high political importance. It is recommended therefore, that such decisions are made by legislature, rather than courts, in conformity with the general values of the respective constitutional order and in procedures assuring that all social groups involved have their say. Freedom of expression and information being the foundation of every democratic society,¹⁶⁶ must be an essential point of reference for such decision making.

The steps undertaken by the EC Commission in order to review and eventually amend existing legislation concerning must-carry rules, important events and satellite TV are necessary to face unresolved conflicts between individual property and general interests concerning information flows to and from citizens. Considering that DRM systems will most probably affect the general conditions of intellectual freedom in democratic societies this issue is too important to be left to the industry to determine. It is reassuring that the Commission seems to agree with this assessment.¹⁶⁷

Since any regulation of DRM systems will structure the framework for copyright management as a whole, it makes sense, in my view, to address this problem collectively with an in-depth reflection of the future role of collecting societies in digital networked environments. In this sense, I recommend undertaking further research in order to find out how the advantages of DRMs (precision, velocity) and collecting societies (also affordable for small producers, strengthening creative capacity, considerable expertise in operating licensing systems responding to the needs of large numbers of users and right

¹⁶⁶ See e.g. European Court of Human Rights, 25 March 1985, *Barthold v. Germany*, Series A no. 90, at paragraph 58, with reference to European Court of Human Rights, 7 December 1976, *Handyside v. United Kingdom.*, Series A no. 24, at paragraph 49. See also COHEN JEHRAM, 1983, *supra* note 20, at p. 386.

¹⁶⁷ European Commission, *The Management of Copyright and Related Rights in the Internal Market*, *supra* note 6, at paragraph 1.2.5.

owners)¹⁶⁸ could be combined in order to promote the free exchange of cultural information without distorting competition in functioning markets.¹⁶⁹ An important part of this research should be dedicated to the difficult questions of how copyright exceptions can effectively be accomplished under conditions of DRMs without exposing users to unreasonably high transaction costs and how the ability of the general public to seek and find important information can be preserved. From the perspective of the institutional aspect of freedom of expression and information, it is essential that this reflection takes due account of the important role of collecting societies as promoters of creativity, cultural diversity and cultural identity.

¹⁶⁸ See FICSOR, 2002, *supra* note 11, at p. 101.

¹⁶⁹ The key competition law problems posed by collecting societies are comprehensively addressed in the contribution of Dorothea Senn to the present publication. See *infra* DOROTHEA SENN, Competition Law Aspects of Digital and Collective Rights Management Systems.