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# The Role of Fundamental Rights in Copyright Law

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# Topics:

- 1) When can or should fundamental rights be invoked in copyright litigation cases?
- 2) Online platforms, © and fundamental rights (Article 17 [CDSMD](#))

## 1) Fundamental rights

- Which fundamental rights: national/EU ([CJEU Funke Medien 2019](#))
  - Action of MS is entirely determined through full harmonization, e.g. Art. 2, 3 InfoSoc → only CFREU
  - Some implementation discretion, e.g. Art. 5(2)(3) InfoSoc → national FRs remain applicable, but discretion “highly circumscribed”

## 1) Fundamental rights

- Which CFREU rights
  - © holders:
    - “Intellectual property shall be protected” (Art. 17(2))
    - Right to an effective remedy (Art. 47(1))
  - Users:
    - Freedom of expression and information (Art. 11)
    - Freedom of the arts and sciences (Art. 13)
    - Freedom to conduct a business (Art. 16)
    - Protection of personal data (Art. 9)
    - ...

## 1) Fundamental rights

- The type of FR-related litigation
- Unconstitutionality of © law because of violation of FRs
  - Classical FR function vis-à-vis the state
  - Direct application of FRs, main issue
  - E.g. annulment action Republic of Poland v European Parliament, Council of the European Union, Art. 263 TFEU (infra);  
Constitutional complaints under nat. law

## 1) Fundamental rights

- The type of FR-related litigation
- Disputes between private parties
  - Preliminary ruling procedures regarding the interpretation of secondary law (Art. 267 TFEU)
  - Indirect effect of FRs in the course of interpreting secondary law:
    - A national court must rely on an interpretation of secondary law which, “whilst consistent with their wording and safeguarding their effectiveness, fully adheres to the fundamental rights enshrined in the Charter” (Funke Medien)

## 1) Fundamental rights

- FRs in Art. 267 TFEU procedures
- First step: Determine the meaning and scope of a legal term in accordance with
  - its usual meaning in everyday language
  - the context in which it occurs
  - the purposes of the rules of which it is part
  - and, where appropriate, its origins.
  - Cf. e.g. [CJEU Constantin Film Verleih 2020](#)

## 1) Fundamental rights

- FRs in Art. 267 TFEU procedures
- Corresponding internal limits of FRs
  - Property not absolute, does not guarantee “highest possible remuneration” ([CJEU Football Association Premier League 2011](#))
  - Freedom of information and of the press are not capable of justifying, beyond Art. 5(2) and (3) InfoSoc a derogation from the author’s exclusive rights (Funke Medien)
  - → “Balancing”

## 1) Fundamental rights

- FRs in Art. 267 TFEU procedures
- Relevance of the Charter beyond “balancing”:
  - Art. 52(1) CFREU: “Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law ...”
    - CJEU RAAP 2020:
      - Exclusion of 3<sup>rd</sup> country performers from EU remuneration rights?
      - No: reciprocity requirement vis-à-vis 3<sup>rd</sup> country performers requires explicit EU legislation

## 1) Fundamental rights

- FRs in Art. 267 TFEU procedures
- Potential of FRs beyond “balancing”:
  - In certain exceptional cases, FRs are the decisive argument to justify the outcome
  - FR protected interest is otherwise completely neglected/practically reduced to zero
  - Cf. Art. 52(1): Every interpretation of secondary law must respect the “essence” of relevant FRs

## 1) Fundamental rights

- FRs in Art. 267 TFEU procedures
- Minimum FR protection for © holders
  - Not considering **a new upload of a work** a communication of the public would strip the copyright holder of his control over the work online ([CJEU Nordrhein-Westfalen v Renckhoff 2018](#))
  - Not considering **framing links that circumvent technological measures** a communication to the public would force © holders to either tolerate infringement or surrender the use of the work, in some cases by means of a licence agreement ([CJEU VG Bild-Kunst 2021](#)).
  - Not requiring **password-protection of open anonymous Wifi's** would deprive the IP FR “of any protection, which would be contrary to the idea of a fair balance” ([CJEU Mc Fadden 2016](#))
  - Allowing an owner of an internet connection used for copyright infringements through file-sharing to **escape liability by merely claiming that another family member might have infringed** is unacceptable if there is no other effective remedy ([CJEU Bastei Lübbe 2018](#))

## 1) Fundamental rights

- FRs in Art. 267 TFEU procedures
- Minimum FR protection for © holders
  - But not in case of minimum harmonization (Constantin Film Verleih)
  - The Enforcement Dir does not require MS to grant a right of information about the telephone number, IP address or email address of an alleged infringer
  - No violation of Art. 17(2) CFREU because merely minimum harmonization
  - → National constitutional law

## 1) Fundamental rights

- FRs in Art. 267 TFEU procedures
- Minimum FR protection for users
  - **Artistic sound sampling** either no reproduction or a quotation ([CJEU Pelham 2019](#))
  - Publication of documents (“leaks”) can be a lawful ‘use of works ... in connection with ... reporting of current events’ without a need to seek authorization beforehand and also absent a summary (Funke Medien and [Spiegel Online 2019](#))
  - Limited liability for **hyperlinks** to illegal content ([CJEU GS Media 2016](#))
  - The transmission by electronic means of a protected work to a court, as evidence in judicial proceedings between individuals, is not a communication to the public because that would “seriously” compromise the right to an effective remedy ([CJEU BY v CX 2020](#))

## 2) FRs and Art. 17 CDSMD

- Art. 17 [CDSMD](#) (17 April 2019)
- **An online content-sharing service provider (OCSSP) performs an act of communication to the public** or an act of making available to the public when it gives the public access to copyright-protected works or other protected subject matter uploaded by its users. An OCSSP ... shall therefore obtain an authorisation from the rightholders ...
- If no authorisation is granted, **OCSSPs shall be liable for infringing content unless they demonstrate** that they have:
  - (a) made **best efforts to obtain an authorisation**, and
  - (b) made ... **best efforts to ensure the unavailability of specific content** for which the rightholders have provided relevant and necessary information (content recognition and filtering); and in any event
  - (c) acted expeditiously, upon receiving a sufficiently substantiated notice from the rightholders, to disable access to, or to remove from their websites, the notified content (**notice and takedown**), and made best efforts to prevent their future uploads in accordance with point (b).
- The cooperation between OCSSPs and RHs “**shall not result in the prevention of the availability**” of content uploaded by users, which does not infringe.
- OCSSPs must put in place an **effective and expeditious complaint and redress mechanism**

## 2) FRs and Art. 17 CDSMD

- Poland action brought on 24 May 2019 (supra)
  - Annul Art. 17(4)(b) and 17(4)(c), in fine or Art. 17 in its entirety
  - ... because the obligation to carry out prior automatic verification (filtering) of content uploaded by users
  - ... undermines the essence of the right to freedom of expression and information/is not proportional and necessary.

## 2) FRs and Art. 17 CDSMD

- Opinion of Advocate General Saugmandsgaard Øe of 15 July 2021
- Proposes to dismiss the action
- BUT in view of freedom of expression and information only under certain conditions:
  - Upload filters must be limited to manifestly infringing content
  - Significantly different (transformative) content shall only be removed ex post

## 2) FRs and Art. 17 CDSMD

- Commission “guidance on Art. 17”, 4 June 2021
  - Dilemma: OCSSPs have to apply automated content recognition technology but no such technology can assess “to the standard required in law whether content, which a user wishes to upload, is infringing or a legitimate use”
  - Ex post restoration of legitimate content insufficient
  - Ex ante blocking “should in principle be limited to manifestly infringing uploads”
    - Exception: “earmarked content”, which is particularly time sensitive (e.g. pre-released music or films or highlights of recent broadcasts of sports events)