

University of Luxembourg

Owning Expression and Propertizing Speech - Freedom of Expression v Copyright before the European Courts

# The Constitutionalisation of Copyright in Germany and the EU

Prof. Dr. Alexander Peukert  
Goethe University Frankfurt am Main  
[a.peukert@jur.uni-frankfurt.de](mailto:a.peukert@jur.uni-frankfurt.de)

- Overview
  - Constitutionalisation
  - Convergence
  - Open questions

## I. Constitutionalisation

- 1) IPRs as property under the constitution
  - IPRs as creatures of statute ([Donaldson v. Becket 1774](#))
  - The constitutional minimum of property
    - German Federal Constitutional Court (BVerfG) 1971-1999

## I. Constitutionalisation

- 2) L&Es as an expression of fundamental rights of users
  - BVerfG Lüth 1958: no rule of private law may conflict with basic rights, and all such rules must be construed in accordance with the spirit of that “objective system of values”

## I. Constitutionalisation

- 2) L&Es as an expression of fundamental rights of users: German case law
  - BGH Disney Parodies 1971:
    - © does not prevent anyone from expressing an opinion; freedom of expression does not require/justify an unauthorized use of protected works
  - BGH Asterix Persiflagen 1993:
    - Freedom of the arts requires that parodies are lawful under § 24 GerCA (“free use”)

## I. Constitutionalisation

- 2) L&Es as an expression of fundamental rights of users: German case law
- [BVerfG Holst 1999](#): right of information for © infringement v. freedom of the press
  - Interpretation of “disproportionate”
  - [BVerfG Anwaltsschriftsatz \(Gregor Gysi\) 1999](#): first publication of attorney letter in historical book no © infringement
  - External balancing
  - [BVerfG Germania 3 2000](#): in consideration of “specific artistic criteria”, literary collage is a lawful “quotation” under © law
  - Extensive interpretation of © act

## I. Constitutionalisation

- 2) L&Es as an expression of fundamental rights of users: German case law
- [BGH Verhüllter Reichstag 2002](#): limitations may have to be interpreted extensively
  - [BGH Gies-Adler 2003](#): no free-standing balancing but interpretation of © act in line with fundamental rights
  - But Hamburg civil courts and BGH in Pelham saga 1999-2012:
    - no consideration of the freedom of the arts

## I. Constitutionalisation

### 3) Europeanisation

- Interpretation of German law in conformity with © directives
  - But often no consideration of EU © law by the courts, e.g. Metall auf Metall/Pelham only [BVerfG 2016](#)
- Constitutional complaint against obviously untenable non-reference to the CJEU
  - Important complaint in © matters since 2009, e.g. [BVerfG 2010](#) → [BGH reference 2011](#) → [CJEU VG Wort 2013](#)



## I. Constitutionalisation

### 3) Europeanisation

- Interpretation of © directives in line with the Charter
- Full harmonisation (CFREU) or leeway for implementation (GG)?
- E.g. [BVerfG AnyDVD 2007 I](#); [BGH AnyDVD 2010](#); [BVerfG AnyDVD 2011 II](#)

## II. Convergence

- 1) Delimitation GG/BVerfG – CFREU/CJEU
  - Implementation leeway – full harmonisation
- 2) Fundamental right to property is not absolute, does not guarantee “every conceivable possibility for economic exploitation” (BVerfG Metall auf Metall)/“highest possible remuneration” (CJEU Murphy)
- 3) Systemic conflict
  - “Copyright necessarily restricts freedom of expression” (AG Szpunar Funke Medien)

## II. Convergence

- 4) © codification remains intact
  - Unless “systemic shortcomings in the protection of a fundamental right vis-à-vis copyright” (AG Szpunar Funke Medien)
- 5) No external balancing beyond codified L&Es
- 6) Instead: balanced interpretation of © acts
- 7) No restrictive interpretation of L&Es but safeguard their effectiveness and observe their purpose

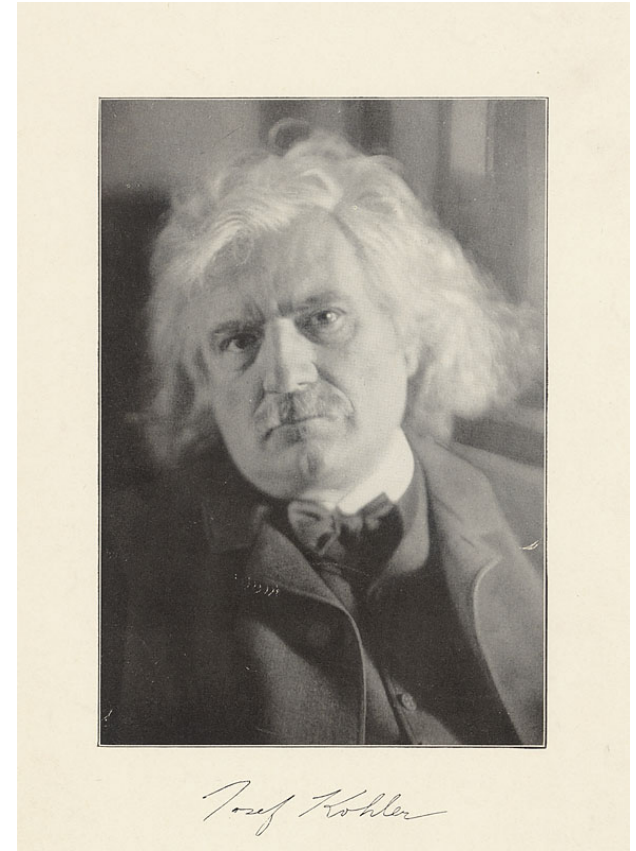
## II. Convergence

### 8) © Theory

I. Kant

defeats

J. Kohler



[Kant: On the Unlawfulness of Reprinting, Berlin \(1785\)](#)

## II. Convergence

### 8) A late victory of Kant's theory of copyright

#### BVerfG/BGH

Artistic freedom protects the interest to be able to induce a creative process by an artistic dialogue with existing works, without being subject to financial risks or restrictions in terms of content

## II. Convergence

### 8) A late victory of Kant's theory of copyright

BVerfG/BGH	CJEU
<p>Artistic freedom protects the interest to be able to induce a creative process by an artistic dialogue with existing works, without being subject to financial risks or restrictions in terms of content</p>	<p>The user of a protected work wishing to rely on the quotation exception must have the intention of <u>entering into 'dialogue' with that work.</u></p>

### III. Open Questions

## 1) Harmonisation of L&Es via the Charter

implementation leeway

### III. Open Questions

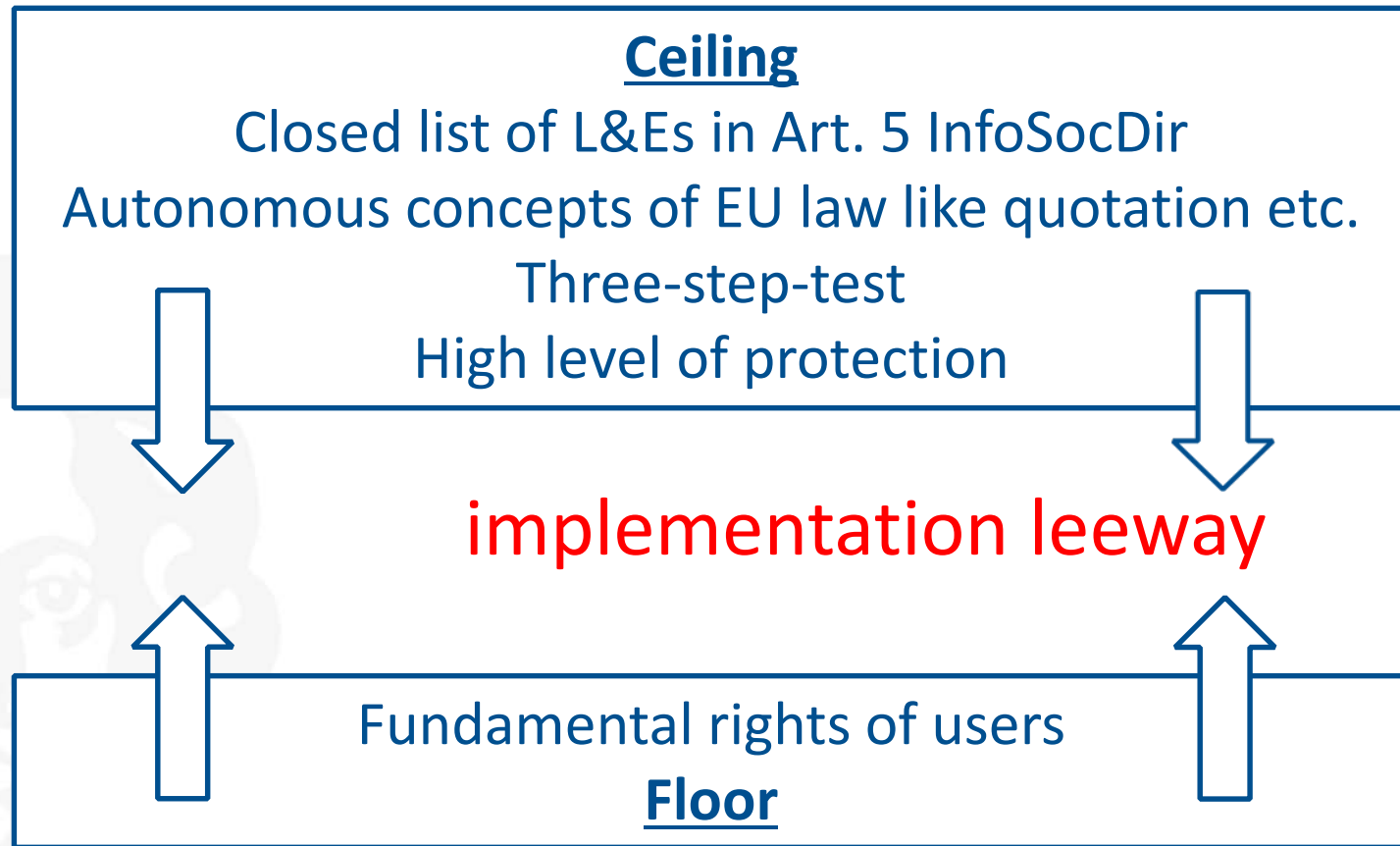
## 1) Harmonisation of L&Es via the Charter





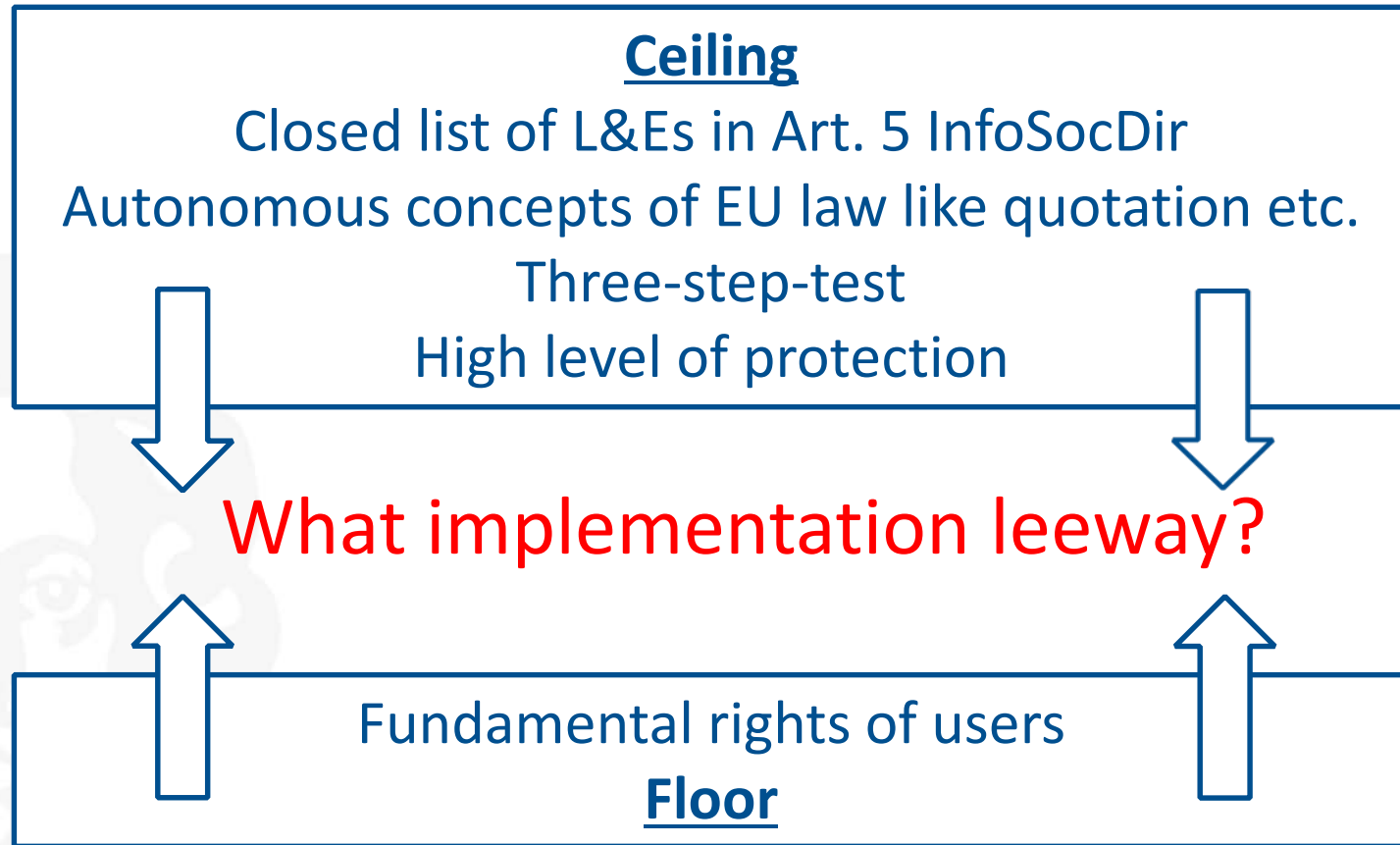
### III. Open Questions

## 1) Harmonisation of L&Es via the Charter



### III. Open Questions

## 1) Harmonisation of L&Es via the Charter



### III. Open Questions

- 2) Irreconcilable balancing results
- Parallel applicability of CFREU and GG in cases of implementation leeway
  - If two rights collide, there is only one right answer, not a range of possible outcomes
  - What if the courts disagree based on the application of the GG or the CFREU?
    - E.g. BVerfG vs. AG Szpunar in Pelham

### III. Open Questions

- 2) Irreconcilable balancing results
- Do MS courts have to request the answer of the CJEU and apply it?
  - CJEU self-restraint in cases of implementation leeway?
  - Possible delimitation
  - CJEU defines the minima of autonomous EU concepts
    - E.g. use “in connection with the reporting of current events”
  - MS courts apply these concepts in consideration of all facts of the case
    - E.g. “to the extent justified by the informatory purpose”

### III. Open Questions

- 3) What is the role of the three-step-test?
- „contributes to the fair balance” (CJEU Funke Medien/Spiegel Online)
  - Consequence: The use of the quoted work must be secondary in relation to the assertions of that user (CJEU Spiegel Online)

### III. Open Questions

- 4) The role of international law
- E.g. Art. 10<sup>bis</sup>(2) Berne (like § 50 German CA) requires for lawful news reporting that works have to be seen or heard “in the course of the [current] event”
  - Art. 5(3)(c) 2<sup>nd</sup> case InfoSocDir does not contain this requirement; CJEU does not refer to 10<sup>bis</sup>(2) Berne
  - What if the CFREU contradicts Berne minimum obligations?

### III. Open Questions

- 5) Moral rights
  - Not harmonized by InfoSocDir
  - But AG Szpunar Spiegel Online:
    - Moral rights ... must be taken into account in the interpretation of the InfoSocDir where the application of those provisions may adversely affect moral rights

### III. Open Questions

- 5) Moral rights
  - BGH Funke Medien:
  - Moral rights form part of the legitimate interests of the rightholder under Art. 5(5) InfoSocDir
  - AG Szpunar Funke Medien/Spiegel Online:
  - In order for a restriction on freedom of expression flowing from copyright to be characterised as necessary, it must meet either the objectives of exploitation or of moral rights.



### III. Open Questions

- 5) Moral rights
- CJEU Spiegel Online
  - Nothing explicit on the moral right of first publication
  - When has a work “already been lawfully made available to the public” (Art. 5(3)(d) InfoSocDir)?
    - Moral rights approach: authorisation of the author required (BGH)
    - But CJEU: authorisation of the copyright holder or first publication “in accordance with a non-contractual licence or a statutory authorization”