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**The Fundamental Right to (Intellectual)
Property and the Discretion of the Legislature**

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Abstract:

The article makes two points regarding the fundamental rights dimensions of intellectual property (IP). First, it explains why the prevailing approach to balancing the fundamental right to intellectual property with conflicting fundamental freedoms as if they were of equal rank is conceptually flawed and should be replaced by a justification paradigm. Second, it highlights the pre-eminent role of the legislature and the much more limited role of the judiciary in developing IP law. The arguments are based on an analysis of the jurisprudence of the European Court of Human Rights (ECHR), the Court of Justice of the European Union (CJEU) and last but not least the German Constitutional Court, the *Bundesverfassungsgericht*, regarding the respective inter-/supra-/national fundamental-rights regimes.

I. From Balancing to Justification

1. The Balancing Paradigm and Its Consequences

Subject to some - albeit significant - renegades like the U.S. Supreme Court,¹ it is now widely accepted in Europe, other jurisdictions like South Africa,² and not least in international IP law that fundamental and human-rights law is highly relevant for IP.³ This discourse is dominated by advocates of a “balancing paradigm”.⁴ *Christophe Geiger* argues that tensions between property and freedom have to be brought into a balanced relationship and that this reasoning offers possibilities for a balanced development of IP law generally.⁵ According to *Daniel Gervais*, conflicts between copyright and rights such as the right to privacy or to information imply striking a balance.⁶ *Laurence Helfer* and *Graeme Austin* opine that striking the appropriate balance between recognising and rewarding human creativity and innovation on the one hand and ensuring public access to these fruits of the human mind on the other poses the “central challenge” when bringing together the two regimes of human rights and IP.⁷

The jurisprudence of the CJEU provides ample examples for the balancing paradigm. Confronted with the question of a Spanish court whether a number of directives and art 17 para 2 and art 47 of the Charter of Fundamental Rights of the EU (Charter)⁸ require Member States to lay down an obligation of internet access providers to communicate personal data to copyright holders in the context of civil enforcement proceedings, the Court held that the fundamental rights to property and to an effective remedy have to be “reconciled” with the

¹ US Supreme Court *Eldred v. Ashcroft* 537 U.S. 186, 219 (2003) (“when ... Congress has not altered the traditional contours of copyright protection, further First Amendment scrutiny is unnecessary”); US Supreme Court *Golan v. Holder* 132 S. Ct. 873, 876 (2012) (“The ‘traditional contours’ of copyright protection, i.e., the ‘idea/expression dichotomy’ and the ‘fair use’ defense, ... serve as ‘built-in First Amendment accommodations’”).

² Constitutional Court of South Africa *Laugh it Off Promotions CC v. South African Breweries International t/a Sabmark International and Another* [2005] ZACC 7, IIC 36 (2005), 868.

³ See Laurence R. Helfer/Graeme W. Austin, *Human Rights and Intellectual Property - Mapping the Global Interface*, Cambridge University Press, 2011.

⁴ See Laurence R. Helfer, *The New Innovation Frontier? Intellectual Property and the European Court of Human Rights*, Harvard International Law Journal 49 (2008), 1, at 46 et seq.

⁵ Christophe Geiger, “Constitutionalising” *Intellectual Property Law? The Influence of Fundamental Rights on Intellectual Property in the European Union*, IIC 37 (2006), 371, 386.

⁶ Daniel J. Gervais, *Making Copyright Whole: A Principled Approach to Copyright Exceptions and Limitation*, University of Ottawa Law & Technology Journal 5 (2008), 1.

⁷ Laurence R. Helfer/Graeme W. Austin, *supra* note 3, at 507.

⁸ OJ No C-364/1, 18.12.2000.

fundamental right to respect for private life, firstly, by applying the IP and data protection directives at stake, but secondly also by interpreting the relatively general provisions of those directives in a way “which allows a fair balance to be struck between the various fundamental rights protected”.⁹ In *Scarlet*, the CJEU developed this nucleus to the general principle that “the protection of the fundamental right to property, which includes the rights linked to intellectual property, must be balanced against the protection of other fundamental rights.”¹⁰ The notion of a “fair balance” is also a core feature in the jurisprudence of the ECHR¹¹ and in the practice of national courts, for example the Austrian¹² and Canadian Supreme Courts.¹³

Although (or probably because) this tool avoids providing guidance as to why which normative value prevails, it yields very concrete results. With regard to the international level, *Daniel Gervais* presents a long and detailed list of uses that international copyright law on principle should not prohibit, ranging from uses “in the private sphere of users” to educational and governmental uses, subject however to uses “that will not demonstrably affect the normal commercial exploitation” and to a compensation mechanism if the limitation or exception causes a loss of income.¹⁴ If courts with the power to declare both statutes and lower court decisions unconstitutional employ the balancing paradigm, these courts inevitably define both the upper and lower boundaries of a permissible IP policy.¹⁵ For example, the CJEU found that court injunctions against internet access and host providers to install a very specific automatic system for filtering peer-to-peer networks in order to prevent copyright infringements did not respect the requirement of a fair balance between the right to intellectual property on the one hand and the freedom to conduct business, the right to protection of personal data and the freedom to receive or

⁹ ECJ Case C-275/06 *Promusicae* [2008] ECR I-271, paras 61-69.

¹⁰ CJEU Case C-70/10 *Scarlet Extended* [2011] ECR I-0000, paras 41 et seq; CJEU Case C-360/10 *SABAM* [2012] ECR I-0000, paras 42-44.

¹¹ E.g. ECHR no 36769/08 *Ashby Donald et Autres c. France*, § 40.

¹² *Oberster Gerichtshof* Case 4 Ob 66/10z, 13.07.2010, *Zeitschrift für Urheber- und Medienrecht* 2011, 275; *Oberster Gerichtshof* Case 4 Ob 42/12y, 17.04.2012, *Ecolex* 2012, 706.

¹³ Canadian Supreme Court *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13.

¹⁴ Daniel J. Gervais, *supra* note 6, at 21-22. The discussions about limitations and exceptions to copyright at WIPO show that none of these allegations can claim broad international consensus; see <http://www.wipo.int/copyright/en/limitations/>.

¹⁵ Laurence R. Helfer, *supra* note 4, at 46.

impart information on the other.¹⁶ Balancing four fundamental rights allows for the resolution of a very concrete private dispute – a magic wand indeed, which is moreover readily at hand: In *Bonnier Audio*, the CJEU applied the fair-balance test to a specific compromise between copyright enforcement on the internet and privacy under Swedish national law, although the *Högsta domstolen* had limited its referring questions to certain directives and expressly declared that the enforcement measure at issue was considered proportionate.¹⁷ And in *Luksan*, the CJEU held that national legislation that denies the principal director of a cinematographic work the rights to exploit her work runs afoul of art 17 para 2 of the Charter.¹⁸ This jurisprudence is criticised for advancing a harmonisation agenda beyond the existing *acquis* without, however, thoroughly applying the Charter. The reference to striking a “fair balance” is considered nothing more than “rhetorical cover for the expansion of [the CJEU’s] jurisdiction”.¹⁹

Balancing fundamental rights in a particular case can even bring about a new exception to copyright law. According to the Austrian *Oberster Gerichtshof*, an otherwise infringing use of a protected work – for example the making available of critical newspaper articles about a person on that person’s website without any further comments²⁰ or the modification of and comment on an election poster of a political party in order to protest against pro-abortion policies²¹ – is nevertheless lawful if six requirements are met: The expression of the defendant is protected under art 10 ECHR; it is not a false and defamatory statement; the use of the work does not undermine the economic interests of the author; it does not conflict with the normal exploitation of the work; it does not prejudice the legitimate interests of the author; and last but not least, the defendant cannot at all or only insufficiently exercise her fundamental right to freedom of expression without interfering with the exclusive copyrights of the

¹⁶ CJEU Case C-70/10 *Scarlet Extended* [2011] ECR I-0000, paras 41 et seq; CJEU Case C-360/10 *SABAM* [2012] ECR I-0000, paras 46 et seq.

¹⁷ CJEU Case C-461/10 *Bonnier Audio* [2012] ECR I-0000, paras 56-60.

¹⁸ CJEU Case C-277/10 *Luksan* [2012] ECR I-0000, paras 68-71.

¹⁹ Jonathan Griffiths, *Constitutionalising or Harmonising? The Court of Justice, the Right to Property and European Copyright Law*, 38 *European Law Review* (2013) 65, 78.

²⁰ *Oberster Gerichtshof* Case 4 Ob 66/10z, 13.07.2010, *Zeitschrift für Urheber- und Medienrecht* 2011, 275.

²¹ *Oberster Gerichtshof* Case 4 Ob 66/10z, 13.07.2010, *Zeitschrift für Urheber- und Medienrecht* 2011, 275.

plaintiff. By articulating these general requirements, the *Oberster Gerichtshof* has created a kind of free-speech fair-use clause. Convincing as this result may be, the Austrian legislature has until now refrained from taking this step. This is not only due to a corresponding civil-law tradition, ignorance or lobbying: The closed list of optional limitations and exceptions to copyright according to art 5 Directive 2001/29 on Copyright in the Information Society²² does not allow Member States to codify such a flexible rule. Instead, this measure is within the exclusive competence of the EU legislature.²³

2. Flaws of the Balancing Paradigm

These examples already highlight why the balancing paradigm has been subject to widespread criticism. This method fails to explain according to which normative criteria a conflict between fundamental rights is to be resolved. What such weighing without a scale will yield is not foreseeable, and it automatically tends to lead to ad-hoc interventions with weak if any foundation in positive law.²⁴

When it comes to conflicts between the fundamental right to property and other fundamental rights such as the freedom of expression, the balancing paradigm is particularly inappropriate: The reason for this specific defect is that the balancing paradigm rests upon the assumption that all fundamental rights are of equal normative value, and that there is no hierarchical order between them.²⁵ Indeed, the CJEU employs the balancing exercise irrespective of whether the freedom to conduct a business conflicts with the freedom of the press or the right to property.²⁶ The Austrian *Oberster Gerichtshof* justifies its jurisprudence in conflicts between copyright and the freedom of expression with a reference to

²² Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L 167, 22.6.2001, p 10.

²³ See *infra* II 2.

²⁴ Critical Abraham Drassinower, *From Distribution to Dialogue: Remarks on The Concept of Balance in Copyright Law*, *The Journal of Corporation Law* 34 (2009), 991, 998; Jonathan Griffiths, *supra* note 19, at 74 (“vacuous and unhelpful”); Laurence R. Helfer, *supra* note 4, at 50.

²⁵ Christophe Geiger, note 5, at 386; Laurence R. Helfer/Graeme W. Austin, *supra* note 3, at 509 (conceptual equivalence).

²⁶ CJEU Case C-283/11 *Sky Österreich* [2013] ECR I-0000, paras 59-60 with reference to *Promusicae* (*supra* note 9).

the case law of the ECHR in conflicts between the freedom of the press and the right to privacy.²⁷

This starting point, however, disregards a fundamental difference between the right to property and other individual freedoms. To hold opinions and to receive and impart information and ideas, to live a private and family life, to conduct a business, to undertake artistic and scientific activities – all these human activities are conceived of as preceding state activity.²⁸ As undefined areas of individual freedom, they are protected by fundamental rights against unjustified state interventions. The common principle underlying these specific freedoms is the principle of equal negative liberty. In this principle, every person's dignity, freedom and equality before the law culminate. The preservation of a maximum of equal negative liberty can be said to form the ultimate end of a democratic society under the rule of law.²⁹ Conflicts between fundamental freedoms have to be resolved under the principle of *praktische Konkordanz* (consistency in practice) to the effect that the fundamental rights of all persons involved are granted the broadest possible effect.³⁰

Conflicts involving the fundamental right to property have to be resolved according to different rules because the subject matter and structure of this fundamental right differs categorically from the aforementioned fundamental freedoms. The fundamental right to property protects neither human activities and properties nor valuable goods as fruits of human labour *as such*. Instead, it guarantees the existence and individual enjoyment of certain legal institutions, namely, property rights with sufficient basis in the legal order. Lawmaking is required in order to establish the subject matter of the fundamental right to property and thus its applicability in the first place.³¹ The legislature is the

²⁷ See *Oberster Gerichtshof* Case 4 Ob 42/12y, 17.04.2012, *Ecolex* 2012, 706, at 3.2 with reference to ECHR no 40660/08, 60641/08 *von Hannover v. Germany (no 2)*.

²⁸ Ernst Wolfgang Böckenförde, *Grundrechtstheorie und Grundrechtsinterpretation*, *Neue Juristische Wochenschrift* 1974, 1529, 1530 et seq.

²⁹ See *Bundesverfassungsgericht* Case 1 BvR 209/83 and others, 15.12.1983, BVerfGE 65, 1, 41 - *Volkszählung*; Helmut Coing, *Grundzüge der Rechtsphilosophie*, 5th ed, de Gruyter 1999, at 153 (freedom and equality as the basis of the entire development of the modern state); Alexander Peukert, *Güterzuordnung als Rechtsprinzip*, Mohr Siebeck 2008, 726 et seq, 774 et seq, 906 et seq.

³⁰ On the principle of "praktische Konkordanz", see *Bundesverfassungsgericht* Case 1 BvF 1, 2, 3, 4, 5, 6/74, 25.02.1975, BVerfGE 39, 1, 43 – *Schwangerschaftsabbruch I*; Konrad Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland*, 20th ed, Müller 1999, para 317 et seq.

³¹ Alexander Peukert, *supra* note 29, at 692 et seq.

creator of the subject matter of the fundamental right to property, which in turn protects this legal institution from unjustified interferences by that legislature and other public authorities.

This structure of the fundamental right to property is well established in the jurisprudence of the ECHR on art 1 of protocol no 1 ECHR. This article entitles every person to the peaceful enjoyment of his “possessions”, but leaves states the right to control the use of “property”. However, the *travaux préparatoires* show that this inconsistent wording is meant to guarantee the “right of property” or the “right to property” and thus a legal institution and not an economic value or interest as such.³² The ECHR holds that art 1 of protocol no 1 is not limited to ownership of physical goods and is independent of the formal classification in domestic law. The right to property is applicable if the circumstances of the case, considered as a whole, may be regarded as having conferred on the applicant “title” or “property rights” to a substantive interest.³³ That title can either take the form of an existing property right³⁴ or a legitimate expectation of obtaining such a right. However, such an “expectation” is “legitimate” only if there is a “sufficient basis for the interest in national law”, for example in the case of specific legislation or a settled case law of the domestic courts confirming its existence.³⁵ In contrast, future income, including the “goodwill” of a business as such, cannot be considered to constitute “possessions” unless it has already been earned or is definitely payable.³⁶ An arguable or already lapsed claim is equally insufficient to establish a property right under art 1 of protocol no 1 ECHR.³⁷ Thus, the fundamental right to property does not

³² ECHR no 6833/74 *Marckx v. Belgium*, § 63; Jens Meyer-Ladewig, *Europäische Menschenrechtskonvention*, 3rd ed, Nomos 2011, art 1 para 8.

³³ ECHR no 31107/96 *Iatridis v. Greece* [GC], ECHR 1999-II, § 54; ECHR no 33202/96 *Beyeler v. Italy* [GC], ECHR 2000-I, § 100; ECHR no 48939/99 *Öneriyildiz v. Turkey*, 2004-XII, § 124; ECHR no 15578/03 *Yuriy Lobanov v. Russia*, § 32.

³⁴ See ECHR no 31206/02 *Fokas v. Turkey*, § 34; on licenses/privileges to perform a business ECHR no 23780/08 *Malik v. The United Kingdom*, §§ 89 et seq with further references.

³⁵ See ECHR no 21861/03 *Hamer v. Belgium*, ECHR 2007-V, § 76; ECHR no 31925/08, *Grudic v. Serbia*, § 72 (pensions); ECHR no 58472/00 *Dima c. la Roumanie* (copyrights); Arjen van Rijn, in: Pieter van Dijk et al, *Theory and Practice of the European convention on Human Rights*, 4th ed, Intersentia 2006, 869.

³⁶ ECHR no 23780/08 *Malik v. The United Kingdom*, §§ 90-93.

³⁷ See ECHR no 44912/98 *Kopecný v. Slovakia*, ECHR 2004-IX, § 52; ECHR no 73049/01 *Anheuser-Busch Inc. v. Portugal*, ECHR 2007-I, §§ 63 et seq; ECHR no 31206/02 *Fokas v. Turkey*, § 33, §§ 35 ff.; ECHR no 18768/05 *Saghinadze and Others v. Georgia*, § 103; ECHR no 38433/09 *Centro Europa 7 S.R.L. and Di Stefano v. Italy*, § 171.

guarantee the right to acquire possessions,³⁸ but it applies, for example, to the already existing bundle of financial rights and interests that arise upon an application for the registration of a trade mark.³⁹

The same principles govern art 17 para 1 of the Charter of Fundamental Rights of the EU. It only applies to “lawfully acquired possessions”, which the CJEU defines as “*rights* with an asset value creating an established legal position under the legal system, enabling the holder to exercise those rights autonomously and for his benefit”.⁴⁰

Finally, art 14 of the German Basic Law is even more outspoken on the point. Firstly, its wording refers to legal institutions, namely, “*Eigentum*” (properly translated as property *right*),⁴¹ and “*Erbrecht*” (the right of inheritance). Art 14 para 1 s 2 goes on to proclaim that “the content and limits” and thus the very definition of what constitutes “*Eigentum*” and the right of inheritance “*shall be defined by the laws*”.⁴² The *Bundesverfassungsgericht* has consistently held that there is no absolute, pre-defined concept of property.⁴³ The fundamental right to property is only applicable if the claimant can show that she owns an existing subjective *right*, which is allocated to her according to the law, and which entitles her to use and dispose of the subject matter for private purposes and to exclude others from it as in the classical case of *Sacheigentum* (rights in real property).⁴⁴

³⁸ ECHR no 23780/08 *Malik v. The United Kingdom*, § 88.

³⁹ ECHR no 73049/01 *Anheuser-Busch Inc. v. Portugal*, ECHR 2007-I, § 76 et seq.

⁴⁰ CJEU Case C-283/11 *Sky Österreich* [2013] ECR I-0000, para 34. Similarly Inter-American Court of Human Rights, *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Series C no 79 (2001), para 144 (“Property can be defined as those material things which can be possessed, as well as any right which may be part of a person’s patrimony; that concept includes all movables and immovables, corporal and incorporeal elements and any other intangible object capable of having value”).

⁴¹ On the use of “property” as a translation of “*Eigentum*” and “*propriété*” see Alexander Peukert, “Intellectual Property”, in: Jürgen Basedow/Klaus J. Hopt/Reinhard Zimmermann (eds), *The Max Planck Encyclopaedia of European Private Law*, Oxford University Press 2012, vol I, 926, 930; in the context of art 1 of protocol no 1 ECHR see Jens Meyer-Ladewig, supra note 32, art 1 para 8.

⁴² See *Bundesverfassungsgericht* Case 1 BvL 19/76, 12.06.1979, BVerfGE 52, 1, 27 - *Kleingarten I*.

⁴³ *Bundesverfassungsgericht* Case 1 BvR 987/58, 14.11.1962, BVerfGE 15, 126, 143 et seq – *Staatsbankrott*.

⁴⁴ See *Bundesverfassungsgericht* Case 1 BvR 673/64, 18.12.1968, BVerfGE 24, 367, 390 - *Hamburgisches Deichordnungsgesetz*; *Bundesverfassungsgericht* 1 BvL 9/75, 22.05.1979, BVerfGE 51, 193, 211 - *Weinggesetz I*; *Bundesverfassungsgericht* 1 BvR 1804/03, 07.12.2004, BVerfGE 112, 93, 107 – *Zwangsarbeiter*.

Since exclusive property rights⁴⁵ are “creatures of statute”,⁴⁶ there is a *numerus clausus* of such rights. What is not in the books has no legal existence. In our case, these books are IP statutes.⁴⁷ At least under German constitutional law, but I would argue under the European Convention of Human Rights⁴⁸ and EU law too,⁴⁹ it is in the exclusive competence of the legislature to create exclusive IP rights.⁵⁰ Only the representative, parliamentary consent to a new exclusive right justifies its binding effect *erga omnes*. Only this form ensures that the legal basis meets the requirements of the rule of law as regards foreseeability, accessibility and precision.⁵¹

This constitutional reasoning is fully in line with the history and practice of modern international IP law. Ever since *Donaldson v. Beckett*,⁵² it has been widely accepted in both common law and civil law jurisdictions that copyrights, patents and other IPRs only exist under the statutes, as “creatures” of the

⁴⁵ With regard to contractual and non-contractual claims as property rights, private parties and courts have a more significant role to play. On the distinction between exclusive property rights, contractual and non-contractual claims see Alexander Peukert, *supra* note 29, at 873 et seq.

⁴⁶ Canadian Supreme Court *Théberge v. Galerie d'Art du Petit Champlain Inc.*, 2002 SCC 34, [2002] 2 S.C.R. 336, at para 5; US Supreme Court *Wheaton v. Peters* 33 U.S. 591 (1834), at 662-663 (“This right ... does not exist at common law - it originated, if at all, under the acts of congress.”); *Bundesverfassungsgericht* Case 1 BvL 77/78, 15.07.1981, BVerfGE 58, 300, 330 - *Naßauskiesung* (“The legislature creates on the level of objective laws those provisions which establish the legal position of the owner”).

⁴⁷ On the applicability of the fundamental right to property to IP rights see art 17 para 2 Charter; ECHR no 73049/01 *Anheuser-Busch Inc. v. Portugal*, ECHR 2007-I, § 72; ECHR nos 25379/04, 21688/05, 21722/05 and 21770/05 *Paeffgen GmbH v. Germany*; ECHR no 40397/12 *Fredrik Neij and Peter Sunde Kolmisoppi v. Sweden*.

⁴⁸ However, the ECHR Court does not consider it necessary to decide in the abstract whether the role in the continental-law system of a rule established by the courts is comparable to that of statutory provisions, it being more important – in any event – to ensure that the legal basis at stake meets the requirements of foreseeability, accessibility and precision in order to be “lawful”; see ECHR no 34478/97 *Fener Rum Erkek Lisesi Vakfı v. Turkey*, §§ 50, 51 with further references.

⁴⁹ On the protection of sporting events see CJEU Joined cases C-403/08 and C-429/08 *Football Association Premier League and Others and Karen Murphy* [2011] ECR I-0000, paras 96-104.

⁵⁰ Alexander Peukert, *supra* note 29, *passim*; Jonathan Griffiths, *supra* note 19, at 69-70; Sascha Sebastian, *Geistiges Eigentum als europäisches Menschenrecht - Zur Bedeutung von Art. 1 des 1. Zusatzprotokolls zur EMRK für das Immaterialgüterrecht*, *Gewerblicher Rechtsschutz und Urheberrecht, Internationaler Teil* 2013, 524, at 527.

⁵¹ See ECHR no 34478/97 *Fener Rum Erkek Lisesi Vakfı v. Turkey*, § 50; Peukert, *supra* note 29, at 884 et seq.

⁵² *Donaldson v. Beckett* 1 English Reports 837, 839 (1774) (“and such a restraint of the liberty of many, for the sake of one, was never established by natural justice”) *contra* *Millar v. Taylor* 4 Burr. 2303, at 2334 (1769): (“It is certainly not agreeable to natural justice, that a stranger should reap the beneficial pecuniary produce of another man’s work”).

legislature. For this reason, they are universally considered “territorial in nature”, bound to the territory of the public authority granting them.⁵³

In sum, the fundamental right to property entails a paradox: Property rights are a result of state activity but at the same time they are protected from interference by public authorities. This unique structure distinguishes the right to property from all other individual freedoms. Therefore, conflicts between the right to property and for example the freedom of expression cannot be resolved by weighing or balancing as if they were of equal rank and structure.⁵⁴ Nor is there a principal priority of either the fundamental right to property or conflicting fundamental rights and freedoms.

3. Justifying Expansions and Limitations of Property Rights

Instead, the paradox of the fundamental right to property has to be resolved by distinguishing two points in time: before and after IP legislation creates IP rights. At both points in time, expanding or limiting IP protection requires justification, not balancing.

The moment *before* an IP law enters into effect and thereby creates or extends IP rights, everyone is equally at liberty to use the respective intangible. By establishing areas of private dominion, the legislature encroaches upon the public domain. It grants the owner a privilege of exhibiting certain activities exclusively whereas all others have to refrain from this conduct. Thereby, their principally equal negative liberty to access and use the good for communicative or other purposes is limited. Such interference *always* requires justification,

⁵³ German *Reichsgericht* II 45/02, 02.05.1902, RGZ 51, 263, at 266; Supreme Court of Canada, *Society of Composers, Authors and Music Publishers of Canada v. Canadian Association of Internet Providers*, 2004 SCC 45, [2004] 2 S.C.R. 427, at para 2; ECJ Case C-192/04 *Lagardère Active Broadcast* [2005] ECR I-7199, para 46; US Court of Appeals for the Federal Circuit, *Voda v. Cordis* 476 F.3d 887, at 902 (2007); Alexander Peukert, “Territoriality and Extraterritoriality in Intellectual Property Law”, in Günther Handl/Joachim Zekoll/Peer Zumbansen (eds), *Beyond Territoriality: Transnational Legal Authority in an Age of Globalization*, Brill Academic Publishing 2012, 189-228.

⁵⁴ This method is not even proper if fundamental freedoms or two or more property rights (see, eg ECHR nos 25379/04, 21688/05, 21722/05 and 21770/05 *Paeffgen GmbH v. Germany*) conflict. The reason is that disputes between private parties involve two different dimensions of fundamental rights, namely the protective function of fundamental rights (typically invoked by the plaintiff) and their classical defensive function (typically invoked by the defendant); see, in this regard, Claus-Wilhelm Canaris, *Grundrechte und Privatrecht*, Archiv für die civilistische Praxis 184 (1984), 201, at 212 et seq.

even if it is executed in later cases.⁵⁵ Correspondingly, IP protection is not an end in itself but an instrument to achieve distinct aims.⁵⁶ Thus, even enforcing copyright law against the persons running “The Pirate Bay” peer-to-peer network amounts to an interference with their right to freedom of expression under art 10 ECHR. This measure violates art 10 *unless* it was “prescribed by law”, pursued one or more of the legitimate aims referred to in art 10 para 2 and was “necessary in a democratic society” to attain such aim or aims.⁵⁷

After an IP right has been created, the justification requirement reverses course. Now, it is the interference with the fundamental right to property – be it a deprivation or the control of the use of the property right - that must be lawful and must pursue a legitimate aim by means reasonably proportionate to the aim it seeks to realise.⁵⁸

In sum, the relationship between IP rights and other fundamental rights is more complex than the balancing paradigm suggests. Whereas the creation, expansion and enforcement of IP rights has to be justified in light of necessary interferences with individual freedoms of users, the limitation of existing property rights has to be justified with a view to the fundamental right to property. Thus, the justification paradigm introduces a differentiated hierarchy of norms, which allows one to identify a basic rule (property or freedom, respectively) on which a court can rely unless there are lawful, legitimate and proportionate reasons not to do so. This methodology is well established in the practice of constitutional courts. It calls upon a court to enter into a structured reasoning as to the legal basis at stake (lawfulness), the aims of the measure (legitimacy), and its effects (proportionality).⁵⁹ Even the principle of proportionality, however, is not properly applied by simply listing all interests

⁵⁵ See ECJ Case C-200/96 *Metronome Musik* [1998] ECR I-1953, para 26 and art 52 para 1 Charter: “Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms”. German constitutional law reaches the same result by extending the fundamental right to a “free development of one’s personality” (art 2 para 1 Basic Law) to every human activity; see *Bundesverfassungsgericht* Case 1 BvR 253/56, 16.01.1957, BVerfGE 6, 32, 36 et seq – *Elfes*; *Bundesverfassungsgericht* 1 BvR 921/85, 06.06.1989, BVerfGE 80, 137, 152 et seq - *Reiten im Walde*.

⁵⁶ Alexander Peukert, *Intellectual Property as an End in Itself?*, European Intellectual Property Review 2011, 67 et seq.

⁵⁷ ECHR no 40397/12 *Fredrik Neij and Peter Sunde Kolmisoppi v. Sweden*.

⁵⁸ See art 1 para 1 s 2, para 2 of protocol no 1 ECHR; art 17 para 1 s 2, 3 Charter; art 14 para 2, 3 German Basic Law.

⁵⁹ In the context of the ECHR see, for example, ECHR *Moskal v. Poland*, no 10373/05, §§ 49-52.

involved and picking the most important one. Instead, it requires a reasoning why the IP expansion/enforcement or limitation is capable of furthering the legitimate aim, whether it is necessary or whether there are less intrusive means to achieve the end, and finally, whether the measure is reasonable.⁶⁰ Only at the very last level may all interests be weighed. However, this balancing exercise may be resolved by drawing on the applicable basic rule – be it the protection of an existing property right or, conversely, the equal freedom to use public domain knowledge.

In sum, the justification paradigm provides an advanced constitutional methodology which promises a more coherent, comprehensive and transparent reasoning than a mere balancing of competing interests.⁶¹ This is not to say that the outcomes will necessarily differ. Doubtlessly, prejudices are very powerful drivers of decision making.⁶² It is, however, a naturalistic fallacy to therefore champion arbitrariness. A normative perspective under the rule of law demands a legal methodology that hinders ad hoc decisions and facilitates criticism and review by forcing the court into a structured, transparent reasoning. The justification approach comes much closer to this ideal than an invitation to weigh all interests involved.

II. The Limited Constitutional Limits of IP Lawmaking

Let me now proceed to my second point concerning the separation of power between the legislature and the judiciary in the area of IP law. In my view, the task to develop and justify IP protection is above all addressed to the legislature. The role of the judiciary, in contrast, is relatively limited. Again, proponents of the balancing paradigm tend to argue the contrary.⁶³

⁶⁰ *Bundesverfassungsgericht* Case 1 BvR 596/56, 11.06.1958, BVerfGE 7, 377, 405 - *Apothekenurteil*; ECJ Case C-44/79 *Hauer* [1979] ECR I-3727, paras 17 et seq.

⁶¹ In its more recent practice regarding art 1 of protocol no 1, the ECHR seems to rely less strongly on the rhetoric of “striking a fair balance” and instead applies the more differentiated three-prong test of lawfulness, legitimate aim and proportionality; see eg ECHR *Świątek v. Poland* (Application no 8578/04) 4 December 2012, § 61, § 70.

⁶² Josef Esser, *Vorverständnis und Methodenwahl in der Rechtsfindung: Rationalitätsgedanken der richterlichen Entscheidungspraxis*, Athenäum-Verlag 1970, at 136.

⁶³ See supra notes 3-6.

1. The Creation of IP Rights

Since the creation of IP rights is within the exclusive competence of the legislature,⁶⁴ it necessarily follows that at the moment of the creation of the rights, it is the legislature who has to consider conflicting fundamental rights. At that early stage, the legislature enjoys a very wide margin of appreciation. This is not to say that IP policy is categorically immune to fundamental-rights scrutiny or limited as in the U.S., where the Supreme Court refuses to even enter into a free-speech review of copyright as long as the idea/expression dichotomy and the fair-use defence as “built-in First Amendment accommodations” are available.⁶⁵ However, neither the right to property nor other fundamental rights imply a specific scope of IP protection:

It is true that art 27 para 2 of the Universal Declaration of Human Rights,⁶⁶ art 15 para 1 (c) of the International Covenant on Economic, Social and Cultural Rights⁶⁷ and national/regional guarantees of the right to property exhibit a protective dimension by calling for some form of property protection of works and inventions.⁶⁸ Art 17 para 2 of the Charter can certainly be read as articulating such a law-making mandate. The German *Bundesverfassungsgericht* also assumes that “the constituting elements of copyright as property within the meaning of the constitution include the axiomatic allocation of the proceeds of creative activity to the author by way of the provisions of private law, and the author’s freedom to dispose of his or her rights in his or her own responsibility.”⁶⁹

⁶⁴ Supra I 2.

⁶⁵ See supra note 1.

⁶⁶ “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”.

⁶⁷ “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”.

⁶⁸ Laurence R. Helfer/Graeme W. Austin, supra note 3, at 513 et seq; on positive obligations to secure the effective exercise of the rights defined in the ECHR see, eg ECHR no 878/80 *X and Y v. The Netherlands*, series A no 91, p 11, §§ 22-23; ECHR no 59857/00, *Bennich-Zalewski v. Poland*, § 91.

⁶⁹ Copyright: *Bundesverfassungsgericht* Case 1 BvR 1631/08, 30.08.2010, Neue Juristische Wochenschrift 2011, 288, at para 60 (English version available at http://www.bverfg.de/entscheidungen/rk20100830_1bvr163108en.html);

Bundesverfassungsgericht 1 BvR 276/71, 07.07.1971, BVerfGE 31, 270, 274 - *Schulfunksendung*; *Bundesverfassungsgericht* 1 BvR 352/71, 25.10.1978, BVerfGE 49, 382, 392 - *Kirchenmusik*; *Bundesverfassungsgericht* 1 BvR 1571/02, 26.01.2005, NJW-RR 2005, 686, 687; on the protection of inventors see *Bundesverfassungsgericht* Cases 1 BvL

“There is, however, nothing whatsoever in the wording of [art 17 para 2 of the Charter] or in the [CJEU’s] case-law to suggest that that right is inviolable and must for that reason be absolutely protected.”⁷⁰ Similarly, art 14 of the German Basic Law does not require that IP rights extend to “every conceivable possibility of exploitation”. Instead, the social function (*Sozialbindung*) of property rights calls for appropriate standards that ensure use and exploitation of the right in conformity with its general nature and social significance.⁷¹ It is up to the legislature to set, within the limits of its “relatively wide” margin of appreciation, the boundaries of IP protection so that the rights correspond to the nature of the subject matter and the interests of all parties concerned.⁷²

As a result, the abstract mandate to establish private property rights only concerns a very limited core of protection. The international human-rights framework merely requires that states adhere to previously established IP rules and forego arbitrary exercises of state power.⁷³ The abstract institutional guarantee of property under the German Basic Law demands that an individual is generally enabled to live an autonomous life in the economic sphere independent of public welfare.⁷⁴ It is certainly debatable whether authors and inventors would really be deprived of this prospect if the scope of today’s copyright and patent protection were significantly reduced or even abolished altogether. In any event, I am not aware of any court decision that has actually held that a certain level of protection falls short of that constitutional minimum. The international IP framework of today is definitely way beyond this chimera.⁷⁵

5/70, 1 BvL 6/70, 1 BvL 9/70, 15.01.1974, BVerfGE 36, 281, 290 et seq; *Bundesverfassungsgericht* Cases 1 BvR 1942/99, 1 BvR 1995/99, 13.03.2001, NJW 2001, 1783, 1785.

⁷⁰ CJEU Case C-70/10 *Scarlet Extended* [2011] ECR I-0000, para 43; CJEU Case C-360/10 *SABAM* [2012] ECR I-0000, para 41.

⁷¹ On authors’ rights *Bundesverfassungsgericht* Case 1 BvR 766/66, 08.07.1971, BVerfGE 31, 275, 286 et seq (no duty to provide for an unlimited protection); *Bundesverfassungsgericht* 1 BvR 352/71, 25.10.1978, BVerfGE 49, 382, 403 – *Kirchenmusik* (not every public performance has to be subject to exclusive rights). On patent law *Bundesverfassungsgericht* Cases 1 BvL 5/70, 1 BvL 6/70, 1 BvL 9/70, 15.01.1974, BVerfGE 36, 281, 290 et seq (no patent protection without registration); *Bundesverfassungsgericht* 1 BvR 1942/99, 1 BvR 1995/99, 13.03.2001, NJW 2001, 1783, 1784 (no duty to prevent competition after the patent term elapsed).

⁷² *Bundesverfassungsgericht* Case 1 BvR 766/66, 08.07.1971, BVerfGE 31, 275, 286; *Bundesverfassungsgericht* Case 1 BvR 1631/08, 30.08.2010, *Neue Juristische Wochenschrift* 2011, 288, at para 60 (English version available at http://www.bverfg.de/entscheidungen/rk20100830_1bvr163108en.html).

⁷³ Laurence R. Helfer/Graeme W. Austin, *supra* note 3, at 516.

⁷⁴ Alexander Peukert, *supra* note 29, at 702 et seq.

⁷⁵ Laurence R. Helfer/Graeme W. Austin, *supra* note 3, at 514.

Conversely, there are also few upper constitutional limits on the expansion of IPRs. If the legislature prefers new exclusive rights and longer terms of protection because it considers this solution to be in the public interest, courts must not replace this judgment with their own political view. Only if such encroachments upon the public domain and thus individual freedoms cannot be said to be “necessary in a democratic society” may such an expansion be struck down for constitutional reasons.⁷⁶ Retroactive term extensions are certainly debatable in this context.⁷⁷ An unlimited term of copyright or patent protection would clearly run afoul of communicative freedoms.⁷⁸

2. Interferences with Existing IP Rights

If IP rights have been established by IP laws, both the European Convention on Human Rights and art 17 para 1 of the Charter require that their deprivation or the control of their use find a foreseeable basis in the law.⁷⁹ Again, it is the legislature who has to provide for the respective regulations. Accordingly, it is the legislature who is called upon to justify such interferences with the fundamental right to property. The task of the courts is basically to apply this IP framework, not to rewrite it.

And again, the legislature enjoys a considerable margin of appreciation to amend IP legislation. The fundamental right to property does not guarantee today’s standard of IP protection. According to the CJEU, the right to property is not an absolute right and must be viewed in relation to its social function. Consequently, its exercise may be restricted, provided that those restrictions in fact correspond to objectives of general interest and do not constitute disproportionate and intolerable interference, impairing the very substance of the right guaranteed.⁸⁰ Similarly, the ECHR asks whether an interference by a

⁷⁶ ECHR no 40397/12 *Fredrik Neij and Peter Sunde Kolmisoppi v. Sweden*.

⁷⁷ See Alexander Peukert, *Die Gemeinfreiheit: Begriff, Funktion, Dogmatik*, Mohr-Siebeck 2012, 79 et seq. Without any reference to the fundamental right to conduct a business CJEU Case C-168/09 *Flos* [2011] ECR I-0000, paras 32 et seq Contra US Supreme Court *Golan v. Holder* 132 S.Ct. 873 (2012).

⁷⁸ Alexander Peukert, supra note 78, at 76 et seq.

⁷⁹ See supra note 58.

⁸⁰ ECJ Case C-200/96 *Metronome Musik* [1998] ECR I-1953, para 21; CJEU Case C-379/08 *Raffinerie Mediterranée and others* [2010] ECR I-2007, para 80; CJEU Case C-416/10 *Jozef Križan and others* [2013] ECR I-0000, para 113. Similarly *Bundesverfassungsgericht* Case 1 BvL 77/78, 15.07.1981, BVerfGE 58, 300, 351 - *Naßauskiesung*.

public authority with the peaceful enjoyment of existing property rights is lawful and pursues a legitimate aim by means reasonably proportionate to the aim to be realised.⁸¹ If these general requirements are met, new limitations or exceptions to existing IP rights may be introduced. According to all fundamental-rights regimes considered here, the legislature enjoys, depending upon the level of constitutional scrutiny applied, a “certain”,⁸² “important”⁸³ or even “wide”⁸⁴ discretion in determining the steps to be taken to ensure compliance with fundamental-rights obligations.

The constitutional margin becomes wider still if the IP legislation applies only to works, inventions or other subject matter created after the coming into force of the new, more limited rules. In such a situation, the amendment does not reduce the scope of already existing IP rights. Instead, future IP rights will come into existence with a more limited scope than rights that accrued in the same subject matter before the amendment. Such an adjustment is constitutional already if the legislature can show objective reasons for its new policy.⁸⁵ As explained, the fundamental right to property does not tie future IP policy to today’s standards but only requires a very basic minimum of IP protection. Thus, even drastic reductions of the scope of IP protection - be it by increasing the thresholds for protection, shortening the terms of protection or even excluding certain subject matter from protection at all – can be accomplished without running afoul of constitutional obligations.

As already indicated, the task of the judiciary is a much more limited one. What courts are called upon to do is to apply the existing IP framework as it stands, as regards both its upper and its lower boundaries.⁸⁶ Trivial as this assessment may seem at first glance, it has significant effects if applied rigorously.

⁸¹ ECHR nos 7151/75, 7152/75 *Sporrong and Lönnroth v. Sweden*, series A no 52, § 69; ECHR no 36813/97 *Scordino v. Italy (no 1)*, ECHR 2006-V, § 93; ECHR no 27912/02 *Suljagić v. Bosnia and Herzegovina*; ECHR no 8578/04 *Swiatek v. Poland*, § 61.

⁸² ECHR no 31443/96 *Broniowski v. Poland*, ECHR 2004-V, § 144; ECHR no 36022/97 *Hatton and Others v. the United Kingdom* [GC], ECHR 2003-VIII, §§ 98 et seq.

⁸³ In the area of IP legislation, see ECHR no 36769/08 *Ashby Donald et Autres c. France*, § 40.

⁸⁴ ECHR no 45036/98 *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v. Ireland*, 2005-VI, § 149; ECHR no 20496/02 *Silickiene v. Lithuania*, § 63.

⁸⁵ See *Bundesverfassungsgericht* Cases 1 BvL 5/70, 1 BvL 6/70, 1 BvL 9/70, 15.01.1974, BVerfGE 36, 281, 290 et seq; Alexander Peukert, *supra* 29, at 697 et seq.

⁸⁶ *Bundesverfassungsgericht* Case 1 BvR 1916/09, 19.07.2011, *Neue Juristische Wochenschrift* 2011, 3428, at para 86 - *Le Corbusier*.

On the one hand, exclusivity extends only so far as it is provided for in the law. Today's level of protection must not be interpreted beyond what was clearly envisaged by the legislature because that level is already way beyond the constitutional minimum of property protection.⁸⁷ Since IP rights depart from the basic norm of equal negative liberty⁸⁸ or, put metaphorically, IP rights are "islands of exclusivity in an ocean of freedom",⁸⁹ the scope of exclusivity must not be interpreted extensively. The fundamental right to property does not imply a "high level of protection" logic.⁹⁰ The CJEU is therefore correct in holding that the distribution right according to art 4 para 1 Directive 2001/29 applies only where there is a transfer of the ownership of the original of a work or a copy thereof but not to a public exhibition of a copy of a work – in spite of the fact that the rightholder will have to forego compensation for this valuable use.⁹¹

On the other hand, limitations and exceptions also have to be applied according to their purpose, which is to realise certain fundamental freedoms. Just as exclusive rights must not be interpreted extensively, statutory limitations and exceptions must not be applied in a particularly restrictive way.⁹² In the early days of its copyright jurisprudence, the CJEU was of the opposite view. The court argued that the exhaustive list of optional copyright exceptions and limitations in art 5 Directive 2001/29 has to be interpreted strictly because it is subject to the three-step test,⁹³ and the provisions derogate from the general principle established by the Directive, namely, the requirement of authorisation from the rightholder for any reproduction of a protected work.⁹⁴ In the meantime, however, the court has clarified and significantly qualified its rigid starting point. It has added a second principle according to which even a "strict" interpretation of copyright exceptions and limitations nonetheless must enable the effectiveness of the provision at stake to be safeguarded and its purpose to be observed, which is – again – to strike a fair balance between interests of the

⁸⁷ ECJ Case C-456/06 *Peek & Cloppenburg* [2008] ECR I-2731, paras 37 et seq.

⁸⁸ *Supra* I 2.

⁸⁹ Christophe Geiger, *Fundamental Rights, a Safeguard for the Coherence of Intellectual Property Law?*, IIC 35 (2004), 268, at 272.

⁹⁰ Alexander Peukert, *supra* note 57, at 67 et seq.

⁹¹ ECJ Case C-456/06 *Peek & Cloppenburg* [2008] ECR I-2731, paras 37 et seq.

⁹² Canadian Supreme Court *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 S.C.R. 339, para 48 (interpretation of fair dealing).

⁹³ See art 5 para 5 Directive 2001/29 (*supra* note 22).

⁹⁴ ECJ Case C-5/08 *Infopaq I* [2009] ECR I-6569, paras 56-59.

rightholder and those of users.⁹⁵ Whereas this new doctrine is a step in the right direction, it suffers from the same flaws as the underlying balancing paradigm: If the two principles of interpreting copyright exceptions and limitations (namely strict vs. flexible interpretation of exceptions/limitations) are of equal rank but lead to contrary results (namely exclusivity vs. lawful use), it remains – again – unclear why one of the two approaches prevails.

Moreover, in *Brüstle v. Greenpeace*, the Grand Chamber of the CJEU did not apply this hermeneutic framework to the interpretation of EU Directive 98/44 on the Legal Protection of Biotechnological Inventions. Instead, it chose a different methodology, namely, that “the meaning and scope of terms for which European Union law provides no definition must be determined by considering, inter alia, the context in which they occur and the purposes of the rules of which they form part”.⁹⁶ The Court held that although Directive 98/44 seeks to promote investment in the field of biotechnology by harmonising patent law, the Directive at the same time shows that the EU legislature intended to exclude any possibility of patentability where respect for human dignity could thereby be affected. On this basis, it gave “wide meaning” to the specific exclusion of patentability for “uses of human embryos for industrial or commercial purposes”.⁹⁷

Indeed, since exceptions and limitations form an integral part of IP laws, courts have to interpret these acts as a whole according to their wording, context, and purpose. The *Bundesverfassungsgericht* recently felt impelled to make the IP community take note of this matter of course. As both copyright as well as its limitations are underpinned by fundamental rights – namely, the fundamental right to property and, for example, the fundamental right to freedom of expression - limitations and exceptions must be interpreted neither restrictively nor extensively but according to what they are meant to cover under the legislative scheme.⁹⁸

⁹⁵ ECJ Joined cases C-403/08 and C-429/08 *Football Association Premier League and Others and Karen Murphy* [2011] ECR I-0000, paras 163-164; CJEU Case C-145/10 *Painer* [2011] ECR I-0000, paras 133-134.

⁹⁶ CJEU Case C-34/10 *Brüstle* [2011] ECR I-0000, para 31.

⁹⁷ CJEU Case C-34/10 *Brüstle* [2011] ECR I-0000, paras 32 et seq.

⁹⁸ *Bundesverfassungsgericht* Case 1 BvR 1145/11, 17.11.2011, *Neue Juristische Wochenschrift* 2012, 754, 755 with further references.

It is true that this framework has to be interpreted in conformity with fundamental rights. If the interpretation and application of non-constitutional law allow for more than one interpretation, courts must give preference to the one that corresponds to the values enshrined in the constitution.⁹⁹ Such a reading informed by fundamental rights can lead both to giving preference to IP protection¹⁰⁰ as well as to favouring communicative freedoms.¹⁰¹

However, respect for the legislature requires an interpretation that is “consistent with the wording of the statute and preserves the fundamental aim of the legislature”.¹⁰² If courts resolve a case by directly balancing conflicting interests and fundamental rights, they “encroach upon the relationship between copyright and the freedom of the press as already established by the legislature on the basis of its discretion”.¹⁰³ Deciding IP cases directly on the basis of balancing fundamental rights runs afoul of the principle of separation of powers. The priority of applying the relevant statutory framework is also reflected in the jurisprudence of the CJEU, which requires first and foremost an application of

⁹⁹ See *Bundesverfassungsgericht* Case 1 BvL 45/56, 23.10.1958, BVerfGE 8, 210, 220-221.

¹⁰⁰ *Bundesverfassungsgericht* Case 1 BvR 1631/08, 30.08.2010, *Neue Juristische Wochenschrift* 2011, 288, at para 66 (English version available at http://www.bverfg.de/entscheidungen/rk20100830_1bvr163108en.html) (the constitutional requirement that the proceeds of creative activity should in principle be assigned to the author rules out a waiver of any statutory remuneration whatsoever); *Bundesgerichtshof* Case I ZB 80/11, 19.04.2011, *Neue Juristische Wochenschrift* 2012, 2958 - *Alles kann besser werden* (copyright has to be enforceable against every infringement on the internet).

¹⁰¹ *Bundesverfassungsgericht* Case 1 BvR 825/98, 29.06.2000, *Neue Juristische Wochenschrift* 2001, 598 - *Germania III* (quotation right); *Bundesverfassungsgericht* Case 1 BvR 1248/11, 15.12.2011, *Neue Juristische Wochenschrift* 2012, 1205 - *AnyDVD* (reach of injunctions); *Bundesgerichtshof* Case I ZR 117/00, 20.03.2003, IIC 35 (2004), 984 - *Gies-Adler* (free uses and parody); *Bundesgerichtshof* Case I ZR 159/02, 03.02.2005, *Neue Juristische Wochenschrift* 2005, 2856 - *Lila Postkarte* (trademark parodies).

¹⁰² *Bundesverfassungsgericht* Case 1 BvR 1631/08, 30.08.2010, *Neue Juristische Wochenschrift* 2011, 288, at para 60 (English version available at http://www.bverfg.de/entscheidungen/rk20100830_1bvr163108en.html);

Bundesverfassungsgericht Cases 2 BvR 1041/88, 2 BvR 78/89, 03.06.1992, BVerfGE 86, 288, 320. Art 20 paras 2 and 3 German Basic Law reads: “(2) All state authority is derived from the people. It shall be exercised by the people through elections and other votes and through specific legislative, executive and judicial bodies. (3) The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice.” (see http://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0107).

¹⁰³ *Bundesverfassungsgericht* Case 1 BvR 1145/11, 17.11.2011, *Neue Juristische Wochenschrift* 2012, 754, 755; *Bundesgerichtshof* Case I ZR 117/00, 20.03.2003, IIC 35 (2004), 984 - *Gies-Adler* (courts have to apply the limitations and exceptions to copyright as codified and must not enter into a general balancing exercise); Canadian Supreme Court *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34, [2012] 2 S.C.R. 231, para 123, (Rothstein J. (dissenting): “While the courts should strive to maintain an appropriate balance between these two goals ..., inferring limits into the communication right in the present case would be beyond the function of the courts”).

the *acquis* and only as a second step, if possible and necessary in the case at hand, an interpretation of these statutes in the light of EU fundamental rights.¹⁰⁴ But what if the applicable IP statute does not allow for a consideration of conflicting fundamental freedoms by means of interpretation because it specifically rules out certain communicative freedoms? For example, art 6 Directive 2001/29 on the legal protection of technological protection measures does not allow EU Member States to enforce the limitations for the purpose of quotations, parody, caricature or pastiche against digital rights management systems. The respective list of “first class” copyright limitations and exceptions is exhaustive, and moreover, it is not applicable in the digital network environment.¹⁰⁵ Thus, the Directive deliberately entitles rightholders to suppress even core political speech and artistic behaviour in order to promote pay-per-use business models on the internet.¹⁰⁶

But even in such a scenario, courts must not simply switch into the balancing mode.¹⁰⁷ Instead of developing an unwritten solution directly on the basis of fundamental rights, they have to articulate that the exclusive right as codified interferes, as in our example, with the freedom of expression or the freedom of the arts. If the court considers this interference to be unjustifiable, it is bound to hold that the exclusive IP right in that respect is unconstitutional. The consequence would be that the IP right is rendered inapplicable so that the freedom of expression automatically prevails. It is then the responsibility and competence of the legislature to redefine the content and limits of IP rights in a way that duly reflects other fundamental freedoms.¹⁰⁸

¹⁰⁴ ECJ Case C-275/06 *Promusicae* [2008] ECR I-271, para 66; Opinion of Advocate General Kokott Case C-275/06 *Promusicae* [2008] ECR I-271, para 56 (“The balance between the relevant fundamental rights must first be struck by the Community legislature and, in the interpretation of Community law, by the Court.”); see also CJEU Case C-416/10 *Jozef Križan and others* [2013] ECR I-0000, para 115. But see *supra* notes 16-18.

¹⁰⁵ See art 6 para 4 subpara 4 Directive 2001/29 (*supra* note 22).

¹⁰⁶ See Alexander Peukert, “Der Schutzbereich des Urheberrechts und das Werk als öffentliches Gut. Insbesondere: Die urheberrechtliche Relevanz des privaten Werkgenusses”, in: Reto M. Hilty/Alexander Peukert (eds), *Interessenausgleich im Urheberrecht*, Nomos 2004, 11-46.

¹⁰⁷ Contra *Oberster Gerichtshof* Case 4 OB 66/10z, 13.07.2010, *Zeitschrift für Urheber- und Medienrecht* 2011, 275.

¹⁰⁸ See Alexander Peukert, *supra* note 78, at 265 et seq. See further Canadian Supreme Court *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34, [2012] 2 S.C.R. 231 para 125 (Rothstein J, dissenting: “providing exceptions to the right to communicate by telecommunication is properly left to Parliament. History has shown that Parliament will indeed legislate when it considers copyright protection to be improperly balanced”).

III. Conclusion: Positivism and the Democratic Legitimacy of IP Law

Until now, courts in Europe and elsewhere tried to avoid such a finding by either interpreting limitations broadly or by subjecting the IP right to a general balancing test. These escape attempts are not surprising. First, courts find themselves in a paradoxical situation: By exhibiting judicial self-restraint and foregoing the option to repair a broken legislative scheme, they have to be even more assertive and tell the legislature that it acted unconstitutionally. Second, property rights are a core element of a liberal rule of law. They are meant to establish autonomy in the economic sphere. It is not easy to accept that these legal tools can have the contrary effect, namely to unconstitutionally limit personal freedoms. However, the massive expansion of IP rights under the banner of a self-referential “property logic” has increased the risk of such conflicts.¹⁰⁹

The methodological and doctrinal solution outlined in this article is not a matter of positivist formalism. Instead, it ensures, in several respects, the legitimacy of the IP system as a whole. For an IP system is legitimate only if it is grounded on democratic decision making, if its boundaries are regulated in a foreseeable manner and if it is responsive to new technological and social circumstances. All these conditions can only be fulfilled by continuous legislative adjustments - if necessary, upon an exceptional wake-up call by the judiciary.

¹⁰⁹ For a liberal critique of a “property logic” see Alexander Peukert, *supra* note 29, at 896 et seq.