

Text and Data Mining in the EU: Managing a Conflict between Copyright and the Right to Information

Maryna Manteghi¹

Email: marinamanteghi@gmail.com

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In the time of advanced digital technologies, the conflict between copyright and other fundamental rights has become more apparent. This article considers the copyright law's balancing mechanisms as well as "external" constitutional balancing tools and their potential for resolving a conflict of competing interests involved in a text and data mining (TDM) process. This topic is actual and valuable for our constantly evolving society and the issue, therefore, is of high priority within the system of modern copyright law. It deserves to be discussed in a comprehensive manner in order to express the palpable and ubiquitous wave of interests in the interaction between copyright and the right to information and advanced technologies that can be seen as a "demand" of our digital world.

1. Introduction

Nowadays, access to information has become a greater public demand. In this regard, Artificial Intelligence (hereafter AI) technologies are likely to become a powerful instrument for the promotion and protection of human rights, especially the public right to information,² as they enable faster access to and processing of digital data. For instance, TDM makes it possible to derive new informational value from existing text and data and thus, generate new knowledge

¹Maryna Manteghi has an LL.M. in international and comparative law, University of Turku, Finland.

²See the right to information enshrined in Article 19 of the Universal Declaration of Human Rights (UDHR), Article 19 of the International Covenant on Civil and Political Rights (ICCPR), Article 10 of the European Convention on Human Rights (ECHR), and Article 11 of the European Union Charter of Fundamental Rights (EUCFR).

and insights.³ The application of the TDM techniques could provide significant public benefits by improving different areas of human life.⁴ TDM implies the automated access, copying and processing of a large number of raw and unstructured digital data⁵ for the purpose of extracting new information.

Although TDM facilitates access to data and promotes the users' right to information the increasing use of TDM has also led to rigorous debates and tension between the rights and freedoms of text and data miners and copyright holders' exclusive rights. The essence of the conflict is in the existence of a potential copyright infringement.⁶ In fact, a computer in order to mine makes copies of the extracted content. Although the copies of data are not used as such and the final output does not contain any visible parts or excerpts from the works, which have been mined, the copying of protected data without authorization potentially infringes the copyright holders' exclusive rights to reproduction under Article 2 of the Directive 2001/29/EC (hereafter the InfoSoc Directive) which provides that "temporary or permanent reproduction by any means and in any form, in whole or in part..." need a permission of the right holder. Moreover, TDM may violate the database "sui generis" rights under Article 7 of the Directive 96/9/EC (hereafter the Database Directive) which provides legal protection for business "...which shows that there has been qualitatively and/or quantitatively a substantial investment in either the obtaining, verification or presentation of the contents...". The provision requires that any "...extraction and/or re-utilization of the whole or of a substantial part, evaluated qualitatively and/or quantitatively, of the contents of that database" need a permission of database owner.

³Text and Data Mining can be defined as "any automated analytical technique aimed at analyzing text and data in digital form in order to generate information which includes but is not limited to patterns, trends and correlations." See Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, OJ L 130, 17.5.2019, Art.2 (2).

⁴ For instance, TDM has already enabled new medical discoveries by linking existing drugs with new medical applications and by uncovering previously unsuspected linkages between proteins, genes, pathways and diseases; TDM of the web is being used by many technology companies such as IBM IT company, SAS (software company) and many European-based SMEs to develop new products and services; TDM has many applications in the field of legal research, such as discovery procedures in trials, automatic summarization or argumentation extraction of court decisions, and many other applications. Recent research which has been conducted at Cornell University with the use of TDM has for example made it possible for researchers to mine 100 million Instagram photographs and discover how clothing styles differ around the world.

⁵ TDM can be applicable to all types of contents such as texts, data, sounds, images, videos, photographs, numbers, facts or other elements, or a combination of these.

⁶ Mendis, S. "Copyright, the Freedom of Expression and the Right to Information: The Persisting Discord", Nomos Verlagsgesellschaft mbH. (2011), p.20-21; The English case *Ashdown v. Telegraph Group Ltd.* (2001).

2. The Copyright Law's Balancing Mechanisms

One should notice that copyright never protects the author alone, but always attempts to find a “fair balance” of interests between various actors involved in the creative process.⁷ Accordingly, copyright on the one hand aims to preserve for the author, who invests time, efforts, skills and money in the creation of his intellectual “product”, the original fruit of his mind through the grant of exclusive rights.⁸ The author, therefore, is encouraged to create new works and thus, contribute to the dissemination of new ideas within the society.⁹ On the other hand, copyright also serves the public by providing certain limitations to the exclusive rights of copyright holders in order to make possible access to knowledge. The public interests are therefore a reason for granting and limiting copyright protection.¹⁰ Accordingly, the conflict of interests between copyright holders and users could be resolved within copyright law through a number of balancing mechanisms. Initially, it must be noticed that in respect to TDM the process of obtaining an authorisation through a licensing mechanism in order to avoid infringement of copyright owner's exclusive rights is too complicated, costly and time-consuming. Due to a great number of data, it seems to be difficult or even impossible for the text and data miners to discuss the licensing terms with all right holders of the mined works. Therefore, the users of TDM should possibly rely on alternative balancing instruments.

2.1 Exceptions and limitations

Text and data miners could rely on the existing exceptions and limitations in order to avoid infringement of copyright holders' exclusive rights. Recently, the new EU Directive on copyright in the Digital Single Market¹¹ (hereinafter the DSM Directive) has introduced exceptions and limitations to the digital and cross-border environment including specific exceptions for uses of

⁷For more discussion on balancing in copyright law see: Geiger C., Copyright and Free Access to Information, For a Fair Balance of Interests in a Globalized World, EIPR 28, 7 (2006), p.367; Dijana Jankovic, Different Legal Aspects of the Intellectual Property Rights, EU and Comparative Law Issues and Challenges Series, Vol.1: Prosedural Aspects of EU Law, 2017, p.145. Hugenholtz, Bernt P. Copyright and Freedom of Expression in Europe, in Innovation Policy in an Information Age, edited by Cooper, Dreyfuss Rochelle, First, Harry & Leenheer Zimmerman, Diane, Oxford University Press, Oxford, 2001. p. 6; Sims, Alexandra. Strange bedfellows: fair dealing and freedom of expression in New Zealand, European Intellectual Property Review, 33(8), pp. 490-498, 2011, p. 495. Geiger, C., & Izyumenko, E., Freedom of Expression as an External Limitation to Copyright Law in the EU: the Advocate General of the CJEU Shows the Way”, Center for International Intellectual Property Studies Research Paper No. 2018-12,p.1, available at: <https://ssrn.com/abstract=3293735> , accessed 25 July 2020.

⁸ Wong, Mary, Toward an Alternative Normative Framework for Copyright: From Private Property to Human Rights, 26 Cardozo Arts & Ent. L.J. 775, 2009, p.780-781. Gillian Davies, Copyright and the Public Interest, London, Thomson, Sweet & Maxwell, 2002, p. 14.

⁹Geiger C., Copyright and Free Access to Information, For a Fair Balance of Interests in a Globalized World, EIPR 28, 7 (2006), p.367.

¹⁰Gillian Davies, Copyright and the Public Interest, London, Thomson, Sweet & Maxwell, 2002, p. 14. Geiger C., Copyright and Free Access to Information, For a Fair Balance of Interests in a Globalized World, EIPR 28, 7 (2006), p.367.

¹¹ Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, OJ L 130, 17.5.2019, p. 92–125.

TDM technology.¹² Accordingly, the DSM Directive acknowledges the importance of the use of different digital technologies in our modern society on the one hand, but on the other hand the introduction of these provisions also makes it clear that the use of TDM technology to access and analyze copyright protected data will be equated, in the absence of any exception, to a copyright infringement.

Article 3 of the DSM Directive provides a mandatory exception, which would benefit only research organizations and cultural heritage institutions for the sole purpose of scientific research and where they have lawful access to the data.¹³ Furthermore, Article 4 of the DSM Directive, which is quite extensive, introduces another mandatory TDM exception, which would be applicable to any entity; however, it provides that copyright owners may be exempted from the application of this exception as far as their “opt-out” is explicitly expressed in an “appropriate manner”.¹⁴ Therefore, the DSM Directive creates a legitimate market for TDM, which copyright holders may control, license or even entirely prohibit.¹⁵ The potential of these exceptions to resolve a conflict of interests is questionable as they may contrast with the right to information due to their “bitter” limitations on purpose and scope.¹⁶

2.2 Idea/expression dichotomy

Another balancing mechanism which can be applicable to TDM is an idea/expression dichotomy. This fundamental copyright doctrine implies that copyright only protects the author’s particular

¹² See Articles 3 and 4 of the DSM Directive.

¹³ See Article 3 of the DSM Directive.

¹⁴ See Article 4 of the DSM Directive.

¹⁵ See <http://copyrightblog.kluweriplaw.com/2019/07/24/the-new-copyright-directive-text-and-data-mining-articles-3-and-4/>

¹⁶ See for more discussion on the scope and purpose of the TDM exception: Hargreaves, I. “Standardisation in the area of innovation and technological development, notably in the field of Text and Data Mining: report from the expert group”, TDM report, pp. 66-68; Vollmer, T., “The right to read should be the right to right!”, 2016, available at <http://www.communia-association.org/2016/09/06/commission-proposes-limit-text-data-mining-europe/>, accessed 12 January 2020; League of European Research Universities (LERU), “EU copyright reform and TDM: potentially good for research but certainly not (yet) for innovation!”, 2016, available at <https://www.leru.org/news/eu-copyright-reform-and-tdm-potentially-good-for-research-but-certainly-not-yet-for-innovation>, accessed 12 January 2020; Corredoira, L., “Current Copyright Policy Tendencies in 2015: Further Weakening of Limits and Exceptions and the ever reducing Public Domain”, Paper presented at the IAMCR 2015 conference in Montreal, Canada, July 12-16, 2015, available at <http://iamcr.org/sites/default/files/Law%20Section.pdf>, p.12; Kretschmer, M., Deazley, R., Edwards, L., Erickson, K., Schafer, B., and Zizzo, D. J. (2014) The European Commission's public consultation on the review of EU copyright rules: a response by the CREATE Centre, European Intellectual Property Review, 36(9), pp. 547-553; Margoni & Kretschmer, The Text and Data Mining exception in the Proposal for a Directive on Copyright in the Digital Single Market: Why it is not what EU copyright law needs, 25 April 2018, p.6, available at <https://www.create.ac.uk/blog/2018/04/25/why-tdm-exception-copyright-directive-digital-single-market-not-what-eu-copyright-needs/>, accessed 20 February 2020; Quintais J., The New Copyright Directive: a Tour D’Horison, Kluwer Copyright Blog, 20 June, 2019, available at <http://infojustice.org/archives/41224>, accessed 20 August 2020; B., Hugenholtz, The New Copyright Directive: Text and Data Mining (Articles 3 and 4), Kluwer Copyright Blog, July 24, 2019, available at <http://copyrightblog.kluweriplaw.com/2019/07/24/the-new-copyright-directive-text-and-data-mining-articles-3-and-4/>, accessed 21 August 2020.

expression of an idea and never the idea itself.¹⁷ Therefore, users might reuse the ideas, derived from the protected content, in their original way without infringing the exclusive rights of copyright owners.¹⁸ From this perspective, since TDM is only a process of extracting knowledge from existing data, it cannot infringe copyright and thus copying of data for the purpose of text and data mining should be merely viewed as a technical act.¹⁹ Nevertheless, it seems to be questionable whether the idea/expression dichotomy would be capable to ensure a sufficient equilibrium between competing interests since a line between idea and expression is often difficult to distinguish. Sometimes, it may be complicated to find out a tool by which it would be possible to extract ideas while leaving the expression untouched, especially in respect to a photography and phonograms.

2.3 Originality requirement

Further, another balancing mechanism, which can be considered for the purpose of this paper is the originality requirement. The concept of originality in copyright law has recently been extended to all kinds of works through the interpretation of the Court of Justice of the European Union (hereafter the CJEU), which held that any work is original if it is the “author’s own intellectual creation.”²⁰ Further, there must be a sufficient degree of originality in selection and arrangement, meaning that the works must originate with an author, must not be copied and must be the result of “skill, judgment and/or labor”.²¹ The originality criteria is a question of fact to be determined on a case-by-case basis. The originality requirement intends to balance the authors’ and users’ interests. Nevertheless, one should take into account the fact that data, which fails to fulfill the originality requirement, may also be a protectable subject matter under the European “sui generis” database rights. This seems to be problematic when the data is only available

¹⁷ Richard H. Jones, The Myth of the Idea/Expression Dichotomy in Copyright Law, *Pace Law Review*, Volume 10, Issue 3, 1990, p.551.

¹⁸ Sankalp, J., The Principle of Idea-Expression Dichotomy: A Comparative Study of US, UK & Indian Jurisdictions, 2012, p.7,

available at SSRN: <https://ssrn.com/abstract=2229628> or <http://dx.doi.org/10.2139/ssrn.2229628>

¹⁹ See for example Kretschmer, M., Deazley, R., Edwards, L., Erickson, K., Schafer, B., and Zizzo, D. J. The European Commission's public consultation on the review of EU copyright rules: a response by the CREATE Centre. *European Intellectual Property Review*, 36(9), 2014, p.9; Caspers M. & Guibault L., "A right to 'read' for machines: assessing a black-box analysis exception for data mining", 2016, p.2, available at <https://asistdl.onlinelibrary.wiley.com/doi/full/10.1002/pa2.2016.14505301017>, accessed 30 July, 2020; Cocoru D., & Boehm M., An analytical review of text and data mining practices and approaches in Europe, Policy Recommendations, 2016, p.6, available at <http://www.openforumeurope.org/wp-content/uploads/2016/05/TDM-Paper-Diana-Cocoru-and-Mirko-Boehm.pdf>, accessed 10 October 2020; Science Europe, Text and Data Mining and the Need for a Science-friendly EU Copyright Reform, Briefing Paper, 2015, p.5, available at: https://www.etag.ee/wpcontent/uploads/2015/11/Briefing_Paper_Research_Integrity_web.pdf, accessed 20 September 2020.

²⁰ See for example *Infopaq International v. Danske Dagblades Forening* [2009]; C-393/09 *Bezpečnostní softwarová asociace v. Ministerstvo kultury* [2010] E.C.R. I-13971; C-403/08 and C-429/08 *Football Association Premier League and Others v. QC Leisure and Others and Karen Murphy v. Media Protection Services* [2011] E.C.R. I-09083; C-604/10 *Football Dataco v. Yahoo! UK and Others* [2012] EU:C:2012:115).

²¹ Margoni, T. The Harmonisation of EU Copyright Law: The Originality Standard, *SSRN Electronic Journal* · January 2016, p.8.

through one database, because the rights owner has the absolute control over the access to the required data. This may be viewed as a particular type of knowledge “privatization”, which may undermine the users’ right to receive and impart information.

2.4 Duration of copyright

Furthermore, for the purpose of balancing the interests of copyright holders on the one hand and users on the other hand the copyright protection is limited in time. Therefore, after a certain period, particularly 70 years after the author’s death, the works become common and fall into the public domain which allows for use without the need for permission.²² The chosen protection term for the works in the EU (since 1993²³) is longer than the 50-year term required by the Berne Convention for the Protection of Literary and Artistic Works.²⁴ The trend towards longer periods of protection of works might diminish the public domain for the benefit of the right holders and to be detrimental for the society. The longer term of copyright protection could possibly hinder access to knowledge and thereby slow down the dynamic process of innovation in the EU. Moreover, some research activities conducted with the aid of TDM techniques may require access to the recent sources of information and therefore, the outdated works, which are in the public domain, may be rather useless in respect to contemporary knowledge discoveries.

3. Constitutional balancing mechanisms

The authors’ rights and the right to information have always been interconnected. The CJEU has already emphasized that the protection of copyright as a fundamental right,²⁵ must be balanced against the protection of other fundamental rights.²⁶ Moreover, in its recent cases²⁷ the CJEU has noticed that the statutory copyright exceptions and limitations should be interpreted in the light

²² Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights (codified version), OJ L 372, 27.12.2006, p. 12–18, Article 1.

²³ Council Directive 93/98/EEC of 29 October 1993 harmonising the term of protection of copyright and certain related rights· L290, 1993-11-24, pp. 9–13.

²⁴ Berne Convention for the Protection of Literary and Artistic Works Paris Act of July 24, 1971, as amended on September 28, 1979, Article 7 (1), available at <https://wipolex.wipo.int/en/text/283693> , accessed 23 July 2020.

²⁵ Copyright enjoys protection under Article 27(2) of the UDHR, Article 15(1)(c) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), and Article 17 (2) of the EUCFR and Article 1 of Protocol No. 1 of the ECHR.

²⁶ CJEU, Scarlet Extended, C-70/10, Judgment of 24 November 2011, EU:C:2011:771; CJEU, Painer, C-145/10, Judgment of 1 December 2011, EU:C:2011:798; CJEU, SABAM v. Netlog, C-360/10, Judgment of 16 February 2012, EU:C:2012:85; CJEU, UPC Telekabel, C-314/12, Judgment of 27 March 2014, EU:C:2014:192; CJEU, Deckmyn, C-201/13, Judgment of 3 September 2014, EU:C:2014:2132; CJEU, GS Media, C-160/15, Judgment of 8 September 2016, EU:C:2016:644; CJEU, Mc Fadden, C-484/14, Judgment of 15 September 2016, EU:C:2016:689; Case C-275/06 Promusicae.

²⁷ Funke Medien NRW GmbH v Germany (C-469/17) EU: C: 2019:623; [2020] 1 C.M.L.R. 13; Pelham GmbH v Hütter (C-476/17) EU: C: 2019:624; [2019] E.C.D.R. 26; Spiegel Online GmbH v Beck (C-516/17) EU: C: 2019:625; [2019] E.C.D.R. 24.

of fundamental freedoms that could help to strike a “fair balance” between competing interests.²⁸ In this regard, if the disputes between copyright holders and text and data miners arise, the conflicting rights, which are of equal importance, have to be balanced.²⁹ Copyright, therefore, cannot prevail over other fundamental rights.

The CJEU has also acknowledged the principle of proportionality³⁰ as a useful functional concept, a constitutionally-based mechanism, for the final balancing of major competing interests, the interests of authors versus those of the society.³¹ In accordance with the principle of proportionality any restrictions or limitations to fundamental rights must be made only if they are necessary in a society and suitable, there must be a proportional relationship between the means and the aims pursued.³² Nevertheless, it should be noticed that the CJEU has not provided any clear criteria to be applied by national courts when considering the notion of the “fair balance,”³³ thereby, there is a need for more legal certainty in its formulation and application.

The European Court of Human Rights (hereafter the ECtHR) has also highlighted the tension between copyright and other fundamental rights such as freedom of expression and the right to receive and impart information.³⁴ The ECtHR jurisprudence suggests that any copyright-based restrictions upon the right to information requires an in-depth analysis of whether restrictions is provided by law, pursue a legitimate aim and are necessary in a democratic society.³⁵ Moreover, various factors should be taken into account, for instance, the nature of the competing interests, the degree to which those interests require protection under specific circumstances³⁶ and others.

²⁸ Case C-469/17 *Funko Medien NRW GmbH v Bundesrepublik Deutschland*, par.51

²⁹ Christophe Geiger, ed., *Constructing European Intellectual Property: Achievements and New Perspectives* (Cheltenham: Edward Elgar Publishing, 2013), 15-16 Paul L.C. Torremans Copyright (and Other Intellectual Property Rights) as a Human Right, in *Intellectual Property and Human Rights* 197 Wolters Kluwer (Paul L.C. Torremans ed.2008).; J4 p.8.

³⁰ Art.52 (1) of the EUCFR.

³¹ See *Productores de Música de España (Promusicae) v Telefónica de España SAU* C-275/06 [2008] 2 CMLR 17 (Promusicae case), Case C-324/09 *L’Oreal v. eBay* (E.C.J. July 12, 2011), [2012] E.M.L.R 6, p. 135 [2012] All ER (EC) 501 (L’Oreal case), Case C-70/10 *Scarlet Extended SA v. Société Belge des Auteurs, Compositeurs et éditeurs SCRL (SABAM)* 2011 (Scarlet Extended case); Case C- 360/10 *Belgische Vereniging van Auteurs, Componisten en Uitgevers (SABAM) v. Netlog NV*.

³² For more discussions on the proportionality in European Copyright Law see Afori O. “Proportionality -- A New Mega Standard in European Copyright Law”, IIC (2014) 45:889–914, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2500232, accessed 20 February 2020; Birnhack, M., *Acknowledging the Conflict between Copyright Law and Freedom of Expression under the Human Rights Act*, working paper, 2008, p.20, available at <http://law.bepress.com/taulwps/art55>, accessed 20 February 2020;

³³ See, for example, (C-275/06) *Promusicae v Telefónica de España* EU:C:2008:54 [68]–[70]; (C-70/10) *Scarlet Extended v SABAM* EU:C:2011:771 [49]; (C-314/12) *UPC Telekabel v Constantin Film Verleih GmbH* EU:C:2014:192 [46]–[47]; (C-484/14) *McFadden v Sony Music Entertainment Germany GmbH* EU:C:2016:689 [83]–[89] (C-149/17) *Bastei Lubbe GmbH & Co KG v Strotzer* EU:C:2018:841 [45]–[47]. Griffiths, J., *Constitutionalising or Harmonising? The Court of Justice, the Right to Property and European Copyright Law*, *Reference to Infopaq International A/S v Danske Dagblades Forening* case, 38 *European Law Review* 65 (2013), 68, 77.

³⁴ See *Ashby Donald and Others v. France* (Ashby Donald and Others v. France, European Court of Human Rights (2013, no. 36769/08).) and *Neij and Sunde Kolmisoppi v. Sweden* (The Pirate Bay case) European Court of Human Rights (2013, no. 40397/12).

³⁵ Article 10 (2) of the ECHR.

³⁶ *Neij and Sunde Kolmisoppi v. Sweden* (The Pirate Bay case) European Court of Human Rights (2013, no. 40397/12).

Although the ECtHR has acknowledged the conflict between copyright and the right to information, the balancing test, the exhaustive list of clear criteria which would be evaluated when balancing competing rights, has yet to be developed.

It also seems reasonable to introduce quite a delicate view on the right to information as an external balancing tool for striking a proper balance between two competing rights. A number of authors claim that since the EU copyright system does not provide much flexibility, the European courts could apply fundamental right provisions, which inherits balancing mechanisms,³⁷ to balance the copyright holder's interests against the right to information and thereby meet the challenges imposed by the emergence of advanced digital technologies.³⁸ Although the horizontal effects of fundamental rights in copyright infringing cases may be beneficial since the two rights will be observed on an equal basis, the clear guidance on specific balancing factors, aspects and circumstances under which the conflict would be placed on the human rights level is necessary. Moreover, the opinion that copyright is not immune to external limitations based on the fundamental rights and must under certain conditions be restricted by the latter may disturb the stability of established rules and arrangements in copyright law and thereby undermine the project of copyright harmonization. In fact, the CJEU in its recent rulings has held that the constitutional provisions on fundamental freedoms cannot be invoked in cases regarding copyright infringement as the autonomous limitation on copyright.³⁹

4. Conclusion

In the time of increasing use of digital technologies, the tension between copyright and the right to information has become more apparent. The capability of the existing balancing mechanisms to ensure the “fair balance” of competing interests involved in TDM processes is highly questionable. The new provisions introducing the specific TDM exceptions are likely to create uncertainty about their coverage and scope, which is possibly, may undermine the users' right to information. In particular, Article 4 of the DSM Directive, which has introduced the “opt-out” mechanism, is the most controversial one. In this regard, it is highly unlikely that that provision

³⁷ Article 51 (1) of the EUCFR, Article 10 of the ECHR, Article 27 (1) of the UDHR and Article 15 of ICESCR.

³⁸ Opinion of the Advocate General in Case C-469/17 *Funke Medien NRW GmbH v Federal Republic of Germany*; Henningsson, D., *Copyright and Freedom of Expression in Sweden and the European Union*, Master Thesis, 2012, available at <https://core.ac.uk/download/pdf/289941687.pdf>, pp.52-53, accessed 12 March 2020,

³⁹ See (C-469/17) *Funke Medien NRW GmbH v FRG* (“*Funke Medien*”); (C-476/17) *Pelham GmbH v Hütter* (“*Pelham*”); and (C-516/17) *Spiegel Online v Volker Beck* (“*Spiegel Online*”).

will be equally implemented across the EU Member States. Moreover, it remains to be seen how national courts and the CJEU will interpret Articles 3 and 4 of the DSM Directive.

Further, it should be noticed that the CJEU has not provided any clear criteria to be applied by national courts when considering the notion of the “fair balance,” thereby, there is a need for more legal certainty in its formulation and application. Additionally, it seems to be doubtful whether the copyright law’s “internal” balancing mechanisms should be considered as the only possible legal tools, which are capable of resolving the conflict of interests. However, before considering whether other “external” constitutional tools can be successfully invoked to strike the “fair balance” when dealing with TDM, the clear guidance on specific balancing factors, aspects and circumstances under which the conflict would be placed on the human rights level should be provided.