

# RELATIVITY IN THE FREE USE OF COPYRIGHT OBJECTS UNDER THE THREE-STEP TEST

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## **Abstract**

*The free use of works by third parties is placed in normative dependence on three conditions which together form a legal basis for the free use of copyright objects without the consent of the author and payment of remuneration. This process is accompanied by the specifics of each case, given the relation author-object of artistic intellectual property, expressing his creative individuality and hence the needs that determine his legitimate interests in the work he created - the object of intellectual property. The admissibility of free use is also relevant to other dynamic quantities that characterize the matter subject to legal regulation. Maintaining a fair balance between the rights and interests of copyright holders and users of protected objects depends on compliance with the new electronic environment, as well as the proper and unhindered functioning of the internal market in the field of copyright and related rights. Legal relevance is given to another dynamic relation with elements of technological development and its consequences associated with the existence of new forms of use of copyright objects. The systemic conditionality of the above-mentioned factors predetermines the application of a systematic method of scientific research to find acceptable and effective solutions in the legal framework of the free use of works. These are circumstances that together form the preconditions for arguing relativity in the free use of works.*

**Keywords:** *legitimate interest, normal use, author, fundamental rights, public interest, balance, restriction, work.*

**JEL Classification:** K38

## **1. Introduction**

The need to establish the free use of copyrighted works is obvious, although this way of use is set within certain legal limits. In the space delineated by them, third parties are allowed to freely use a work - subject to copyright without the consent of the author and payment of remuneration. The arguments for this are related to the interests of society and its constituent individuals, in connection with the exercise of priority rights from the category of fundamental. Achieving a fair balance between these two poles through legislation at the national and supranational levels shows the importance of issues related to the free use of works for society, its constituents and authors. In the search for a stable ratio between them, the existing legal framework uses concepts, the essence of which is a quantity influenced by many factors. This forms several difficulties in the process of free use of works, despite the explicit indication of the conditions for use without the consent of the author and payment of remuneration in *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*<sup>2</sup>. The types of possible behaviour representing free use are in line with the achievement of pre-specified results - for educational or research purposes, in favour of government agencies such as libraries and archives, to cover current events, to cite, for use by people with disabilities, for public safety purposes and administrative or judicial purposes. This basis for law-making decisions aims at reconciling interests in the copyright process by the copyright holder<sup>3</sup>, as well as "finding the right ratio" with "society's interests in access to cultural, scientific and other creative achievements"<sup>4</sup>. On the other hand, however, there is an option the consequence of which is to prevent the restriction of fundamental rights of other members of society by the exclusive right of the author to use his work and allow third parties similar behaviour.

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<sup>2</sup> OJ L 167, 22.6.2001, p. 10–19 .

<sup>3</sup> Maneva, Veselina, *Conflict or synergy between human cultural rights and copyright in the media environment*, in: *Media in Bulgaria: 25 years later: national scientific and practical conference*, 31.10.2014, New Bulgarian University, Sofia, 2015. The document is available online at: <http://eprints.nbu.bg/3651/>; last accessed on 12.06.2022.

<sup>4</sup> Tsakova, Violetta. *The effort and powerlessness of the law to regulate the free use of copyrighted works*, 2012. The document is available online at: <https://copyrights.bg/2012/>, last accessed on 12.06.2022.

## 2. Admissibility of free use of a work and restriction of rights

Restriction of fundamental rights is a process, the legal regulation of which takes place in the presence of explicitly stated restrictive grounds, ways of restriction and achievable goals. The restriction is temporary, for the period of existence of the restrictive grounds or for the time necessary to achieve the legally established objectives<sup>5</sup>. The free use of a work does not restrict the author to independently performing behaviour that represents the use of the work, there is no consequence of a change in the parameters of his behaviour concerning the object of artistic intellectual property. For him, all options originally used by law, both in terms of volume and in terms of self-assessment of when and whether to proceed to the exercise of his right, are legally admissible and respectively possible. Next, influence is available only to the exclusive nature of the right and provided that a third party or persons exercise the opportunity provided by law for free use by implementing behaviour originally granted to the author. In comparison, the right limited by a prohibition or obligation is also with a changed process of its exercise, including a changed or limited access to the respective good.

## 3. Relativity arising from the content of the legal framework

In the content of the triad of conditions for admissibility of free use, it is noteworthy that two of them - "not to contradict the normal use of the work and not to prejudice the legitimate interests" - are concerning a specific subject-rights holder. The use of the singular emphasizes the specificity, the individuality of the relation between the author and the work created by him - an object of intellectual property and on this basis of the related normal use and legitimate interests.

The full and comprehensive disclosure of the meaning of the conditions for the free use of copyright objects implies the application of different ways of interpretation, choice of interpretive result and taking into account the peculiarities of the factual and legal specifics of each of the statutory cases. This peculiarity adds another characteristic of the national legal norms, allowing free use of works, which are not only exclusive and imperative but also relative. This aggregate itself is not characteristic of the normative system of law, given its purpose. In the context of the outlined subject of the research, the accents in it are focused on considering the relative nature of the normative content intended to regulate the legal free use of works - a subject of copyright. Relativity forms several legal challenges which are caused by shortcomings due to the lack of an acceptably dynamic legally institutionalized standard for free use. The situation outlined is also complicated by the ignorance of facts that have the potential to effectively influence social processes<sup>6</sup>.

Predominantly, the relative legal norms are established given the necessity to detail individual social interactions and achieve fairness by the law enforcement entity in the process of their implementation without referring to the subjective attitude of the parties to the evaluation concepts contained in the provisions. This legislative solution puts relativity within easily definable and predictable limits.

The analysis of the legal framework for free use not only in *Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001* but also in the *Convention for the Protection of Literary and Artistic Works*<sup>7</sup>, is the basis for concluding the existence of relativity and the emergence of problematic situations from the placing in normative dependence of "author - normal use, author - legitimate interests" and "free use". This, in turn, provokes the question of the admissibility of free use as a rule or depending on each case.<sup>8</sup>

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<sup>5</sup> Stanin, Manol. *Limitation of Citizens' Rights*, Collection of Reports "UN: Historical Traditions and Contemporary Law", University Publishing House "Neofit Rilski", Blagoevgrad, Bulgaria, 2015, ISBN 978-954-00-0058-9, p. 371-376.

<sup>6</sup> Friedrich August von Hayek. *Law, Legislation and Freedom, Legal Norms and Legal Order*, volume one, Saint Kliment Ohridski University Publishing House, Sofia, 1996, p. 23.

<sup>7</sup> The Berne Convention: signed on 9 September 1886; completed at Paris (1896), revised at Berlin (1908), completed at Berne (1914), revised at Rome (1928), at Brussels (1948), at Stockholm (1967) and at Paris (1971), and amended in 1979 (Berne Union).

<sup>8</sup> Christophe Geiger, Daniel J. Gervais and Martin Senftleben. *Chapter 5: Understanding the "three-step test"*, Handbook Chapter of International Intellectual Property, Published: 30 Jan 2015, pp. 167-189, DOI:10.4337/9781782544807.00014.

#### 4. A fair balance between rights

The *Directive 2001/29/EC of the European Parliament and the Council of 22 May 2001* explicitly emphasizes the necessity to maintain a fair balance between the rights and interests of copyright holders - rights holders and users of protected objects. The balance does not necessarily mean equality, a statement which is reinforced by the requirement of its fairness. However, in each case, it is necessary to refine it sustainably, and in the sense of "maintenance", this process must be accompanied by adaptive effects over time. These are requirements that should be achieved following the specifics of the new electronic environment, as well as with the proper and smooth functioning of the internal market in the field of copyright and related rights. Thus, the fair balance between the above poles is a variable, because it depends on the variables, the state of which is mandatory, as well as the objectification of the findings in the relevant law-making decisions.

The content of the considered document emphasizes the legal relevance of another dynamic relation. It has elements of technological development, the consequences of which are related to the existence of new forms of use of copyright objects.

#### 5. Legal and legitimate interests in the context of the normal use of a work

The use of work contains a set of possibilities for performing certain actions. Some of them are objectified and in this order are legally established in the process of exercising the author's right to use his work, as well as to allow third parties to use it, except in cases of free use. Others, however, are in direct connection not with the legal interest of the author but with his legitimate interests, for the realization of which there are no explicitly sanctioned subjective rights. Therefore hypotheses of the use of a work should not be considered exhaustive as new ones may be added over time. This is because they are affected by the continuous development of technology. On the other hand, legitimate interests understood as a profit, benefit or advantage, recognized and legally protected<sup>9</sup>, also presuppose use that is not explicitly stated but is within the scope of legal protection because it is in line with constructive human necessities, does not contradict the law and does not violate public order and good mores. In the process of outlining the variety of possibilities in the content of the concept of "use of a work" and the factors that influence them there is a need for reflections on the phrase "normal use" preferred from the subject of the lawmaking activity.

The lawful use of a work presupposes two options: the use of a work is objectified in the respective behaviour by the author personally or by third parties. In the latter case, this is possible only with the prior consent of the rights holder, except in cases of free use. They are admissible only if they do not impede the normal use of the work, i.e. stated explicitly in the context of national legal provisions and EU law and following the legitimate interests of the author. For the use of a work to be normal, in addition to complying with legal provisions, they must be adequate in their content to the pace of technological development and the harmonious development of the internal market in the field of copyright and related rights.

#### 6. On the content of the relation author-free use of the work he created

The existing legal framework related to the legal regulation of the free use of work contains potential and creates conditions for achieving its obstruction. The author has the opportunity to oppose the free use of the work he has created, for example by abusing his right to defend his legitimate interests or to stop using the work due to changes in his beliefs. Other hypotheses are also possible: the author to ignore the obvious violation of his legitimate interests and normal use of the work he created or not at all understand that they have been violated, as well as to exercise or not exercise his right to defence. Restrictions on free use to satisfy interest have settled, albeit dynamic, boundaries. A question arises - if there are limits to the free use of a work, can the same be said about

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<sup>9</sup> Kandeveva, Emilia. *The concept of "interest" in administrative law and process*, Juridical Collection, volume XVIII, 2011, p. 6.

the author's ability to restrict this use. The negative answer is obvious because normal use and legitimate interest considered from the perspective of the subjectivism of the author/creator can lead to the impossibility of free use in specific cases. This finding stems from the relation between "creative activity" and the personality of the author. Therefore, for each author are permissible differences in the relation of legitimate interest and normal use of the work created by him, arising concretely from the specifics of the elements that make up the structure of his personality.

### **7. "Unfounded" and "unjustified" from the perspective of what is necessary**

Establishing the free use of copyright objects as an exception should be in strict compliance with the law. The assessment is made based on simultaneity in the fulfilment of three conditions which are specified cumulatively in the *Berne Convention for the Protection of Literary and Artistic Works*, *Directive 2001/29/EC of the European Parliament and the Council of 22 May 2001* and others. In the comparison, the emphasis on "unfounded" and "unjustified" in the negative impact on the legitimate interests of the author is striking. This is a circumstance that allows for an imbalance in the system. Probably the specified legislative decision is in the context of the requirement that any restriction of rights must be necessary. According to the case law of the European Court of Human Rights "necessary" is used in the sense of "urgent public necessity"<sup>10</sup>. In the case under consideration, there are two interests - the public interest in the free use of works and the author's interest in using the work created by him. Although they are aimed at the same object it is unthinkable to put a sign of equality between them. The author's interest is not only legal but also legitimate. This means that the requirement of the law-making entity to create and maintain a state of fair balance should be in the author's favour.

Maintaining a state of balance in the present case is realized by determining the status of entities with opposing interests in terms of the useful properties of an object. For the author, the rights arise with the act of creation of the work and precede the specification of the admissibility for free use by third parties. In the process of lawful counter-use, it is possible to achieve a sustainable balance but it is also easy to achieve an imbalance, especially when there is a discrepancy between factual and legal.

### **8. Fundamental rights and freedoms and admissibility of free use of a work**

The protection of intellectual property, in particular copyright, guarantees the rights and interests of intellectual property subjects, verbally designated as authors. The existing legal protection covers not only the granted rights but also the processes of their realization. The prioritization of other rights and freedoms, also enshrined in the *Charter of Fundamental Rights of the European Union*<sup>11</sup> with fundamental status, is in line with maintaining a fair balance, which also implies their protection. Bringing to the forefront of specific interests in unity with the fundamental rights provided for their satisfaction is legitimate only up to the explicitly and exhaustively provided cases for permissible exceptions and limitations. Bringing to the forefront of specific interests in unity with the fundamental rights provided for their satisfaction is legitimate only up to the explicitly and exhaustively provided cases for permissible exceptions and limitations. In this way, the guarantee of certain fundamental rights and freedoms is ensured by the admissibility of the free use of works subject to copyright during the period of their protection.

The intellectual property right is among the rights with fundamental status. This implies a wide range of possibilities not only for its protection but also for its exercise. These processes are in line with essentially identical processes for the protection and exercise of other fundamental rights, including freedoms. Their indisputable conditionality presupposes a balancing effect through the means of legal regulation to achieve a fair ratio. Influencing intellectual property rights by allowing

<sup>10</sup> See Judgment of the ECHR from 26 April 1979 on the case *Sunday Times v. the United Kingdom*.

<sup>11</sup> OJ C 326, 26.10.2012, p. 391–407.

the free use of a work by finding that the process is within the bounds of justice guarantees other fundamental rights, including fundamental freedoms<sup>12</sup>.

## 9. Conclusion

The legal regulation of the use of works-protected objects of artistic intellectual property by third parties without the consent of the author and payment of remuneration is legally institutionalized through various law-making decisions, but at the same time, several problematic situations arise. Evidence of this is the case law of the European Court of Justice, references for a preliminary ruling, and acts of the European Parliament and the Council of Europe.

At present, the rights and interests of other persons and the society are prioritized and this has a corresponding legitimate restrictive effect on the author if three conditions are met. At the same time, these conditions contain limits to the exercise of prioritized fundamental rights and public interests. Their way of expression in the legal framework presupposes possible offences given the need for the users of works to comply with conditions placed in normative dependence on a third party - the author. In its entirety, the process of effective legal regulation requires clear limitations for both groups of rights holders. This presupposes the formulation of unambiguous restrictive grounds and criteria for determining the degree of restriction not only of the subjective copyright but also of the prioritized rights in the conditions of a fair balance between them. Shifting the focus of restrictions to fundamental rights, when the process of exercising them is relevant to protected copyrights, is an option to minimize problematic situations.

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