

COPYRIGHT LAW IN AND UNDER THE  
CONSTITUTION

THE CONSTITUTIONAL SCOPE AND LIMITS TO  
COPYRIGHT LAW IN THE UNITED STATES

IN COMPARISON WITH THE

SCOPE AND LIMITS IMPOSED BY  
CONSTITUTIONAL AND EUROPEAN LAW ON  
COPYRIGHT LAW IN GERMANY\*

TOM BRAEGELMANN\*

INTRODUCTION—THE EXPANSION OF COPYRIGHT IN SCOPE AND  
DURATION AS A CONSTITUTIONAL CHALLENGE AND THE  
REASON FOR A COMPARISON OF CONSTITUTIONAL  
COPYRIGHT LAW ..... 101

I. CONSTITUTIONAL COPYRIGHT LAW IN THE UNITED STATES ..... 103

A. *Article I, Section 8, Clause 8 of the United States  
Constitution—The Intellectual Property or Copyright  
Clause* ..... 103

B. *Genesis and Original Scope of the Copyright Clause*..... 104

C. *Preemption of State Copyright*..... 105

D. *The Expansion and Delineation of the Copyright Clause by*

\* Permission is hereby granted for noncommercial reproduction of this article in whole or in part for education or research purposes, including the making of multiple copies for classroom use, subject only to the condition that the name of the author, a complete citation, and this copyright notice and grant of permission be included in all copies.

\* Tom Braegelmann, LL.M. (Benjamin N. Cardozo School of Law). Attorney and Counselor at Law in New York (admitted to the bar in the State of New York) and Rechtsanwalt in Germany (admitted in Berlin). E-mail: braegelm@yu.edu or tom.braegelmann@gmx.de. I thank Professor Otto Pfersmann, University Paris I Panthéon-Sorbonne, for inspiring and encouraging me to write about this subject. I also thank the Benjamin N. Cardozo School of Law for inviting Prof. Pfersmann to New York City as a visiting professor in the fall of 2007. I also thank the staff of the Cardozo Arts and Entertainment Law Journal, whose support and work was terrific. I dedicate this article to Petra. © 2009 Tom Braegelmann.

<i>Congress and the Supreme Court</i> .....	106
1. The Influence of English Law and Natural Law on the Foundations of Copyright Law.....	106
2. The Meaning and Scope of "Writings" .....	108
3. The <i>Feist</i> Decision: "Originality" as a Limiting Constitutional Requirement .....	109
(i) The Reasoning of the Supreme Court in <i>Feist</i> .....	109
(ii) Legal Effects of the <i>Feist</i> Decision .....	112
(iii) Interpretation of the <i>Feist</i> Decision .....	113
(iv) Criticism of the <i>Feist</i> Decision .....	114
4. How Long Are "limited Times"? The <i>Eldred</i> Decision.....	116
E. <i>The Relation of the Copyright Clause to Other Powers of Congress: Alternatives to the Copyright Clause Within the U.S. Constitution</i> .....	120
F. <i>Conclusion: the Constitutional Limits to Copyright Law in the U.S.</i> .....	123
II. CONSTITUTIONAL AND EUROPEAN LIMITS ON COPYRIGHT LAW IN GERMANY.....	124
A. <i>Article 73 no. 9 GG—the Power of the Federal Parliament ("Bundestag") to Enact Federal Copyright Law</i> .....	124
B. <i>Article 14 GG—Constitutional Protection of Intellectual Property</i> .....	125
C. <i>Time Limits in the German Copyright Act (UrhG)</i> .....	126
D. <i>The Main Decisions by the Federal Constitutional Court ("FCC") Construing the Constitutional Scope of German Copyright Law</i> .....	128
1. BVerfGE 31, 229 (July 7, 1971)—"Kirchen- und Schulgebrauch".....	129
2. BVerfGE 31, 255 (July 7, 1971)— "Tonbandervielfältigungen" .....	130
3. BVerfGE 31, 270 (July 7, 1971)— "Schulfunksendungen" .....	131
4. BVerfGE 31, 275 (July 8, 1971)—"Schallplatten".....	131
5. BVerfGE 49, 382 (1978)—"Kirchenmusik" .....	133
6. BVerfGE 79, 29 (1988)—"Vollzugsanstalten" .....	134
III. LIMITS TO COPYRIGHT LEGISLATION MANDATED OR DEMANDED BY EUROPEAN LAW .....	135
A. <i>The New Intellectual Property Clause of the EU Charter of Fundamental Rights</i> .....	137
B. <i>Conclusion: Constitutional and European Limits on German Copyright Law</i> .....	139
C. <i>Comparison of the U.S. and German Constitutional Copyright Law</i> .....	141
CONCLUSION .....	142

INTRODUCTION—THE EXPANSION OF COPYRIGHT IN SCOPE AND  
DURATION AS A CONSTITUTIONAL CHALLENGE AND THE REASON FOR A  
COMPARISON OF CONSTITUTIONAL COPYRIGHT LAW

The modern economy needs and produces intangible goods that are generally called "intellectual property."<sup>1</sup> Most prominent among these goods are patents, trademarks, and copyrights. One usually finds elaborated Copyright Acts in the developed world. However, as the developed world is still largely governed by national constitutions or their functional equivalents, such as the EU and EC treaties, the question arises as to how far the moral and economic need for copyright law is anchored, restrained, and limited by these constitutions. The general and accelerating worldwide trend to expand and add legal intellectual property protection—the cumulative effect of which is not known and which is potentially disastrous to science, culture and uninhibited progress—underscores and highlights the need for the enforcement of constitutional limits on copyright protection.

Adding to this need is the fact that copyrighted content travels with such ease and speed around the planet, thus changing its copyright regime with every border it crosses. It might therefore be useful to examine how the same creative work might fare under different constitutional copyright regimes.

The intellectual property world is divided into two camps regarding copyright: common law countries and civil law countries, namely the Anglo-American copyright system and the Continental "droit d'auteur" system.<sup>2</sup> As such, it would seem a fruitful and worthwhile pursuit to compare two major constitutional regimes from each of these camps in order to analyze how constitutional law shapes and limits simple copyright law. Moreover, today's evolving intellectual property law regime is administered and shaped by an increasing number of powerful international agencies and multilateral treaties—either under the umbrella of the U.N.'s WIPO Copyright Treaty ("WCT") or the Berne Convention, both administered by the World Intellectual Property Organization ("WIPO"), or under the wings of the WTO's TRIPS agreement and TRIPS council. When interpreting these treaties, one must also look at the (constitutional) copyright traditions of the

<sup>1</sup> See the Agreement on Trade Related Aspects of Intellectual Property Rights, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Apr. 15, 1994, 1869 U.N.T.S. 299, 33 I.L.M. 1125, 1197, [hereinafter *TRIPS Agreement*] available at [http://www.wto.org/english/docs\\_e/legal\\_e/27-trips\\_01\\_e.htm](http://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm) (defining "intellectual property" via Art. 1 para. 2 within seven categories, including copyrights, patents, and trademarks, in relation to international trade).

<sup>2</sup> For a description of this main conceptual chasm in the world of copyright, see ARTUR-AXEL WANDTKE & WINIFRIED BULLINGER, URR: PRAXISKOMMENTAR ZUM URHEBERRECHT, Introduction, no. 25 (2006).

member states—either because there is no other guidance available and the member states must therefore have had their own legal copyright principles in mind when they agreed to these treaties, or because members explicitly and intentionally introduced into such a treaty a (limiting) provision stemming from the (constitutional) copyright law traditions of one of the members or copyright camps,<sup>3</sup> or even created provisions which might be seen as a hybrid mixture of copyright principles from different traditions.

Eventually, the international copyright law regime will lead to a world-wide harmonization of copyright laws. As the international copyright law regime fuses different constitutional copyright traditions, the effect will be that national constitutions will be confronted with (and have to implement and digest) foreign concepts of constitutional copyright law.<sup>4</sup> All of these considerations suggest that a comparison of national constitutional copyright law regimes will be a valuable and educational exercise.<sup>5</sup>

However, when talking about constitutional limits on copyright law one could come up with many different kinds of constitutional rights and principles that might restrict it: freedom of speech, freedom of the arts, freedom of science, preempted state legislative powers in a federal state and so forth, that are all not based on copyright-law reasoning in itself. Moreover, these limitations to copyright would only apply in case there was a copyright that might infringe one these rights. This article, however, is focusing on the way constitutions create the realm of copyright in the first place, how constitutional copyright law is constrained by the principles which concern copyright itself, and how it is restrained by its "internal logic" as it were, as far as such principles and an "internal logic" can be found. The question I am interested here is therefore: What is copyright law in and under the constitution? What is "constitutional copyright law?" Where does it begin, where does it end? The question as to how the field of copyright law is thereafter limited by conflicting constitutional rights is interesting, but will not be addressed in this article.

<sup>3</sup> One prominent example would be Article 9, paragraph 2 of the TRIPS Agreement, which obliges the member states to introduce a limit on copyright's subject matter: "Copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical conceptions as such." *TRIPS Agreement*, *supra* note 1. This provision is clearly modeled on a related American provision in 17 U.S.C. § 102(b) with quite similar language. 17 U.S.C. § 102(b) (2002).

<sup>4</sup> WANDTKE & BULLINGER, *supra* note 2, Introduction, no. 6 (foreseeing a marriage between the Anglo-American copyright system and the continental "moral rights" regime). The German term for Constitutional Copyright Law is "Urheberverfassungsrecht."

<sup>5</sup> See generally Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225 (1999) (discussing the value of comparative constitutional law).

This inquiry will try to fathom and show how constitutional copyright is governed, shaped and limited by its own discourse within the realm of copyright law as a distinct and partly autonomous sub-system of constitutional law. This could be worthwhile because it might lead to a better understanding of how copyright law could function as a genuine and important part of a constitution. In turn, this inquiry might lead to a more refined understanding of how constitutional limitations on copyright function (or might miss their goal), and in what way there may be a fundamental difference between limitations imposed by copyright principles on the one hand, and other limitations derived from other constitutional rights on the other hand that are not part of the inner discussions within the realm of copyright law.

This article thus first explores the constitutional structure of American copyright law. Part II then turns to the German constitution,<sup>6</sup> taking into account European law. This is followed by Part III, which provides an account of the commonalities and differences between the two systems, and concludes with a critical evaluation of them in comparison. The methodological approach of this comparison will be guided by the approaches and cautions put forward by Mark Tushnet.<sup>7</sup>

## I. CONSTITUTIONAL COPYRIGHT LAW IN THE UNITED STATES

### A. Article I, Section 8, Clause 8 of the United States Constitution—The Intellectual Property or Copyright Clause

The United States Constitution enumerates several federal powers of Congress. Article I, Section 8, Clause 8, states, "The Congress shall have power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." The power of the federal government to enact both copyright and patent law is usually derived from this clause.<sup>8</sup> The text of this clause has never been amended. It is usually referred to as the "Copyright Clause" or "intellectual property clause," as it also covers patents and related subject matter.<sup>9</sup> As this article will

<sup>6</sup> All of the translations of German sources and materials in this article were made by the author.

<sup>7</sup> Tushnet, *supra* note 5, at 1229 (who also "cautions against adopting interpretive strategies that impute a high degree of constructive rationality to a constitution's drafters.").

<sup>8</sup> MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 1.02 (3d ed. 2008).

<sup>9</sup> On the variety of names for this clause, see Justin Hughes, *How Extra-Copyright Protection of Databases Can Be Constitutional*, 28 U. DAYTON L. REV. 159, 161 (2002) [hereinafter Hughes, *Databases*].

be chiefly about copyright law it will use the term "Copyright Clause."

### B. *Genesis and Original Scope of the Copyright Clause*

The history of the Copyright Clause per se is not easy to trace because the clause was introduced but never debated at the Constitutional Convention<sup>10</sup> and has never been amended. Statements made by George Washington and other Framers regarding state copyright law before the Constitutional Convention indicate that the Copyright Clause was intended to engender a marketplace in writings.<sup>11</sup> After the Constitution was drafted and subjected to referenda in the states, Madison made the following statement concerning the Copyright Clause in the Federalist Papers:

The utility of this power will scarcely be questioned. The copyright of authors has been solemnly adjudged, in Great Britain, to be a right of the common law. The right to useful inventions seeks with equal reason to belong to the inventors. The public good fully coincides in both cases with the claims of individuals. The States cannot separately make effectual provision for either of the cases, and most of them have anticipated the decision of this point, by laws passed at the instance of Congress.<sup>12</sup>

The text of the Copyright Clause itself makes it plain that the primary purpose of copyright is not to reward the author but to secure the general benefits derived by the public from the labors of authors.<sup>13</sup> The Framers' intentions were threefold:<sup>14</sup> (1) they thought it was preferable to favor authors over publishers in order to develop knowledge; (2) they thought that the progress of knowledge was in the national interest and that this progress could be achieved by creating new works; and, (3) the Framers were willing to suppress, for limited times, the copying of expression (which could amount to censorship via copyright) in exchange for the progress of the market and the benefit of the nation. They did not, however, begin from philosophical principles regarding copyright; instead, they were rather pragmatic and political, and they

<sup>10</sup> Marci A. Hamilton, *The Historical and Philosophical Underpinnings of the Copyright Clause*, Occasional Papers in Intellectual Property from Benjamin N. Cardozo School of Law, Yeshiva University, 1999, at 9 [hereinafter Hamilton, *Copyright Clause*].

<sup>11</sup> *Id.* at 10. See also NIMMER & NIMMER, *supra* note 8, at § 1.02 (stating that "[N]o helpful 'legislative' history is available in view of the secrecy of the committee proceedings").

<sup>12</sup> The Federalist, No. 43 (James Madison), quoted in Marci A. Hamilton, *Copyright at the Supreme Court: A Jurisprudence of Deference*, 47 J. COPYRIGHT SOC'Y U.S.A. 317, 318 (2000) [hereinafter Hamilton, *Copyright at the Supreme Court*].

<sup>13</sup> NIMMER & NIMMER, *supra* note 8, at § 1.03[A].

<sup>14</sup> Hamilton, *Copyright Clause*, *supra* note 10, at 12.

treated copyright as a self-evident element of the Constitution.<sup>15</sup> The English copyright law of that time,<sup>16</sup> on which American copyright law is somewhat based, is only of limited use for definitive guidance when interpreting the Copyright Clause because English copyright law was not imported wholesale, and the surrounding governmental structure and principles of the U.S. Constitution are very different from those of Britain.<sup>17</sup> Due to this lack of material, the Supreme Court's copyright law jurisprudence (approximately ninety decisions) had for a long time resulted in rather short opinions, the gist of which was that the scope of copyright law could largely be defined by Congress with a few limits set by the Copyright Clause; this changed with the Feist<sup>18</sup> decision in 1991.<sup>19</sup> Thus, in reverse, one can draw the conclusion that the Supreme Court has constantly and steadfastly rejected any natural law theory of copyright.<sup>20</sup>

### C. *Preemption of State Copyright*

The Copyright Clause is not a mandate that Congress must fulfill; rather, it is a power which Congress may exercise. Only if and the extent to which Congress exercises this power is state copyright law preempted by the Supremacy Clause in the Constitution.<sup>21</sup> For a long time, Congress left these state copyright laws, which often predated the Constitution, largely untouched. Not until the 1976 Copyright Act (codified at 17 U.S.C.<sup>22</sup>) did Congress aggressively preempt state copyright law on a large scale.<sup>23</sup> This preemption was achieved with the new provision in 17 U.S.C. § 301. Section 301 states that, beginning on January 1, 1978, all rights that are equivalent to any rights within the Copyright Act are solely governed by Article 17 of the U.S.C. and that from then on, no such rights could arise or exist under the common law or state law.<sup>24</sup> A considerable side effect of this large-scale preemption

<sup>15</sup> Hamilton, *Copyright at the Supreme Court*, *supra* note 12, at 4.

<sup>16</sup> Namely, the Statute of Anne from 1709, which called for, "the Encouragement of Learned Men to compose and Write useful Books", giving authors the "sole Right and Liberty of Printing such a book" (for 21 years), quoted in Hamilton, *Copyright Clause*, *supra* note 10, at 4, n.6.

<sup>17</sup> Hamilton, *Copyright at the Supreme Court*, *supra* note 12, at 4-5.

<sup>18</sup> *Id.* at 6. This case "suggests that the court's willingness to acquiesce in Congress's legislative judgments . . . may have peaked." *Id.*

<sup>19</sup> See *infra* Part II.D.3.

<sup>20</sup> Hamilton, *Copyright at the Supreme Court*, *supra* note 12, at 5.

<sup>21</sup> Hamilton, *Copyright Clause*, *supra* note 10, at 11. See also U.S. CONST. art. VI, cl. 2 (the Supremacy Clause).

<sup>22</sup> The Copyright Act of 1976, 17 U.S.C. §§ 101-810 (2000).

<sup>23</sup> Hamilton, *Copyright Clause*, *supra* note 10, at 10.

<sup>24</sup> See NIMMER & NIMMER, *supra* note 8, at § 1.01[B] ("Congress has acted in explicit terms to pre-empt various state law through § 301 of the Copyright Act of 1976. Because of [this], . . . courts usually need not gauge whether the federal interest in this field is domi-

in the realm of copyright law is that any redefinition of the scope of copyright law by the courts may or may not affect the legislative powers of the states.<sup>25</sup>

D. *The Expansion and Delineation of the Copyright Clause by Congress and the Supreme Court*

The courts have rarely taken up the task of understanding, interpreting, and construing the scope and meaning of the Constitution's Copyright Clause. Only recently has there been an increasing number of constitutional challenges to the copyright law.<sup>26</sup> However, there is still, in comparison to other clauses of the Constitution, little applicable case law available.<sup>27</sup>

1. The Influence of English Law and Natural Law on the Foundations of Copyright Law

Throughout its copyright jurisprudence, the Supreme Court embraced the principle that copyright law is based on positive, not natural law. As a result, this Court has assumed the role of statutory interpreter in most copyright cases.<sup>28</sup> Right away in its first copyright law case, *Wheaton v. Peters*,<sup>29</sup> the Court refused to read the entirety of English copyright law into the Copyright Clause and the Copyright Act of 1790 (one of the earliest pieces of legislation enacted by the First Congress); furthermore, it also refused a natural law foundation for copyright law. The *Wheaton* case is still cited by the Supreme Court when it rejects natural law arguments in copyright law.<sup>30</sup> The background of this case is the conflict between the then official reporter of U.S. Supreme Court decisions, Richard Peters, and the previous reporter, Henry Wheaton. When Peters began publishing summaries of cases de-

nant, whether the field of federal regulation is sufficiently comprehensive to raise an inference of intent to pre-empt, or whether any of the other pre-emption tests apply; rather, in general the courts may simply turn to the explicit statutory language.”)

<sup>25</sup> For a detailed account of the breadth and mechanics of the preemption entailed by the Copyright Act, see MARSHALL LEAFFER, UNDERSTANDING COPYRIGHT, 523-49 (4th ed. 2005).

<sup>26</sup> The “relatively recent phenomenon of constitutional attacks on copyright law” is pointed out by Marybeth Peters, who has been the “Register of Copyrights” since 1994 at the United States Copyright Office/Library of Congress and thus the highest ranking copyright official of the U.S. Government. See Marybeth Peters, *Constitutional Challenges to Copyright Law*, 30 COLUM. J.L. & ARTS 509 (2007).

<sup>27</sup> “Until recently, the body of constitutional law relating to copyright was almost nonexistent. When the Constitution and copyright law did intersect, it was on issues having little to do with substantive copyright law . . .” *Id.* See also NIMMER & NIMMER, *supra* note 8, at § 1.02.

<sup>28</sup> Hamilton, *Copyright at the Supreme Court*, *supra* note 12, at 7. A nice overview of the history of U.S. copyright law can be found at the Association of Research Libraries’ website at [www.arl.org/pp/ppcopyright/copyresources/copytimeline.shtml](http://www.arl.org/pp/ppcopyright/copyresources/copytimeline.shtml) (last visited Feb. 2, 2009).

<sup>29</sup> *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834), quoted in Hamilton, *Copyright at the Supreme Court*, *supra* note 12, at 28.

<sup>30</sup> Hamilton, *Copyright at the Supreme Court*, *supra* note 12, at 9.

ided during Wheaton’s tenure, Wheaton sued him and maintained that “an author was entitled, at common law, to a perpetual property in the copy of his works.”<sup>31</sup> Wheaton thus effectively argued that there existed in the U.S.—“by securing” in the Copyright Clause—a pre-existing copyright law quite apart from the Constitution’s Copyright Clause and the Copyright Act. All the Copyright Clause added, in Wheaton’s opinion, was an additional Constitutional layer of protection for copyright.<sup>32</sup> Peters, in contrast, argued that Wheaton had failed to properly obtain copyright by registration (as required by the Copyright Act), and that the only copyright law that existed in the U.S. was the Copyright Clause and the Copyright Act.

The Court, however, rejected Wheaton’s position and reasoned that Congress had not simply sanctioned a pre-existing right when it enacted the Copyright Act of 1790, but had rather created a new, statutory right.<sup>33</sup> The Court stated that this had already been the case in England: “[T]he law appears to be well settled in England, that, since the Statute of Anne, the literary property of an author in his works can only be asserted under the statute.”

The Supreme Court then made it clear that it would not recognize any perpetual natural law of copyright:

That an author, at common law, has a property in his manuscript, and may obtain redress against any one who deprives him of it, or by improperly obtaining a copy endeavors to realize a profit by its publication, cannot be doubted; but this is a very different right from that which asserts a perpetual and exclusive property in the future publication of the work, after the author shall have published it to the world.<sup>34</sup>

Thus, the words “by securing” in the Copyright Clause do not operate as a limitation on the congressional power to enact copyright legislation.<sup>35</sup> Eventually, the *Wheaton* case set the course for the Supreme Court’s copyright law jurisprudence for a long time, by rejecting English copyright law as a main interpretative tool, by rejecting natural law as a foundation of copyright law, and by showing great deference to congressional judgment regarding the appropriate scope of copyright law.<sup>36</sup>

<sup>31</sup> *Wheaton v. Peters*, 33 U.S. (8 Pet.) at 593.

<sup>32</sup> NIMMER & NIMMER, *supra* note 8, at § 1.04.

<sup>33</sup> Hamilton, *Copyright at the Supreme Court*, *supra* note 12, at 8. The direct quotation is: “Congress, then, by this act, instead of sanctioning an existing right, as contended for, created it.” 33 U.S. (8 Pet.) at 661.

<sup>34</sup> *Wheaton v. Peters*, 33 U.S. (8 Pet.) at 657.

<sup>35</sup> NIMMER & NIMMER, *supra* note 8, at § 1.04.

<sup>36</sup> Hamilton, *Copyright at the Supreme Court*, *supra* note 12, at 9.

## 2. The Meaning and Scope of "Writings"

Another issue arose in *Burrow-Giles v. Sarony*,<sup>37</sup> which dealt with a famous picture of Oscar Wilde.<sup>38</sup> Congress had previously amended the Copyright Act to include photographs, and the question before the Court was whether this was constitutional, as the Copyright Clause only mentioned "writings." The Court rejected a plain-meaning interpretation of the Copyright Clause. Instead, it looked to the first Copyright Act from 1790, enacted immediately after the ratification and passage of the Constitution, and enacted by some of the Framers to boot. This act already extended copyright not only to books but also to maps and charts. The Court gave "very great weight" to the fact that the contemporaneous understanding of the Copyright Clause extended beyond a narrow class of writings.<sup>39</sup> The decision also makes it obvious that the Supreme Court would not invalidate a federal law that had been in force for almost 100 years. Eventually, the Supreme Court interpreted "writings" to mean and to be synonymous with "literary productions," concluding that there is "no doubt" that photographs were covered by the Copyright Clause.<sup>40</sup> However, this would only extend to photographs which were somewhat creative and thus "original."<sup>41</sup> The Supreme Court later gave "writings" an even broader meaning: "[A]lthough the word 'writings' might be limited to script or printed material, it may be interpreted to include any physical rendering of the fruits of creative intellectual or aesthetic labor."<sup>42</sup> What one can conclude from this definition is that the Copyright Clause is open to cover new subject matters that were, like photography, unknown at the time of the framing. It is thus, in a way, "living."<sup>43</sup>

<sup>37</sup> *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884).

<sup>38</sup> The picture can be found at [http://en.wikipedia.org/wiki/Burrow-Giles\\_Lithographic\\_Co.\\_v.\\_Sarony](http://en.wikipedia.org/wiki/Burrow-Giles_Lithographic_Co._v._Sarony) (last visited Jan. 31, 2009).

<sup>39</sup> *Burrow-Giles*, 111 U.S. at 57 ("The construction placed upon the Constitution by the first act of 1790 and the act of 1802, by the men who were contemporary with its formation, many of whom were members of the convention which framed it, is of itself entitled to very great weight, and when it is remembered that the rights thus established have not been disputed during a period of nearly a century, it is almost conclusive.")

<sup>40</sup> *Burrow-Giles*, 111 U.S. at 58.

<sup>41</sup> Hamilton, *Copyright at the Supreme Court*, *supra* note 12, at 19.

<sup>42</sup> *Goldstein v. California*, 412 U.S. 546, 561-62 (1973).

<sup>43</sup> Rejecting the notion that the Constitution "embalms inflexibly the habits of 1789," the renowned Judge Learned Hand wrote in 1921 that the Copyright Clause's, "grants of power to Congress comprise not only what was then known, but what the ingenuity of men should devise thereafter. Of course, the new subject matter must have some relation to the grant, but we interpret by the general practice of civilized people in similar fields, for it is not a strait-jacket but a charter for a living people." See *Reiss v. Nat'l Quotation Bureau*, 276 F. 717, 719 (S.D.N.Y. 1921).

## 3. The *Feist* Decision: "Originality" as a Limiting Constitutional Requirement

The telephone book publishing company Feist copied 1,309 telephone book entries from Rural's white pages. Four of these were fictitious listings that Rural had inserted into its directory to detect copying. Rural sued for copyright infringement and prevailed in the district court and in the Court of Appeals.

The Supreme Court then had to determine whether telephone book white pages were copyrightable; that is, whether they were sufficiently "original" (or had enough "originality")<sup>44</sup> to justify copyright protection. The Supreme Court not only ruled on this question but also decided that the requirement of originality was not just a statutory, but also a constitutional requirement.<sup>45</sup> This most seminal case for American constitutional copyright law in recent years, *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.* ("Feist"),<sup>46</sup> was unanimously<sup>47</sup> decided in 1991.<sup>48</sup> It "had a powerful impact on copyright law, both here and abroad."<sup>49</sup>

### (i) The Reasoning of the Supreme Court in *Feist*

When Congress drafted the new Copyright Act in 1976, it made it clear that it intentionally added no definition of "original" because Congress wanted to incorporate the long-standing copyright case law that had developed over the centuries.<sup>50</sup> Congress's decision to show deference to the judiciary gave the Supreme Court the opportunity to use a case which hinged on the scope of originality in order to define a constitutional limit to copyright law.

The requirement of originality itself is prescribed by 17 U.S.C. § 102(a), which states, "copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression . . ." At first, the Supreme Court just defines the limits of copyright law itself:

<sup>44</sup> See LEAFFER *supra* note 25, at 58-61, with a discussion of the scope of the term "originality."

<sup>45</sup> NIMMER & NIMMER, *supra* note 8, at § 1.06[A].

<sup>46</sup> *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991).

<sup>47</sup> Unanimous Supreme Court decisions are very rare in copyright case law. See Hamilton, *Copyright at the Supreme Court*, *supra* note 12, at 5.

<sup>48</sup> For very critical accounts of this decision, see Justin Hughes, *Created Facts and the Flawed Ontology of Copyright Law*, 83 NOTRE DAME L. REV. 43 (2007) [hereinafter Hughes, *Created Facts*], available at <http://ssrn.com/abstract=101207>. See also Marc Temin, *The Irrelevance of Creativity: Feist's Wrong Turn and the Scope of Copyright Protection for Factual Works*, 111 PENN ST. L. REV. 267 (2006-2007); Justin Hughes, *How Extra-Copyright Protection of Databases Can Be Constitutional*, 28 U. DAYTON L. REV. 159 (2002-2003).

<sup>49</sup> Hughes, *Created Facts*, *supra* note 48, at 48.

<sup>50</sup> See NIMMER & NIMMER, *supra* note 8, at § 2.01. ("The phrase 'original works of authorship' which is purposely left undefined, is intended to incorporate without change the standard of originality established by the courts under the previous copyright statute[s].")

That there can be no valid copyright in facts is universally understood. The most fundamental axiom of copyright law is that no author may copyright his ideas or the facts he narrates. . . . At the same time, however, it is beyond dispute that compilations of facts are within the subject matter of copyright. . . . The sine qua non of copyright is originality. To qualify for copyright protection, a work must be original to the author. Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity.<sup>51</sup>

However, the Supreme Court took this occasion and decided to not simply rule on the scope of the Copyright Act itself, but rather to act in its role as the final interpreter of the Constitution.<sup>52</sup> The constitutional context of copyright law had been mostly ignored for quite some time.<sup>53</sup> In contrast, the *Feist* Court's observations on copyright law today "define United States copyright's bedrock" though "the decision's constitutional thrust was a surprise."<sup>54</sup> The unanimous Court flatly stated that "originality is a constitutional requirement."<sup>55</sup> Thus, the Court limited the scope of the Copyright Act and the powers of Congress somewhat, if not considerably, because not every expression will have enough "originality" to be copyrightable.

The Court looked at the words of the Copyright Clause and at two leading Supreme Court cases<sup>56</sup> from the nineteenth century to assist it in defining the scope and content of the Copyright Clause. The Court concentrated on two terms: "authors" and "writings." Relying on previous case law, the Supreme Court defined the Constitution's term "writings" in this way: "[f]or a particular work to be classified under the head of writings of authors . . . originality is required. . . . [O]riginality requires independent creation plus a modicum of creativity. . . . The writings which are to be protected are the fruits of intellectual labor . . ." The court then turned to the meaning of the scope of the term "author": "[i]n a constitutional sense [it] mean[s] [someone to] whom anything owes its origin, [the] originator, maker" and emphasized "the creative component of originality."<sup>57</sup>

<sup>51</sup> *Feist*, 499 U.S. at 345.

<sup>52</sup> Hamilton, *Copyright Clause*, *supra* note 10, at 13.

<sup>53</sup> Hamilton, *Copyright Clause*, *supra* note 10, at 14.

<sup>54</sup> Hamilton, *Copyright Clause*, *supra* note 10, at 13.

<sup>55</sup> *Feist*, 499 U.S. at 346.

<sup>56</sup> The Trade-Mark Cases, 100 U.S. 82 (1879); *Burrow-Giles*, 111 U.S. 53. See also Temin, *supra* note 48 (arguing that the Supreme Court misunderstood and misread these cases).

<sup>57</sup> *Feist*, 499 U.S. at 346-47.

Originality is thus something like the essence of authorship.<sup>58</sup> The Court, however, stretched itself to make clear that this is not such a high demand, and that originality is different from novelty.<sup>59</sup> The Court then fortified its constitutional interpretation throughout the decision: "[This] originality requirement . . . remains the touchstone of copyright protection today. . . . It is the very "premise of copyright law." The Court called this premise "the bedrock principle of copyright"<sup>60</sup> and a "constitutional minimum."<sup>61</sup> In sum: "originality is a constitutionally mandated prerequisite for copyright protection."<sup>62</sup> The Court then drew the distinction to mere facts:

No one may claim originality as to facts. This is because facts do not owe their origin to an act of authorship. The distinction is one between creation and discovery: The first person to find and report a particular fact has not created the fact; he or she has merely discovered its existence. . . . [O]ne who discovers a fact is not its "maker" or "originator" . . . The discoverer merely finds and records.<sup>63</sup>

After that, the Court discarded the theory of "sweat of the brow" or "industrious collection."<sup>64</sup> The underlying notion of this theory, developed by some lower courts, was that copyright was a reward for the hard work that went into compiling facts,<sup>65</sup> (or even merely collecting facts), but the Court made short shrift of this theory: "Without a doubt, the 'sweat of the brow' doctrine flouted basic copyright principles."<sup>66</sup> The Court argued that "sweat of the brow" was not within the scope of the Copyright Clause precisely because the primary objective of copyright is not to reward the labor of authors, but "to promote the Progress of Science and useful Arts." It elaborated the rationale for why this would exclude "sweat of the brow" protection: "[T]o accord copyright protection

<sup>58</sup> NIMMER & NIMMER, *supra* note 8 at § 1.06[A].

<sup>59</sup> *Feist*, 499 U.S. at 345-46 (To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily, as they possess some creative spark, no matter how crude, humble or obvious it might be. Originality does not signify novelty; a work may be original even though it closely resembles other works so long as the similarity is fortuitous, not the result of copying. To illustrate, assume that two poets, each ignorant of the other, compose identical poems. Neither work is novel, yet both are original and, hence, copyrightable.). *Id.* See also MANFRED REHBINDER, URHEBERRECHT, 26 (2006) (The German equivalent to the low level of originality demanded by the Supreme Court is the so-called "kleine Münze" ("small change"). This term describes the fact that almost every creative expression is copyrightable in Germany).

<sup>60</sup> *Feist*, 499 U.S. at 346-47.

<sup>61</sup> *Id.* at 348.

<sup>62</sup> *Id.* at 351.

<sup>63</sup> *Id.* at 346-47.

<sup>64</sup> *Id.* at 352-54.

<sup>65</sup> *Id.* at 353.

<sup>66</sup> *Id.* at 354.

on this basis alone distorts basic copyright principles in that it creates a monopoly in public domain materials without the necessary justification of protecting and encouraging the creation of writings by authors.<sup>67</sup>

The Court also underscored that, though it may seem unfair that much of the fruit of the compiler's labor may be used by others without compensation, this would not be some unforeseen or unintended byproduct of the Copyright Act's demand of originality; rather, the Court stated, this is "the essence of copyright" and a constitutional requirement.<sup>68</sup> The Court tried to glean this requirement from the text of the Constitution itself, but did so by just repeating the text of the Copyright Clause:

The primary objective of copyright is not to reward the labor of authors, but "to promote the Progress of Science and useful Arts." To this end, copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work. This principle, known as the idea/expression or fact/expression dichotomy, applies to all works of authorship.<sup>69</sup>

It is clear, however, that the Supreme Court held that originality is a requirement that does not favor authors, but rather favors progress of science. Then the Court sealed its reasoning with a bold statement:

[R]aw facts may be copied at will. This result is neither unfair nor unfortunate. It is the means by which copyright advances the progress of science and art. . . . This, then, resolves the doctrinal tension: Copyright treats facts and factual compilations in a wholly consistent manner. Facts, whether alone or as part of a compilation, are not original and therefore may not be copyrighted.<sup>70</sup>

Eventually, the Supreme Court dismissed Rural's claim of copyright infringement: "As a Constitutional matter, copyright protects only those constituent elements of a work that possess more than a de minimis quantum of creativity. Rural's white pages, limited to basic subscriber information and arranged alphabetically, fall short of the mark."<sup>71</sup>

### (ii) Legal Effects of the *Feist* Decision

The legal effect of the *Feist* decision is that effort without a

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 349.

<sup>69</sup> *Id.* at 349-50.

<sup>70</sup> *Id.* at 350.

<sup>71</sup> *Id.* at 363.

creative outcome is not rewarded with a copyright in the United States. The creative outcome or "work" has a constitutionally privileged status. *Feist* effectively curtails any monopoly in public domain materials and protects an old idealistic view of knowledge: "The general rule of law is, that the noblest of human productions—knowledge, truths ascertained, conceptions, and ideas—become, after voluntary communication to others, free as the air the air to common use."<sup>72</sup> Thus, mere facts must be available for all to use. This also fits nicely with the First Amendment's concerns of a free marketplace of ideas and expression.<sup>73</sup> Essentially, *Feist* ensured that American copyright law squares with the First Amendment in a way that both can operate as foundations of modern capitalism in America.<sup>74</sup>

### (iii) Interpretation of the *Feist* Decision

One could argue that the *Feist* decision casts the traditional justifications for copyright aside.<sup>75</sup> One of them is Hegelian and Kantian in essence: a thing created by a human is worthy of protection because it is an embodiment of his or her personality.<sup>76</sup> The product is an extension and expression of that person.<sup>77</sup> However, the *Feist* decision is not at all concerned with the personality of the creator but rather with the quality of its product; it defines "originality" as an objective limit to protection of the work and thus of the protection of the creator. *Feist* thus somewhat de-personifies copyright law.<sup>78</sup>

The Lockean justification is:

[H]aving mixed one's labor with the materials provided on

<sup>72</sup> See *Int'l News Serv. v. Associated Press*, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting).

<sup>73</sup> Hamilton, *Copyright Clause*, *supra* note 10, at 16-17 (maintaining that the Court in *Feist* brings copyright law more in line with its prior First Amendment decisions. These decisions, which removed the state and churches as censors by invalidating laws against blasphemy, heresy, and sedition made it in return possible to profit from dissent via copyright protection).

<sup>74</sup> *Id.* at 17 ("The court's proposition that facts must be free was a corollary to the First Amendment doctrine that fosters a free marketplace of ideas"). See also Hamilton, *Copyright at the Supreme Court*, *supra* note 12, at 21.

<sup>75</sup> Hamilton, *Copyright Clause*, *supra* note 10, at 16-17. For an elaborate account of the basic copyright doctrines, see WILLIAM LANDES & RICHARD POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW*, 85-123 (2003). See also LEAFFER, *supra* note 25, at 17-25 (identifying three justifications for copyright: the natural law justification in both its Lockean or Hegelian version and the utilitarian conception which is apparently embodied in the Copyright Clause). For a German/European take on the justification of copyright law, see REHBINDER, *supra* note 59, at 9-16. See also HEINRICH HUBMANN & HORST-PETER GÖTTING, *GEWERBLICHER RECHTSSCHUTZ*, 49-69 (2002).

<sup>76</sup> Justin Hughes, *The Philosophy of Intellectual Property*, 77 *Geo. L.J.* 287, 343 (1988-1989) ("Hegel argues that recognizing an individual's property rights is an act of recognizing the individual as a person").

<sup>77</sup> Hamilton, *Copyright Clause*, *supra* note 10, at 18.

<sup>78</sup> *Id.* at 19.

earth, the laborer then has a rightful claim in the product. . . . The justification for placing property rights in the product lies in the fact that the producer has impressed her labor upon that which is in the commons and transformed raw material into something else.<sup>79</sup>

Traditionally, copyright law is therefore thought to induce creative activity by justly rewarding its output with an exclusionary right. A mix of the Hegelian/Kantian and Lockean view of copyright law is thought to support and undergird current American copyright law;<sup>80</sup> however, these views were precisely refuted by the Supreme Court. *Feist* rejects copyright claims justified solely on the basis of labor expended; therefore, Locke's property theory can no longer explain and account for American copyright law, as Locke's property theory contains no limitation concerning the quality of the labor.<sup>81</sup>

*Feist* rather boils down to an acceptance of modern capitalism by the Constitution and the Supreme Court. This is achieved by creating a marketplace for expressions by distancing the product from the producer, by emphasizing the need for wealth accumulation, and by demanding objective quality criteria independent from the creator's personality. *Feist* would thus mark the maturing of the Copyright Clause, as it leaves the traditional justifications of copyright behind.<sup>82</sup>

#### (iv) Criticism of the *Feist* Decision

The *Feist* decision has been the subject of heavy critique claiming the constitutional demand for originality cannot be found in the Constitution.<sup>83</sup> The plain language of the Copyright Clause does not mention "originality" as a constitutional requirement for a valid copyright. Although *Feist* purports to be merely following and building on former case law, it breaks new ground by constitutionalizing the originality requirement. Yet, it is somewhat unclear how Justice O'Connor determined (or rather, found out) that the Constitution demands "originality," especially when *Feist* did not pose a constitutional question and "could have been easily decided at the statutory level."<sup>84</sup> A close look at the preced-

<sup>79</sup> *Id.* at 21. *Cf. id.* at 21, n.27, (paraphrasing John Locke's Second Treatise of Government § 27).

<sup>80</sup> *Id.* at 21.

<sup>81</sup> *Id.* at 21.

<sup>82</sup> Hamilton, *Copyright Clause*, *supra* note 10, at 25.

<sup>83</sup> Hughes, *Created Facts*, *supra* note 48, at 43, 45. For his extensive critical analysis of the *Feist* decision, see *id.* at 46-49.

<sup>84</sup> *Id.* at 48 ("The court could have achieved the same result at the statutory level, and much of Justice O'Connor's opinion is devoted to the conclusion that purely factual works are not 'original works' under the statute."). This seems to be a quite withering critique

ing cases the Supreme Court cites in order to support the constitutional demand for "originality" only reveals that all one can glean from such cases is that facts are not copyrightable, and not that there should be an additional creative hurdle to attain copyright.<sup>85</sup>

Critics also claim that it is not possible to distinguish between creative expression and merely "discovered" facts in the way the Court does<sup>86</sup> because this differentiation might be "fundamentally flawed"<sup>87</sup> since "facts" are not "reality," but rather information created by humans about reality:

The problem with the *Feist* analysis is that it is wrong – and that error has produced over a decade of distortion in copyright doctrine. *Feist* is wrong because many facts clearly owe their origin to discrete acts of human originality.<sup>88</sup> . . . The *Feist* decision's definition of 'facts' and its understanding of their unprotected nature fails to capture how created facts arise in our social reality.<sup>89</sup>

The exclusion of mere facts also has the result that simple databases containing raw data, which are created with a lot of work yet no creativity, are not copyrightable and thus cannot be protected.<sup>90</sup> This is criticized as being detrimental to the American database industry and a competitive disadvantage in comparison to Europe.

However, many constitutional scholars forcefully argue that *Feist*'s understanding of the Copyright Clause effectively makes such protection unconstitutional.<sup>91</sup> Moreover, "[f]ollowing *Feist*, courts in the United States have consistently found that copyright law does not prevent copying of all or a very large percentage of a database."<sup>92</sup> Many scholars believe that such database protection could not be enacted under any other legislative power of Con-

of Justice O'Connor's methodology.

<sup>85</sup> Temin, *supra* note 48, at 267.

<sup>86</sup> *Id.* at 264, 267 ("The addition [of the originality requirement] was based on confusion between language and the world . . . . The court, ignoring the difference between the world and the words that describe it, creates a factitious mystery that it tries to solve by adding [a minimum standard of originality].").

<sup>87</sup> Hughes, *Created Facts*, *supra* note 48, at 43 ("It is black letter doctrine that facts are not copyrightable: facts are discovered, not created—so they will always lack the originality needed for copyright protection. As straightforward as this reasoning seems, it is fundamentally flawed.").

<sup>88</sup> *Id.* at 43, 45. For an extensive critical analysis of the *Feist* decision, see *id.* at 46-49.

<sup>89</sup> *Id.* at 107.

<sup>90</sup> Hughes, *Databases*, *supra* note 9, at 165 ("[The Copyright Act can] still protect a database of factual entries, but only if the creativity in its selection and/or arrangement rendered it an original work; and even then, the legal protection would only extend to copying of that selection and arrangement.").

<sup>91</sup> This likely result of the *Feist* decision was heavily criticized, and Congress attempted several times to create additional database protection, but has until now failed to do so. See *id.* at 159-60, where Hughes argues that such database protection could be constitutional, but remains "agnostic" about it.

<sup>92</sup> *Id.* at 165.

gress—the limitations of the Copyright Clause would effectively block any legislation related to copyright-like subject-matter.<sup>95</sup> The argument proposed is that *Feist* not only says what Congress may not do under the Copyright Clause,

but that the [Copyright] Clause establishes what Congress may not do at all. Nothing in *Feist* expressly states that the Copyright . . . Clause limits the scope of Congress's power under other provisions of the Constitution. On the other hand, if the limitation is limited to that enumerated power in the Copyright Clause, it is no limit at all—a result that makes no sense.<sup>94</sup>

Nevertheless, as Congress has not enacted such additional database protection, there is no related case law and the point is thus somewhat moot for the moment. Yet, the question of the Copyright Clause's relation to the other powers of Congress is further discussed in a case concerning bootlegging (secret and illegal recording of live music performances) where Congress actually has enacted some new copyright-like protection, that was challenged in court.<sup>95</sup>

#### 4. How Long Are "limited Times"? The *Eldred* Decision

From an economic perspective, it is generally accepted that economic efficiency requires that copyright terms be limited for several reasons.<sup>96</sup> However, there is a long-standing trend in the U.S. and world-wide to extend copyright terms time and again. In the U.S., the original term consisted of two subsequent terms of fourteen years, beginning with the registration of the work. It was later extended to two terms of twenty-eight years. In 1976, this was extended to a term totaling the life of the author plus fifty years. Most recently, in 1998, the term was extended to life-of-the-author plus seventy years, and for works made for hire to at least ninety-

<sup>95</sup> See *id.* at 159, 170-89 (providing an extensive and exhaustive account of this constitutional conundrum and Hughes' critical opinion of it).

<sup>94</sup> *Id.* at 181.

<sup>95</sup> See *infra* Part II.E.

<sup>96</sup> Two of the main reasons are: (1) the costs of finding the owner of a copyright increase with the length of the copyright term; and, (2) costs may be prohibitively high for creators of new works if they have to obtain licenses to use all the intellectual property they seek to build upon. See WILLIAM LANDES & RICHARD POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 210-53 (2003) (giving a critical account of the economic justifications for limited copyright terms and state). *Cf. id.* at 214 ("It is true that enormous tracing costs would be incurred by any would-be publisher of a new translation of the *Iliad* if the heirs of Homer could enforce copyright in the Work. But this is only because no one knows who they are. . . . It is . . . absence of registration that creates prohibitive tracing costs."). *Id.* See also Richard A. Posner, *How Long Should A Copyright Last?*, 50 J. COPYRIGHT SOC'Y U.S.A. 1, (2003). See also William M. Landes & Richard A. Posner, *Indefinitely Renewable Copyright*, 70 U. CHI. L. REV. 471 (2003) (Raising questions concerning the widely accepted proposition that economic efficiency requires that copyright protection should be limited in its duration.).

five years and up to one hundred and twenty years. Given this trend towards increasingly longer copyright terms, "the constitutional limitation should be borne in mind that copyright may last for 'limited Times' only."<sup>97</sup>

On its face, this language "[seems to] create[] a very real limitation upon congressional power."<sup>98</sup> The legal significance of "limited times" is, however, unclear, although the motivation—a hostility deeply rooted in Anglo-American law and politics to the conferral of monopolies by the executive branch of government—is clear enough.<sup>99</sup> The problem is that any time period that is not infinity, that is, any fixed number of years, is limited in the literal sense of the Copyright Clause. It is plain that "'limited' must mean something far short of infinity."<sup>100</sup> However, all that can be stated straightforwardly is that Congress can neither grant perpetual copyright nor, in all likelihood, something that is "nominally a 'limited time' but in fact the equivalent of perpetual protection (e.g., a one-thousand year term)."<sup>101</sup> Moreover, although all of the extensions of the copyright term granted by Congress were held to be constitutional, it is likely that a piecemeal approach of continuous extension of protection will become unconstitutional at the point at which it becomes "*de facto* perpetual."<sup>102</sup> However, the Constitution is silent regarding this real prospect of its own circumvention.

It is a related problem that the extension of copyright terms usually also covers existing works. This is problematic if one views copyright as limited to induce and promote the creation of new works, because by extending the term for an existing work, the author cannot be induced to create this work since it already exists. Thus, one could argue that the extension of existing copyrights would violate the Copyright Clause. However, the first Copyright Act of 1790, enacted by the first Congress and by some of the Framers, extended the terms of pre-existing copyright. This seemingly was not seen as a constitutional problem, as the courts deem the judgment of those contemporary with the Constitution to have great, if not decisive, weight; the courts always accepted the term extension of existing copyrights as constitutional under the Copy-

<sup>97</sup> NIMMER & NIMMER, *supra* note 8, at § 9.01 (criticizing this development and foreseeing that "[o]ne imagines that, at some point, an end point must be reached."). Nimmer also observes that in the U.S., "an unchallenged course of [legislative] conduct over decades [like the continuous extension of the copyright term] can establish the constitutionality of [this] practice . . ." *Id.* at § 1.05[A][1].

<sup>98</sup> *Id.* at § 1.05[A][1].

<sup>99</sup> LANDES & POSNER, *supra* note 96, at 211.

<sup>100</sup> *Id.*

<sup>101</sup> NIMMER & NIMMER, *supra* note 8, § 1.05[A][1].

<sup>102</sup> *Id.*

right Clause.<sup>103</sup>

When Congress extended the copyright terms in 1998, via the "Sonny Bono Copyright Extension Term Act" ("CTEA"), it invited a direct constitutional challenge that eventually reached the Supreme Court. In *Eldred v. Ashcroft*<sup>104</sup> the Court upheld the lower courts' judgments validating the constitutionality of the amendment, stating it neither violated the First Amendment<sup>105</sup> nor the Copyright Clause.<sup>106</sup> At the time of the decision, the Supreme Court "declined to place any limits on Congress's authority to extend copyright terms."<sup>107</sup>

Congress has authority under the Copyright Clause to extend the terms of existing copyrights. Text, history, and precedent, we conclude, confirm that the Copyright Clause empowers Congress to prescribe "limited Times" for copyright protection and to secure the same level and duration of protection for all copyright holders, present and future.<sup>108</sup>

....

As we read the Framers' instruction, the Copyright Clause empowers Congress to determine the intellectual property regime that, overall, in that body's judgment, will serve the ends of the Clause. Beneath the façade of their inventive constitutional interpretation, petitioners forcefully urge that Congress pursued very bad policy in prescribing the CTEA's long terms. The wisdom of Congress's action, however, is not within our province to second-guess. Satisfied that the legislation before us remains inside the domain the Constitution assigns to the First Branch, we affirm. . . .<sup>109</sup>

The only limit the Court set is some kind of rationality test: whether it is a rational exercise of the legislative authority conferred by the Copyright Clause. On that point, we defer substantially to Congress. "It is Congress that has been assigned the task of defining the scope of the limited monopoly that

<sup>103</sup> *Id.* at 1-98 (noting that Chief Justice Marshall, when sitting as district judge, approved of the Copyright Act of 1790).

<sup>104</sup> 537 U.S. 186 (2002). Justice Ginsburg delivered the opinion for the 7-2 majority, Breyer and Stephens dissented.

<sup>105</sup> See Paul Bender, *Copyright and the First Amendment after Eldred v. Ashcroft*, 30 COLUM. J.L. & ARTS 349, 354 (2006-2007) (arguing that the court's conclusion that the First Amendment and copyright law do not generally conflict is too broad).

<sup>106</sup> See the extensive discussion of this case by NIMMER & NIMMER, *supra* note 8, § 1.05[A][1], at 1-96-100. See also Kevin Goldman, *Limited Times: Rethinking the Bounds of Copyright Protection*, 154 U. PA. L. REV. 705 (2006). See also Richard A. Posner, *supra* note 95, at 1-2, who analyzes the effect of the decision ("[W]e shall now have many copyrights lasting a century or more, and with the momentum that the Act and the Court's upholding of it are bound to lend to future extensions, we face the prospect of copyrights that are de facto perpetual or close to it. And such copyrights are a bad thing, although to explain why they are a bad thing will require a careful analysis. . ."). *Id.*

<sup>107</sup> NIMMER & NIMMER, *supra* note 8, at § 9.01.

<sup>108</sup> *Eldred*, 537 U.S. at 199.

<sup>109</sup> *Id.* at 222.

should be granted to authors in order to give the public appropriate access to their work product."<sup>110</sup>

The Court also accepted "international concerns" and cautioned against "an isolationist reading of the Copyright Clause that is in tension with America's international copyright relations over the last hundred or so years."<sup>111</sup> In this context, it is very interesting that the Court accepted as a rational reason among Congress's reasons for extending the Copyright term the fact that the CTEA was a reaction to European legislation, namely the Copyright Directive that was enacted in 1993. As the court states:

The CTEA reflects judgments of a kind Congress typically makes, judgments we cannot dismiss as outside the Legislature's domain. . . . [A] key factor in the CTEA's passage was a 1993 European Union (EU) directive instructing EU members to establish a copyright term of life plus 70 years.<sup>112</sup> Consistent with the Berne Convention, the EU directed its members to deny this longer term to the works of any non-EU country whose laws did not secure the same extended term. By extending the baseline United States copyright term to life plus 70 years, Congress sought to ensure that American authors would receive the same copyright protection in Europe as their European counterparts. Matching the level of copyright protection in the United States to that in the EU can ensure stronger protection for U.S. works abroad and avoid competitive disadvantages vis-à-vis foreign rightholders. . . . The reason why you're going to life-plus-70 today is because Europe has gone that way.<sup>113</sup>

Additionally, the Court accepted the consideration that increasing longevity and the trend toward rearing children later in life demanded an extension of the copyright term, as copyright protection after the author's death was always meant to allow the following two generations to benefit from the copyright. Another rational reason for extending already existing copyrights accepted

<sup>110</sup> *Id.* at 205-06 (quoting *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984)).

<sup>111</sup> *Id.* at 207.

<sup>112</sup> *Id.* See also the EU's Council Directive 93/98/EEC of 29 October 1993 Harmonizing the Term of Protection of Copyright and Certain Related Rights, O.J. (L 290) 9-13 [hereinafter *Copyright Term Harmonization Directive*], available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:1993L0098:20010622:EN:PDF>. Article 1 paragraph 1 harmonizes the copyright term throughout the EU to life-of-the-author-plus 70-years. Article 7 of this directive contains the provision that had denied U.S. citizens the term of 70 years as long as the U.S. was not granting the same term to EU nationals in the U.S. This provision is in compliance with Article 7 paragraph 8 of the Berne Convention, which allows such exceptions due to a lack of reciprocity. Berne Convention for the Protection of Literary and Artistic Works, art. 7, Sept. 9, 1886, as last revised Oct. 2, 1979, 828 U.N.T.S. 221. The EU's exclusion of American authors was also in compliance with TRIPS. See THOMAS DREIER, URHG KOMMENTAR Vor §§64ff., no. 21 (2006).

<sup>113</sup> *Eldred*, 537 U.S. at 206-07 (citation omitted).

by the Court is Congress's assumption that longer copyright terms encourage copyright holders to invest in the restoration and public distribution of works (such as old silent movies).<sup>114</sup>

E. *The Relation of the Copyright Clause to Other Powers of Congress: Alternatives to the Copyright Clause Within the U.S. Constitution*

There are other legislative powers the Constitution confers to Congress, such as the "Commerce Clause"<sup>115</sup> or the "Necessary and Proper Clause." It is still not resolved to what extent these provisions enable Congress to use these general powers in a situation where the more limited Copyright Clause would apply. The question is whether Congress could circumvent the Copyright Clause in such a way that would seemingly eradicate the limitations of the Copyright Clause imposed by the Constitution. If Congress could enact copyright statutes (or something which is very much akin to a copyright) under its general powers, the intended limitations of the Copyright Clause would be without effect—a result stemming from the Supreme Court's broad interpretation of Congress's Commerce power. However, the Framers probably did not intend the Copyright Clause to be meaningless, and such an interpretation would seem to be unsystematic.<sup>116</sup>

This issue first arose in the nineteenth century when the Supreme Court struck down several federal trademark statutes as unconstitutional<sup>117</sup> while finding that trademarks would not fit under the Copyright Clause (as they belong neither to the arts nor to the sciences, but to commerce, and as they are neither writings nor discoveries), the Supreme Court also held that Congress had no power to enact a federal trademark act under its Commerce powers.<sup>118</sup> Trademark has thus remained for a long time (and partly still is) a matter for the states.

Currently, this question is still the subject of much debate and litigation. The United States joined the World Trade Organization ("WTO") and its respective IP-agreement, TRIPS, in 1994. In order to be in compliance with these treaties, the U.S. needed to change its copyright law considerably, and consequently enacted a so-called "anti-bootlegging" statute, codified in the Copyright Act.<sup>119</sup> This provision is meant to protect performing artists

<sup>114</sup> *Id.*

<sup>115</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>116</sup> See *supra* note 91 and accompanying text.

<sup>117</sup> See *The Trade-Mark Cases*, 100 U.S. 82 (1879).

<sup>118</sup> NIMMER & NIMMER, *supra* note 8, at § 1.09[A]. With the composition and jurisprudence of the Supreme Court somewhat changed since the New Deal, Congress much later, in 1946, enacted the Lanham Act. 15 U.S.C. §§ 1051–1141 (2000). This Act, however, is much more limited in scope than the previous unconstitutional acts.

<sup>119</sup> 17 U.S.C. § 1101 (2000). All of this was achieved with the "Uruguay Round Agreement

from the unauthorized recording of their live performances (for which no copyright protection was available until 1994). Yet the provision is problematic because it has no time limit (since it is unlawful to sell any unauthorized live recordings, no matter when such recordings were made)<sup>120</sup> and contains no real originality standard.<sup>121</sup> It is therefore highly questionable with respect to two issues: (1) whether Congress could have enacted it under the Copyright Clause, and (2) whether it is constitutional.<sup>122</sup>

Three recent cases—all in all five decisions—have come out in different ways.<sup>123</sup> In 1999, the Federal Court of Appeals for the Eleventh Circuit held that 17 U.S.C. § 1101 was constitutional because even if the Copyright Clause did not apply, it would be constitutional under the Commerce Clause—even though Congress had not invoked the Commerce Clause when it enacted the statute.<sup>124</sup> The Court based its decision on the proposition that the various grants of power in the Constitution stand alone and must be independently analyzed. "In other words, each of the powers of Congress is alternative to all of the other powers, and what cannot be done under one of them may very well be doable under another."<sup>125</sup> Thus, "the Commerce clause may be used to accomplish that which the Copyright Clause may not allow."<sup>126</sup> The Court then found that the anti-bootlegging statute was "more of an incremental change than a constitutional breakthrough," adding that "common sense does not indicate that extending copyright-like protection to a live performance is fundamentally inconsistent with the Copyright Clause."<sup>127</sup> This seems to mean that the Copyright Clause does indeed block the other legislative powers of Congress, but only in extreme cases.

Act," which, in the opinion of one prominent commentator, has effectively killed traditional copyright jurisprudence in the U.S. See David Nimmer, *The End of Copyright*, 48 VAND. L. REV. 1385, 1387 (1995). See also NIMMER & NIMMER, *supra* note 8, at § 8E.05.

<sup>120</sup> See 17 U.S.C. § 1101(a)(3) (2000). Nimmer critically or even disparagingly calls the anti-bootlegging statute "paracopyright". NIMMER & NIMMER, *supra* note 8, at § 8E.05[B].

<sup>121</sup> See NIMMER & NIMMER, *supra* note 118, at 1398–1401 for an analysis of this provision.

<sup>122</sup> NIMMER & NIMMER, *supra* note 8, at § 8E.05 ("Congress largely ignored those constitutional ramifications when adding the instant features to copyright law.")

<sup>123</sup> For further details, see Brian Danitz, *Martignon and KISS Catalog: Can Live Performances Be Protected?*, 15 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1143 (2005). See also Dotan Olliar, *Resolving Conflicts Among Congress's Powers Regarding Statutes' Constitutionality: The Case of Anti-Bootlegging Statutes*, 30 COLUM. J.L. & ARTS 467 (2007); Marybeth Peters, *Constitutional Challenges to Copyright Law*, 30 COLUM. J.L. & ARTS 509 (2007) (presenting the governmental legal view).

<sup>124</sup> *United States v. Moghadam*, 175 F.3d 1269 (11th Cir. 1999).

<sup>125</sup> *Id.* at 1277.

<sup>126</sup> *Id.* See NIMMER & NIMMER, *supra* note 8, at § 1.09[B] for an extensive discussion of this case.

<sup>127</sup> *Id.* at 1280. The Court also independently recognizes that "[o]n its face, the protection created by the anti-bootlegging statute is apparently perpetual and contains no express time limit; therefore, phonorecords of live musical performances would presumably never fall into the public domain," but the Court simply avoids resolving whether this would violate the "limited times" language of the Copyright Clause because the parties had never raised this issue before. *But see* NIMMER & NIMMER, *supra* note 8, at § 1.09[B].

Then, in 2004, a federal district court in California held that the anti-bootlegging statute was unconstitutional, finding that 17 U.S.C. § 1101 violated the "for limited times" requirement of the Copyright Clause, which could not be healed by using the Commerce Clause as an alternative.<sup>128</sup>

In the instant case, allowing Congress to invoke the Commerce Clause in a situation where the Copyright Clause would otherwise be violated would "eradicate from the Constitution a limitation on the power of Congress." The framers certainly believed that some limit on protection for copyrights and patents should exist; otherwise, they would not have included the explicit limits contained in Art. I, § 8, cl. 8. Permitting the current scope of the Commerce Clause to overwhelm those limitations altogether would be akin to a "repeal" of a provision of the Constitution.<sup>129</sup>

However, in a rehearing demanded by the U.S. Government,<sup>130</sup> this decision was overturned by the same court<sup>131</sup> in 2005.<sup>132</sup> Now the Court simply argued that there was no conflict because the statute did not create a new copyright.

The Statute complements, rather than violates, the Copyright Clause by addressing similar subject matter, not previously protected—or protectable—under the Copyright Clause. Properly construed, the anti-bootlegging statute serves as a complement to copyright regulation, rather than a derogation from it.<sup>133</sup>

Then, in 2007, after a lower court in 2004<sup>134</sup> had found that the anti-bootlegging statute would be in violation of the Copyright Clause, the Federal Court of Appeals for the Second Circuit<sup>135</sup> vacated and remanded that decision and held that the statute was constitutional.<sup>136</sup> The court applied the following test: "Congress exceeds its power under the Commerce Clause by transgressing

<sup>128</sup> *KISS Catalog v. Passport Int'l Prods.*, 350 F. Supp. 2d 823 (C.D. Cal. 2004).

<sup>129</sup> *Id.* at 837.

<sup>130</sup> The U.S. Government intervened after it heard about the decision, which is possible in civil procedure whenever a case hinges on a question of constitutionality, and asked the judge to reconsider his decision. See 28 U.S.C. § 2403(a) (2000).

<sup>131</sup> The court had a different judge because the first judge had died after deciding to reconsider his prior decision.

<sup>132</sup> *KISS Catalog v. Passport Int'l Prods.*, 405 F. Supp. 2d 1169 (C.D. Cal. 2005).

<sup>133</sup> *Id.* at 1176. Apparently, the briefs by the U.S. Government were very convincing.

<sup>134</sup> See *United States v. Martignon*, 346 F. Supp. 2d 413 (2004) (The proprietor of a music store who sold such bootleg recordings was prosecuted for violation of the anti-bootlegging statute).

<sup>135</sup> The Second Circuit has the most experience in copyright law because its jurisdiction covers the media industry in New York City. The Second Circuit is rivaled only by the Ninth Circuit, which covers Hollywood.

<sup>136</sup> *United States v. Martignon*, 492 F.3d 140 (2d Cir. 2007).

limitations of the Copyright Clause only when (1) the law it enacts is an exercise of the power granted Congress by the Copyright Clause and (2) the resulting law violates one or more specific limits of the Copyright Clause.<sup>137</sup>

This means that whenever the subject matter is "copyright," the limitations of the Copyright Clause apply.<sup>138</sup> However, the court decided that the anti-bootlegging statute was not "copyright" and thus not covered by the Copyright Clause.<sup>139</sup> Thus the court accepted that Congress had the power to enact the statute under the Commerce Clause.<sup>140</sup>

Though the recent case law supports the constitutionality of the anti-bootlegging statute, it should become clear from this overview that this matter is far from settled. Some courts are still willing to declare the law to be unconstitutional, thus null and void, and others differ as to whether the Copyright Clause or the Commerce Clause applies.

To this end, without a Supreme Court decision, it is therefore still unknown how far the Copyright Clause is swallowed or circumvented by the general powers of Congress, or how far it blocks Congress from enacting laws using its general powers.<sup>141</sup>

#### F. Conclusion: the Constitutional Limits to Copyright Law in the U.S.

The analysis has shown that there are effective limits on copyright law in the U.S. Constitution. American constitutional law does not recognize any pre-existing natural law of copyright, and thus no perpetual copyright. Under the U.S. Constitution, all copyright law is positive law. The Copyright Clause's subject matter is limited, but open to extension due to technological progress. The most effective limit on Congress's legislative powers seems to be the "originality" requirement from the *Feist* case. This requirement is regularly applied by the courts. Facts are therefore not copyrightable in America. Another limit concerning subject matter, at least for a long time, was that (extensive) federal trademark legislation was barred by the Copyright Clause. The consti-

<sup>137</sup> *Id.* at 149.

<sup>138</sup> See Adam Regoli, *The Next (and Last?) Constitutional Copyright Case*, 6 VA. SPORTS & ENT. L.J. 243 (2007) (discussing whether the anti-bootlegging statute is "copyright" or not).

<sup>139</sup> *Martignon*, 492 F.3d at 150 (defining the constitutional meaning of "copyright" as, "in order for a law to be considered an exercise of Congress's Copyright Clause power, it must allocate property rights in expression.")

<sup>140</sup> *Id.* at 152 ("Because [the anti-bootlegging] statute is not a copyright law its enactment was well within the scope of Congress's Commerce Clause authority, it is constitutionally permissible unless some other constitutional provision prevents its enforcement.")

<sup>141</sup> NIMMER & NIMMER, *supra* note 8, at 1.09[A] ("Unless it were authoritatively held that the express authority of the Copyright Clause by implication precludes Congress from regulating the writings of authors based on other constitutional authority, it seems that the Commerce Clause could offer an alternative basis for 'copyright legislation.'")

tutional time limit however, though accepted in theory by the Supreme Court, has not yet had any practical effect at all. It thus remains to be seen whether the Supreme Court will defer once again to Congress's interpretation of the Constitution when the next copyright extension comes around – and there surely will be another attempt to extend copyright some more. Finally, the question of whether other powers of Congress are blocked by the Copyright Clause is still open for debate, especially when it comes to database protection and anti-bootlegging legislation.

## II. CONSTITUTIONAL AND EUROPEAN LIMITS ON COPYRIGHT LAW IN GERMANY

It is necessary to point out right away in the beginning that German "Urheberrecht," though the proper translation of this term is "copyright," is not entirely identical to the American concept of "copyright."<sup>142</sup> When speaking of "copyright" in the German context, one must keep in mind that what is meant is an intellectual property regime in line with the Continental "droit d'auteur" system;<sup>143</sup> here, the concept is not limited to economic rights but rather puts a heavy emphasis – at least in theory – on the personality rights and moral rights of the authors ("Urheber" in German). German copyright is not, with all due respect, just like American copyright.<sup>144</sup>

### A. Article 73 no. 9 GG—the Power of the Federal Parliament ("Bundestag") to Enact Federal Copyright Law

The German Constitution, the Grundgesetz ("GG"), contains a copyright provision in its chapter dealing with the legislative powers of the German federal parliament ("Bundestag"). Pursuant to Article 73 no. 9 GG, "the Federation shall have the exclusive power to legislate in the following areas: . . . Industrial property right, copyright ("Urheberrecht") and publisher's rights." The genesis of this clause is unspecified; apparently, it was not discussed much in 1948.<sup>145</sup>

<sup>142</sup> See WANDTKE & BULLINGER, *supra* note 2, Introduction, no. 25.

<sup>143</sup> *Id.* (describing this main conceptual chasm in the world of copyright).

<sup>144</sup> A very fine analysis of the ideological history and constitutional aspects of German copyright law is given in Paul Kirchhof, *Der Verfassungsrechtliche Gehalt des geistigen Eigentums*, in Festschrift für Wolfgang Zeidler 1639 (1987).

<sup>145</sup> See MANGOLDT & KLEIN, GG (1996), art. 73 no. 529 et. seq. (providing the historical background, genesis, and confusing language of the Copyright Clause of the German Constitution, which was apparently drafted by a single member of the convention that created the constitution ("Parlamentarischer Rat")). Especially important is no. 543 ("Art. 73 no. 9 GG is the only clause [in the section which regulates the powers of the federal parliament] that rests solely on the unaccountable errors and misunderstandings of a single person."). See also RUDOLF DOLZER, ET AL., *Bonner Kommentar*, art. 73 No. 9 GG (providing another take on the historical background).

The question of what is meant by Urheberrecht/copyright in Article 73 no. 9 GG is not quite clear; however, there is a consensus that this provision is open to the further development and progress of technology, science, and culture. Thus, the scope of Article 73 no. 9 GG can change and therefore encompass new objects in the future as well as whole new kinds of intellectual property.<sup>146</sup> One could also say that the German Constitution contains a dynamic conception of copyright and intellectual property.<sup>147</sup> One example would be the protection for non-creative databases that the EU introduced with Directive 96/9/EC. Such a protection had never been available in Germany before. It was implemented in § 87a-e UrhG, as completely new subject matter (a so-called "sui generis right") under Article 73 no. 9 GG—neither the German Parliament nor any court, to say nothing of the Federal Constitutional Court, thought that the Federal Parliament lacked the power to enact the new protection for databases.<sup>148</sup> This is obviously a big difference from the situation in the United States after *Feist*. One could, therefore, conclude that Article 73 no. 9 GG gives the German Parliament the power to shape copyright law as it likes, as Article 73 no. 9 GG does not explicitly contain any effective or substantial limits (unlike the American copyright power as construed by *Feist*).<sup>149</sup> However, the applicable case law of the German Federal Constitutional Court ("FCC") has introduced other implicit or quasi-limitations (see below).

### B. Article 14 GG—Constitutional Protection of Intellectual Property

German copyright law is protected and shaped by the German Constitution's basic rights ("Grundrechte").<sup>150</sup> The main an-

<sup>146</sup> See Maunz, in Maunz/Dürig (1988), art. 73 no. 145 – 146, 150 (stating that art. 73 no. 9 GG is just a general clause that encompasses all of intellectual property ("Geistiges Eigentum") and is therefore open to further development and the introduction of statutory exceptions and limitations. Thus the legislature would, via art. 73 no. 9 GG, decide effectively about the scope of property protection granted by art. 14 GG.). See also MANGOLDT & KLEIN, *supra* note 145, no. 554, 555, 561 et. seq. Bryde, in Münch/Kunig, GGKl, art. 14, no. 17 (5 ed. 2000).

<sup>147</sup> See DOLZER, ET AL., *supra* note 145, no. 10 ("This must be so because the subject matter of art. 73 no. 9 GG has and always had a dynamical nature. Thus, if the regulated object changes, this must lead to a factual extension of the legislative power of the federal parliament as well.").

<sup>148</sup> See DOLZER, ET AL., *supra* note 145, no. 55-56 on the constitutionality of the new database protection. See also Vogel, in SCHRICKER, URHEBERRECHT KOMMENTAR, 2.ed, Vor. § 87a ff. no 8 – 19 (1999) on the legislative proceedings within the EU and later in Germany [hereinafter SCHRICKER].

<sup>149</sup> DOLZER ET AL. *supra* note 145, no. 11 (arguing that the only real legal content of art. 73 no. 9 GG is that the Constitution accepts that there should be something like copyright and intellectual property in existence at all. One could thus argue that art. 73 no. 9 is a weak intellectual property guarantee.).

<sup>150</sup> See REHBINDER, *supra* note 59, at 54-58, on the constitutional protection for creative persons ("Der Verfassungsschutz des geistig Schaffenden"). See also DREIER, *supra* note 112, Introduction, no. 39-41 ("Constitutional Protection" ("Verfassungsrechtlicher

chor for this protection is Article 14 GG, which contains both a protection clause and a duty to balance property interest with the public interest.<sup>151</sup> The economic aspect of a copyright is protected as property (in the constitutional sense) pursuant to the Property Protection Clause in Article 14 paragraph 1 GG because the constitutional term of property encompasses any right that has an economic value.<sup>152</sup> As under German copyright law doctrine, copyright also contains an element of personality right or moral right; the protection is also partially guaranteed by Articles 1 and 2 GG, which protect human dignity and freedom of action, respectively.<sup>153</sup> One could also say that the German Constitution still contains a concept of "intellectual property" that bears the imprint of natural law thinking.<sup>154</sup>

This constitutional protection, however, does not mean that the legislature is bound by some rigid constitutional copyright law—the legislature has discretion when it comes to enacting copyright statutes. Nevertheless, the German legislature must respect the fundamental connection between the economic value of the copyrighted content and the author. In general, the author thus ought to benefit, at least in principle, from this economic value.<sup>155</sup> However, this does not mean that the German constitution demands a perpetual copyright.<sup>156</sup>

In addition, as the property clause of the German Constitution is qualified by a "public good"/"general welfare"/"common weal" provision ("Allgemeinwohlbindung"), the legislature has to make sure that it strikes a just and appropriate balance between the individual interests of authors to profit from their creations on the one hand, and those of the public (and publishers and so forth) to exploit the works on the other hand, taking into account the nature and social importance of the right in question.<sup>157</sup>

### C. Time Limits in the German Copyright Act (UrhG)

The German Copyright Act ("Urheberrechtsgesetz" or "UrhG") was enacted in 1965 with the intention to be a major reform of copyright law ("Urheberrechtsreform"). It was subse-

Schutz").  
<sup>151</sup> Grundgesetz [GG] ["Basic Law" = Constitution] art. 14, para. 1 ("property and the right of inheritance are guaranteed. Their content and limits shall be determined by the laws."); art. 14 para. 2 ("Property imposes duties. Its use should also serve the public weal.").

<sup>152</sup> See REHBINDER, *supra* note 59, at 56. See also DREIER, *supra* note 112, Introduction, no. 39.

<sup>153</sup> See also DREIER, *supra* note 112, Introduction, no. 39.  
<sup>154</sup> See WANDTKE & BULLINGER, *supra* note 2, Introduction, no. 26. See also Kirchhof, *supra* note 144, at 1640.

<sup>155</sup> DREIER, *supra* note 112, Introduction, no. 39.

<sup>156</sup> WANDTKE & BULLINGER, *supra* note 2, § 64, no. 1.

<sup>157</sup> DREIER, *supra* note 112, Introduction, no. 39.

quently amended quite often.<sup>158</sup> Pursuant to § 64 UrhG, a German copyright lasts for the time of the life of the author plus seventy years.<sup>159</sup> This time limit was introduced in 1965 with the new German Copyright Act; before 1965, it was fifty years. The proponents of a natural law theory of intellectual property who argued for perpetual property never succeeded in Parliament or in court because the reasons in German copyright jurisprudence for such a time limit are manifold.<sup>160</sup> This time limit was later accepted by the German Constitutional Court, and thus deemed not to be an unconstitutional "taking"/expropriation ("Enteignung").<sup>161</sup>

One of the policy reasons for § 64 UrhG's time limit is that the general public can demand the free use of intellectual goods for the improvement of cultural life ("Kulturleben"). Another is the fact that every creative person is not creating in a vacuum and without history but is rather building upon the work of his or her predecessors. Yet another is that every cultural expression, if it is not forgotten, becomes some kind of public good or intellectual/creative commons ("geistiges Gemeingut") and the cultural possession ("Kulturbesitz") of everybody.<sup>162</sup> Another is the fact that non-rivalrous uses of copyrighted contents are possible because they are intangible. Physical property can only be used by one owner or owners at a time; only rivalrous uses are possible. However, copies can be made of intellectual property, and then someone else can use it simultaneously, non-rivalrously, without diminishing the use of the original owner. The analogy would be a candle: when you transfer a flame to another candle, it does not extinguish or even diminish the original flame. Thus, the situation of intellectual property is factually very different from real property, which justifies a treatment of intellectual property that is different from the treatment of real property.<sup>163</sup>

The justification for limited copyright terms that is mostly held and accepted as predominant in German copyright jurisprudence is the fundamental qualification of the copyright as being based on a personality right, or "moral right"/"droit moral" ("Ur-

<sup>158</sup> Available at [www.gesetze-im-internet.de/urhg/index.html](http://www.gesetze-im-internet.de/urhg/index.html).

<sup>159</sup> See REHBINDER, *supra* note 59, at 184-86 on the details and effect of this provision. See also WANDTKE & BULLINGER, *supra* note 2, § 64. See also DREIER, *supra* note 112, § 64.

<sup>160</sup> See REHBINDER, *supra* note 59, at 44-47 (providing a detailed account).

<sup>161</sup> See REHBINDER, *supra* note 59, at 46, no. 109 (supporting this decision). See *infra* Part III.D.4 for a discussion of the applicable constitutional case law.

<sup>162</sup> See EUGEN ULMER, URHEBER- UND VERLAGSRECHT § 77, 339 (1980) (arguing that time limits are not arbitrary. The claim for eternal copyright misunderstands the foundation and sense of copyright—it follows from the meaning of every social order that works of literature and science have the destiny to be free for everybody ("gemeinfrei") eventually and forever).

<sup>163</sup> See REHBINDER, *supra* note 59, at 45, no. 107.

heberpersönlichkeitsrecht").<sup>164</sup> In Germany, the copyright is intrinsically and inseparably tied to the personality of the author. While the personality is not eternal, it can, according to German constitutional law, continue to "exist" for some time after the author's death. Just as the copyright must eventually fade away after the death of an author, his or her personality vanishes in the minds of the surviving persons. Thus, a time limit would be inherent in any copyright under German law. Another line of reasoning, which has gained the favor of the Federal Constitutional Court (see *infra* Part III.D) goes like this: all copyrightable works are going to be published; the author, by creating the work, intends to publish it, which amounts to an intentional transfer of the work to the public.<sup>165</sup> The concrete time limit, however, cannot be determined by these theories and must thus be left to the political process, which has to take into account the average lifespan and memory-span of the close relatives of the author.<sup>166</sup>

Interestingly, the long German time limit of life-of-the-author-plus-seventy-years (subsequently adopted by France and Austria) later compelled the EU to harmonize and extend the same time limit throughout the EU in order to put an end to disturbances in the internal EU market based on varying terms of protection in member states. As the EU excluded such a time limit for non-EU citizens, as long as there was no reciprocity, the U.S. felt urged to extend its term of protection nationally for Americans and foreigners in order to receive the extended protection for U.S. citizens throughout the EU. Thus, the abovementioned CTEA was enacted, which was held to be constitutional in the *Eldred* decision of the Supreme Court. Therefore, an extension of German copyright law eventually triggered a similar extension in the U.S. Both extensions were held to be constitutional, but on different grounds. This shows how interconnected the realm of copyright is on a world-wide level.

#### D. *The Main Decisions by the Federal Constitutional Court ("FCC") Construing the Constitutional Scope of German Copyright Law*

The German Federal Constitutional Court ("FCC")<sup>167</sup> has issued several decisions that construe the constitutionality and scope of the German Copyright Act of 1965 in conjunction with

<sup>164</sup> DREIER, *supra* note 112, Introduction, no. 54.

<sup>165</sup> Kirchhof, *supra* note 144.

<sup>166</sup> See REHBINDER, *supra* note 59, at 46, no. 109.

<sup>167</sup> The "Bundesverfassungsgericht" is most of the times abbreviated as "BVerfG" by German lawyers. The official court reporter from which the decisions are quoted is known as "BVerfGE."

the demands of the German Constitution.<sup>168</sup> A batch of the most important and fundamental ones were issued in 1971, in direct reaction to constitutional challenges ("Verfassungsbeschwerden") to the then new German Copyright Act.

#### 1. BVerfGE 31, 229 (July 7, 1971)—"Kirchen- und Schulgebrauch"

The new Copyright Act of 1965 contained a § 46 UrhG that gave churches and schools the right to use copyrighted works in church and school books ("Kirchen- und Schulgebrauch") as well as other educational materials without having to remunerate the author or rightholder. The legislature argued that this free compulsory license was necessary to keep the costs of schoolbooks and other educational materials down, and that the mere fact that an author is published in widely distributed official schoolbooks should be a great honor and official certification as a "recognized cultural good" ("anerkanntes Kulturgut"), compensation greater than any amount of money. The legislature thought that authors should even be thankful ("Dankesschuld") that they were allowed to build upon the common and traditional cultural knowledge and goods of the people ("den geistigen Gesamtbesitz des Volkes"), and that they should therefore not be so greedy and ask for monetary compensation.<sup>169</sup>

The FCC however swiftly declared that this provision was a violation of Article 14, paragraph 1 GG, because it amounted to an uncompensated taking/expropriation, and was thus invalid. Here, the FCC for the first time introduced a kind of balancing test for copyright legislation:

It is the task of the legislature, when it is setting the substantive scope of copyright law, to find suitable and reasonable standards to secure the use and exploitation of copyright in a way that is appropriate for the nature and social importance of copyright law . . . The interest of the public to have uninhibited access to cultural goods is a justification to grant access to protected works—without the consent of the author—after their publication, in order to use them for the purposes of churches, schools and education—however, it does not justify that the author does not get any compensation.<sup>170</sup>

Thus, the German legislature has some discretion when it

<sup>168</sup> See REHBINDER, *supra* note 59, at 57.

<sup>169</sup> BVerfGE 31, 229, 246. The FCC rejected this argument as downright ridiculous, saying that everybody builds upon traditional knowledge and rightly asked why, under the statute, only authors were not paid for their work, as opposed to the publishers, printers and so forth, who were not within the scope of the exception.

<sup>170</sup> *Id.* at 230.

comes to copyright legislation; it may grant compulsory licenses in the public interest but generally cannot do so for free. This amounts to a substantial constitutional limit to copyright legislation because it diminishes the leeway of the legislature to grant compulsory licenses at will.

Most notably, though, is the fact that the FCC uses the "nature and social importance of copyright law" as the decisive argument. This reasoning does not have a basis in the Constitution itself, one could argue, but rather stems from a form of natural law jurisprudence or ideology, as it were.

### 2. BVerfGE 31, 255 (July 7, 1971)— "Tonbandvervielfältigungen"

This decision was concerned with the exception from copyright protection for private copying in § 53 UrhG. The legislature had accepted recent case law that the infringement provisions of the UrhG were in fact unenforceable against private persons, especially with the introduction of consumer electronics and taping devices. Private taping ("Tonbandvervielfältigungen") of music was thus made legal. In exchange, the legislature introduced a still-existing levy-scheme on media copying devices (back then: tape recorders) and blank media (in 1971, mostly cassettes), organized and maintained by collecting societies like GEMA. This system, which is occasionally updated in order to catch up with technological progress, would thus provide a kind of collective remuneration to the authors and copyright holders. However, both the rights-holders and the producers of copying devices and blank media were not content with the compromise and challenged the private copying exception as an unconstitutional taking or expropriation. The FCC rejected this challenge, ruling that the legislature had found a reasonable compromise, balancing out the conflicting interests of consumers, authors and producers of the new copying devices.<sup>171</sup> The court also accepted the factual analysis of the legislature that it was not feasible to enforce copyright against private consumers, and that it also was not feasible to try to collect individual copyright fees from those consumers.<sup>172</sup> However, due to technological progress, it might later become actually feasible and affordable to enforce copyright against private consumers on a wide scale. If so, it remains to be seen if such a change in the facts would force the FCC to change its view on the constitutionality of the balanced compromise it upheld in this decision.

<sup>171</sup> BVerfGE 31, 255, 265.

<sup>172</sup> *Id.* at 266.

### 3. BVerfGE 31, 270 (July 7, 1971)—"Schulfunksendungen"

This decision dealt with § 47 UrhG, which allows schools to record educational broadcasting programs ("Schulfunksendungen") on television and the radio and to keep and use them for educational purposes for a year. There is no compensation granted in return to the authors. In this case, the FCC decided that the provision was not a violation of the property guarantee in Article 14, paragraph 1 GG, and thus constitutional and still valid law:

This provision raises no constitutional concerns. The author is not paid additional compensation because § 47 UrhG deals with an additional exploitation of the same work. The author of an educational broadcasting program already receives an appropriate compensation from the broadcasting company. . . . Thus the legislature has complied—to an adequate/sufficient extent—with the affirmative constitutional demand/duty ("verfassungsrechtliches Gebot") to give or attach the exploitation rights of a work in principle to its author. The constitutional guarantee of copyright law does not entail a duty of the legislature to grant multiple compensation for the exploitation of the same work.<sup>173</sup>

This decision thus limits the affirmative constitutional duty of the legislature to arrange for an adequate compensation considerably: not every single exploitation or use must be remunerated; it just has to be made sure that the author receives some compensation.

### 4. BVerfGE 31, 275 (July 8, 1971)—"Schallplatten"

This decision is important because it lays out in greater detail what is meant by the "nature and social importance of copyright law" as a constitutional concept. It is sometimes thought to be one of the cornerstones of constitutional copyright jurisprudence.<sup>174</sup> The case itself dealt with performing artists, who, under the new Copyright Act of 1965, were treated differently (and somewhat less favorably) than before. Their former "real" copyrights for phonorecords ("Schallplatten") were changed in legal status to mere "neighboring rights," providing less protection to their works. The performers thus argued that they were stripped of their constitutional rights of copyright protection and adequate compensation. The FCC, in rejecting the argument, decided that the new rules for performing artists were constitutional, again granting

<sup>173</sup> BVerfGE 31, 270, 274.

<sup>174</sup> See MANGOLDT & KLEIN, GG (1999), art. 14, no. 151. See also REIBINDER, *supra* note 59, at 46, no. 109. See also *id.* at 57, no. 141.

significant, although limited, discretion to the legislature:

The legislature, when reforming a whole area of law, is free—within the limits of Art. 14, para 1 GG—to reformulate and reshape the substance of existing rights and to create new duties and claims in relation to these rights, as long as the original attachment of these rights to their owners is preserved.<sup>175</sup>

The court then got down to the details and explained the meaning of the property protection clause in Art. 14 GG, in relation to copyright law—this language is quoted by the FCC constantly to this day in matters concerning constitutional copyright law.<sup>176</sup> What follows is partly a free translation and summary:

The guarantee of Art. 14, para. 1 GG, does not mean that a legal right cannot be touched and changed anymore forever. It also does not mean that substantive changes of such a protected right would be illegal. The legislature has a lot of discretion when it comes to the creation and content of these rights. . . . Thus the legislature may create new rights, for instance copyrights, that were heretofore unknown to the law. . . . The legislature may thus change individual legal rights when it reforms a whole area of law. . . . When it comes to copyright, the legislature was under no duty to grant to the performing artists copyrights that were the equivalent to other, general copyrights. The legislature was free to create new legal rights that differ from the existing copyright system. . . . The legislature has wide discretion concerning which and whose interest should be protected in copyright law. All the legislature has to avoid in this respect is obviously unsuitable or arbitrary decisions, namely granting arbitrary privileges to one of the interested parties.<sup>177</sup>

Then the FCC made a very important and prominent statement regarding the time limits of copyright law (which are not explicitly mentioned or mandated by the German Constitution):<sup>178</sup>

The time limit for the rights in question meets no constitutional objection. The claim that any time limit for copyrights would be unconstitutional is unfounded. *The constitution does not oblige the legislature to create 'eternal' copyright claims.* All the constitution demands results from the guarantee of property: the legislature has a duty to attach the economical rights to the

<sup>175</sup> BVerfG 31, 275.

<sup>176</sup> See the affirmation of this decision in BVerfGE 49, 382, 392 (1978) and in BVerfGE 79, 29, 40-41 (1988), which boldly states: "The main aspects of the constitutional principles concerning copyright law have already been clarified and settled by the judicature and decisions of the FCC."

<sup>177</sup> BVerfG 31 at 284-86.  
<sup>178</sup> See REHBINDER, *supra* note 59, at 46, no. 109 (agreeing with this decision). See also *id.* at 57, no. 141.

authors in principle; however, this does not mean that the authors should be granted every conceivable opportunity to exploit their works. It is rather the duty of the legislature to find a regulation and balancing of the various interests that is appropriate for the *nature of the right* in question. The new Copyright Act from 1965 is continuing the former copyright law that always and only knew copyrights with time limits. Thus, *the rights enacted in the Copyright Act are time-limited because of their inherent nature* ("ihrem Wesen nach Rechte auf Zeit") *because intellectual creations are intended to be freely available after a certain amount of time.* Unlimited copyrights would lead to considerable practical complications because soon there would be no clarity concerning the ownership of such rights. . . . That copyrights are treated differently from real property—which has no time limits—is not a violation of the constitutional principle of equality ("Gleichheitssatz") because real property and copyright are so different in character that *it is impossible to treat these rights in the same way.* . . . When it comes to the question how long a copyright may last, the legislature has a lot of discretion. The time limits may be different from time to time, taking into account the changing circumstances and interests at the respective time. The legislature is thus not completely bound by old copyright doctrines that perhaps were only appropriate at the time, but not anymore.<sup>179</sup>

#### 5. BVerfGE 49, 382 (1978)—"Kirchenmusik"

The underlying question in this decision was, whether it was constitutional to allow the performance of copyrighted music within religious ceremonies and churches (hence: church music — "Kirchenmusik") for free. The FCC decided that this was unconstitutional. In the decision the FCC gave a more precise description of the legislature's duty to protect copyrights:

The legislature has principally the duty to attach the economic rights/results of the creative effort to the author and to give him or her the freedom to decide and dispose within his or her own responsibility. However, the legislature also has the task of regulating the details of the substantial content of copyright law and to find suitable rules that secure an adequate exploitation and use of the copyright which complies with the nature and

<sup>179</sup> BVerfG 31 at 287-88 (emphasis added). See also RUDOLF KRABER, PATENTRECHT, § 26 (2004) (approving this decision and stating, "The fact that inventors and creators own intellectual property that is protected by art. 14 GG does not prevent the legislator from granting various time limits for exclusionary rights (which constitute intellectual property in the first place), taking into account the various necessities demanded by the protected subject-matter."). See also the most renowned commentary on German copyright law, which flatly accepts all time limits to copyright as being essential to copyright law: Katzenberger, in SCHIRCKER, *supra* note 148, § 64, no. 1-4.

social importance of this right.<sup>180</sup> . . . The power and discretion of the legislature is, however, not unlimited: limitations of copyright that are justified with public interest reasons must be really legitimated by such interests. An excessive or disproportionate substantial limitation that is not justified by the social aspect of copyright law would be unconstitutional under Art 14, para. 1 GG.<sup>181</sup>

The court also redefined the reason why every copyright must eventually fade and end:

A work that is published is no longer under the control of the author has entered, as intended, the public sphere/societal space ("gesellschaftlicher Raum") and can thus become an independent factor which influences and determines the cultural and intellectual picture of the times. This social aspect of intellectual property can be recognized by the legislature and taken as a reason to use its discretion to grant only a time-limited intellectual property right.<sup>182</sup>

The FCC later added (see the decision *infra* subsection 6), "In the course of time, the work will detach itself from the private control and will become part of the intellectual and cultural commons. This is the inherent justification for the time limit of the duration of copyright law in § 64 UrhG."<sup>183</sup>

#### 6. BVerfGE 79, 29 (1988)—"Vollzugsanstalten"

Finally, in 1988, the FCC settled which interests would prevail over the authors' interests and determined which kinds of limitation would be more appropriate (or proportional) than others. The particular question was, whether jails ("Vollzugsanstalten")

<sup>180</sup> BVerfGE 49, 382, 392 (1978).

<sup>181</sup> *Id.* at 400.

<sup>182</sup> *Id.* at 394-95 (1978), *aff'd*, BVerfGE 79, 29, 42 (1988).

<sup>183</sup> See BVerfGE 79, at 42, 44, 46 (quoting at 42 approvingly Kirchhof, *supra* note 144) ("German Copyright doctrine says that all copyrightable works must become common goods after a certain amount of time. The constitution does not oblige the legislator to create eternal copyrights. . . . Individual property thus dissolves into public domain goods. . . . The protected work enters the public sphere and becomes a well-known, recognized work, thus a cultural good. . . . Though this work stays the same, remains identical with its original, it is widely disseminated and used by the public. . . . This common and popular success which was as much to the author as well to the work of others and the use of the work by the public, can be structured by the law in different ways. However, it is, under the German Constitution arguably feasible for the legislature to accept the fact that the work is leaving the control of the author anyhow eventually. That is why the decision of the legislature in Germany to grant copyright for limited times strikes a just balance—because the authors intend their works to become common goods of the public, that why they have to accept that their works are hoping to be used by everybody—and the public should in return therefore be willing to compensate the author for his efforts.") Kirchhof, *supra* note 144 at 1639, 1648, 1659-61. Kirchhof was a judge at the German Constitutional Court at the time but did not participate in this decision, as he belonged to another senate of the court.

were allowed to stage "public" performances of copyrighted works as part of the supervision and rehabilitation of the inmates ("Gefangenenbetreuung"). The court found that this was constitutional. In the Court's opinion, the public interest is more likely to prevail over the interests of authors and copyright holders than private interests. However, the public interest would usually only justify compulsory licenses if authors and rightsholders were awarded some form of compensation.<sup>184</sup> But even then, the legislature may not deny the right of the author to control the copyright for *any* kind of public interest; a limitation of the compensation or a free and compulsory license system would only be justified by a very intense public interest.<sup>185</sup> With this opinion, the Court thus established a modified proportionality or balancing test for constitutional copyright law.

The FCC further clarified that authors should be able to exploit their creations in ways that can lead to a financially responsible life and that they can make decisions which make economic sense. The decision, however, again pointed out that the individual interest of the author must not always prevail over the public interest and that the authors do not have a constitutional right to profit from every conceivable exploitation of their work. The legislature is free to recalibrate the balance of interests in copyright law, as long as it leaves the constitutionally protected core of copyright ("Kern des Urheberrechts"), which is not further defined in the decision, untouched.<sup>186</sup>

### III. LIMITS TO COPYRIGHT LEGISLATION MANDATED OR DEMANDED BY EUROPEAN LAW

Up until now there has been no unified European Copyright<sup>187</sup> but only a flurry of harmonizing directives, containing many exceptions. This budding and growing mass of European law is slowly but surely encroaching and marginalizing the powers of the German Federal Parliament to enact copyright law as it pleases under Article 73, no. 9 GG.<sup>188</sup> Moreover, these European copyright directives contain a significant number of limitations

<sup>184</sup> This is supported by Papier, *in* Maunz/Dürig (2002), art. 14 no. 197 ("[L]imitations of rights to transfer/use are more apt to be justified for the common good than rights of exploitation."). See also the approval by MANGOLDT & KLEIN, *supra* note 174, at art. 14 no. 152.

<sup>185</sup> BVerfGE 79 at 41-42.

<sup>186</sup> See BVerfGE 79 at 40. This proposition recognizes that the efforts of persons (publishers, printers, critics, etc.) other than the authors add considerable value to the published work, even though authors originally create all copyrighted works. See Kirchhof, *supra* note 144, at 1646-47, 1659.

<sup>187</sup> DREIER, *supra* note 112, Introduction, no. 48.

<sup>188</sup> See DOLZER, ET AL., *supra* note 145, at 8.

that the member states must implement in one way or another. The sheer number of directives makes it impossible to examine each one here; one prominent example must suffice.

In 1993, the European community enacted the so-called Copyright Term Harmonization Directive<sup>189</sup> because the differences in copyright protection terms throughout Europe were perceived as an unnecessary burden on the EU's (or, at that time, the EC's) common market.<sup>190</sup> Setting the term to life-of-the-author-plus-seventy-years throughout the EU, via Article 1, paragraph 1 of this directive, was the most pragmatic way to respect already-existing property rights (which eventually led, as shown above, to the very same term extension in the U.S.). This directive is thought to have improved both the EU's internal market and European copyright law considerably.<sup>191</sup>

According to recital number two of this directive,

[T]here are consequently differences between the national laws governing the terms of protection of copyright and related rights, which are liable to impede the free movement of goods and freedom to provide services, and to distort competition in the common market; whereas, with a view to the smooth operation of the internal market, the laws of the Member States should be harmonized so as to make terms of protection identical throughout the Community.<sup>192</sup>

This statement implies that the seventy years granted to copyright holders in the EU must be and remain an absolute limit. Otherwise, the goal of harmonization would be thwarted and contradicted. Any new isolated extension of the general copyright term in the national law of a member state would thus violate this copyright directive. As European law is, in a certain way, higher than national law and thus trumps national law, such a statute,

<sup>189</sup> Council Directive 93/98/EEC of 29 October 1993 Harmonizing the Term of Protection of Copyright and Certain Related Rights, O.J. (L 290) 9-13 [hereinafter *Copyright Term Harmonization Directive*], available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:1993L0098:20010622:EN:PDF>. This directive was superseded by the 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), O.J. (L 372) 12-18, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:372:0012:0018:EN:PDF>.

<sup>190</sup> See the discussion of the *Copyright Term Harmonization Directive* in DREIER, *supra* note 112, §§ 64ff., no. 17. See also WANDTKE & BULLINGER, *supra* note 2, § 64, no. 6-7.

<sup>191</sup> See Jörg Reinbothe, *Hat die Europäische Gemeinschaft dem Urheberrecht gutgetan?—Eine Bilanz des Europäischen Urheberrechts*. [Translation: Did the EU improve or do some good to copyright law? An account of European Copyright Law], in PERSPEKTIVEN DES GEISTIGEN EIGENTUMS UND WETTBEWERBSRECHTS, FESTSCHRIFT FÜR GERHARD SCHICKER, 483, 490-91 (Ansgar Ohly et al., ed. 2005). Reinbothe had been, until 2006, for about ten years the head of the division within the EU commission that was in charge of European copyright policy and legislation.

<sup>192</sup> Copyright Term Harmonization Directive, *supra* note 189. The superseding Directive 2006/116/EC, *supra* note 189, states the identical language in its recital number three.

which was in violation of higher-ranking European law, would in all likelihood not be applicable in that member state and thus quasi-void. Thus, the Copyright Term Harmonization Directive has the effect of a quasi-constitutional limit on copyright legislation in the EU's member states, including, of course, Germany. So far, though, no case has arisen challenging the EU limit because no member state has granted a longer copyright term than that limit.

#### A. *The New Intellectual Property Clause of the EU Charter of Fundamental Rights*

If the EU Reform Treaty, also known as the Lisbon Treaty,<sup>193</sup> enters into force, the EU Charter of Fundamental Rights will enter into force as well. Currently, the charter is still just a proposal with no direct legal effect. According to Article 6 of the Lisbon Treaty, the Charter's fundamental rights shall have the same legal value as the Treaties, though this shall not extend in any way the competences of the EU.<sup>194</sup> Thus, the German and the European legislature will from then on have to take into account the new property guarantee in Article 17 of the EU's Charter of Fundamental Rights.<sup>195</sup> Since the "Tanja-Kreil" decision of the ECJ in 2000, which addressed a conflict between European law and the German Constitution, it is settled European case law that European law, including European fundamental rights, can supersede any provision in the constitution of a member state of the EU.<sup>196</sup> There is a powerful Intellectual Property Clause in this Charter: Article 17,

<sup>193</sup> Treaty of Lisbon, 2007 O.J. (C 306) 01 available at <http://eur-lex.europa.eu/jOhtml.do?uri=OJ:C:2007:306:SOM:EN:HTML>.

It might be that the Lisbon Treaty will eventually fail due to the referendum against it in Ireland, and because of political and constitutional challenges in other member states. However, even then it seems likely that at least the EU Charter of Fundamental rights itself will be salvaged and ratified in the near future (maybe in a piecemeal approach to rescue as much as possible from the Lisbon Treaty) because the critique against the Lisbon Treaty is not leveled so much against the charter but apparently more against other provisions in it that are perceived by some as "neoliberal" and/or as un-democratic impairments of the sovereignty of the member states.

<sup>194</sup> There is, however, an exception for Britain and Poland, where the Charter will have no legal effect. See art. 1 of the Protocol on the Application of the Charter of Fundamental Rights of the European Union to Poland and to The United Kingdom, 2007 O.J. (C 306) 157, available at [http://eur-lex.europa.eu/LexUriServ/site/en/oj/2007/c\\_306/c\\_30620071217en01560157.pdf](http://eur-lex.europa.eu/LexUriServ/site/en/oj/2007/c_306/c_30620071217en01560157.pdf).

<sup>195</sup> See P.P. CRAIG & GRAINNE DE BURCA, EU LAW, 358-62 (3rd ed. 2002) (discussing the Charter). The legal foundations and doctrine of the EU'S basic rights, as embodied in the EU Charter of Fundamental Rights, are delicately carved out by Jürgen Kühling, *Grundrechte*, in EUROPÄISCHES VERFASSUNGSRECHT 583-630 (Armin von Bogdandy, ed. 2003). See also THOMAS OPPERMANN, EUROPARECHT 150-52 (2005). The charter is available at [http://www.europarl.europa.eu/charter/pdf/text\\_en.pdf](http://www.europarl.europa.eu/charter/pdf/text_en.pdf) (last visited Feb. 1, 2009).

<sup>196</sup> See OPPERMANN, *supra* note 194, at 153.

paragraph 2 bluntly states, "Intellectual property shall be protected."<sup>197</sup> This clause is obviously influenced by natural law theories and thinking, which could have an effect on future legislation<sup>198</sup> and will add an interesting dimension to the debate over where to draw the boundaries of copyright in the modern digital environment.<sup>199</sup> What is conspicuous is the fact that the clause does not mention any time limits. However, it is unlikely, in view of the strict limit of seventy years originally set by the Copyright Term Harmonization Directive, that the Intellectual Property Clause actively propagates some kind of eternal copyright protection. Nevertheless, as the clause is among the fundamental rights, it could well be that the clause contains an affirmative duty to protect intellectual property and thus to enact ever-increasing copyright protection (even if the Charter does not grant new competences to the EU).<sup>200</sup> The reason: the EU would not need new competences and powers in regard to copyright, obviously, as it has already enacted numerous copyright directives under the harmonization competence. All one can say at the moment is that the legal effects of such a peremptory statement as "intellectual property shall be protected" are uncertain.<sup>201</sup>

The question is how far Article 17, paragraph 1 of the Charter, which contains the general property guarantee, influences the EU's Intellectual Property Clause, especially because paragraph 1 contains certain limitations to property. One might think, using a systematic interpretation, that these exceptions exclusively and only apply to Article 17, paragraph 1 because it is Article 17, paragraph 1, sentence 3, which allows limitations to property for the public good: "The use of property may be regulated by law in so far as is necessary for the general interest." If this does not apply to Article 17, paragraph 2, which comes after this general exception, many exceptions to copyright law would be illegal under the Charter, such as the exception for private copying. However, as

<sup>197</sup> The German text uses the controversial term "Geistiges Eigentum."

<sup>198</sup> See WANDTKE & BULLINGER, *supra* note 2, Introduction, no. 27 (commenting on the text of an identical provision in the failed EU constitution). See also STREINZ, EUV/EGV, of Charter of Fundamental Rights art. 17, no. 4 and no. 7 (R. Streinz ed, Munich 2003) (discussing a former decision by the ECJ (Metronome Musik/Music Point, from 1998, ECR I 1953) that constituted the European case law basis for the EU's "constitutional" protection of intellectual property and which led to this clause). For a discussion of the principles of EU copyright law, see also in detail CRAIG & DE BURCA, *supra* note 195, at 1097-1103.

<sup>199</sup> Brian Fitzgerald, *Symposium Review: Innovation, Software, and Reverse Engineering*, 18 SANTA CLARA COMPUTER & HIGH TECH. L.J. 121, 155 (2001).

<sup>200</sup> See Treaty of Lisbon, *supra* note 193, at art. 6.

<sup>201</sup> Jean-Luc Piotraut, *European National IP Law Under the EU Umbrella: From National to European Community IP Law*, 2 LOY. INT'L L. REV. 61, 79-80 (2004-2005). However, it is apparently not really true that the media company Bertelsmann lobbied for the inclusion of this broad Intellectual Property Clause as some kind of "Bertelsmann Clause," as it were.

the official explanation of the Charter for Article 17 makes somewhat clear,<sup>202</sup> the Intellectual Property Clause is purportedly only there to underscore the importance of Intellectual Property:

Protection of intellectual property, one aspect of the right of property, is explicitly mentioned in paragraph 2 because of its growing importance and Community secondary legislation. Intellectual property covers not only literary and artistic property but also patent and trademark rights and associated rights. The guarantees laid down in paragraph 1 shall apply as appropriate to intellectual property.

Thus, the limitation of property in the public interest would or should apply to intellectual property as well (unless Article 17, paragraph 1, sentence 3 is not a "guarantee" in this sense, perhaps the language is ambiguous here because it contains a political compromise). Anything else would not make any sense because then Article 17, paragraph 1, sentence 2 of the Charter, which allows the taking/expropriation of property only under certain limited circumstances, would also not apply, and this would be detrimental to the protection of intellectual property because this would imply that intellectual property could be seized by the government without limitations. However, one does not know if the courts will later accept the official explanation of the EU Charter as persuasive, let alone binding authority, because these explanations, as they themselves admit in the beginning, "have no legal value and are simply intended to clarify the provisions of the Charter."<sup>203</sup>

#### B. Conclusion: Constitutional and European Limits on German Copyright Law

German constitutional copyright law ("Urheberverfassungsrecht") is quite flexible and dynamic, open to covering new subject matter and regulatory approaches, while not prescribing any definite limits concerning the protection term or exceptions. Rather, the FCC has developed a highly refined and rarefied balancing test based upon the interplay of the Copyright Act of 1965 and the German Constitution. This balancing test, in effect, demands that all the interests which have a stake in copyright law have to be balanced out. Greater weight, though, is granted to authors because the German Constitution, as interpreted by the FCC, apparently demands that copyright law must give them

<sup>202</sup> Text of the Explanations Relating to The Complete Text of the Draft Charter of Fundamental Rights of The European Union, CHARTER 4473/00, available at [http://www.europarl.europa.eu/charter/pdf/04473\\_en.pdf](http://www.europarl.europa.eu/charter/pdf/04473_en.pdf).

<sup>203</sup> *Id.*

enough substantial support. On the other hand, even though "eternal copyright" is not explicitly ruled out by the German Constitution, it seems likely that no kind of "eternal copyright" would survive the balancing test.

This balancing approach, however, has its pitfalls, and the legislature might often not know what is constitutionally permitted unless the FCC issues a clarifying decision. Thus, the FCC, wielding its balancing test, effectively influences and shapes German copyright law to quite a considerable degree. What appears to be problematic is the fact that the FCC still uses a kind of natural law approach when it deals with copyright, arguing from the "nature" of copyright — this approach might veil the FCC's own political agenda and has the capacity to sow confusion and intimidate and paralyze the legislature. One can thus be quite critical of the FCC's constant ideological and unreflecting use of the "Wesen" or "nature" of copyright and "Geistiges Eigentum"/Intellectual Property as an argument in and of itself.<sup>204</sup> Often natural law reasoning or reasoning from the objective meaning of legal terms is used to hide one's own interests and policy convictions and to sell them as grand, incontrovertible truths—a trick sometimes used to evade contentious, serious arguments over substantial issues.<sup>205</sup> Appar-

<sup>204</sup> See REHBINDER, *supra* note 59, at 41-42, who notes that the term "Geistiges Eigentum"/Intellectual Property was dug up from the legal history of civil law, where it was mothballed. *Id.* at 41. "There is a reason that the term 'Geistiges Eigentum'/Intellectual Property is used in a simplified and propagandistic way that appeals to lay people who are not copyright experts. This way the old natural law doctrine of the French enlightenment is revived (propriété intellectuelle, intellectual property), which propagated—in order to legitimize and thus push through certain political demands for the creation and extension of copyright law—a natural copyright that purportedly was above the state and politics. This is a classic example of the 'eternal return of natural law' from the natural law phase in the German courts in the 1950s and early 1960s, when courts argued often in the name of the 'nature of a thing' ('Natur der Sache') that intellectual property and copyright law was at its core independent from positive statutory law. Thus, the term 'Geistiges Eigentum'/intellectual property is nothing but an ideological fighting word or battle cry ('ideologischer Kampfbegriff') which is intended to let certain policy demands for desired contents of statutes look like being naturally binding on the legislator. However, such decisions are not prescribed but rather have to be decided democratically." *Id.* at 41 (citations omitted). "The Term 'property' should not be used as a description of the control ('Werkherrschaft') that copyright grants over creative works. Equating this control with real property sows confusion because it ignores the aspect of moral rights in copyright. . . . One should therefore refrain from using the term 'Geistiges Eigentum'/Intellectual Property in the realm of copyright/'Urheberrecht.'" *Id.* at 42 (citations omitted). See also Christoph Ann, *Die idealistische Wurzel des Schutzes geistiger Leistungen*, GRURInt 2004 Heft 7-8, p. 597, 600 (pointing out that the fact that American copyright law is not based on natural law reasoning casts doubt on the European attempts to base copyright law principles on natural law, especially because natural law reasoning is otherwise still very much alive in the U.S. . . . In the end, Ann comes to the conclusion that the modern world wide intellectual property law regime is more concerned with the protection of investments, and less with the idealistic roots of intellectual property law. This, together with the progressing commercialization of intellectual property, Ann concludes, considerably weakens the viability of any attempts to base intellectual property law on natural law or other idealistic foundations. *Id.* at 603).

<sup>205</sup> However, this methodological assessment is not meant to downplay the FCC's good in-

ently, for policy reasons, the FCC is not willing to admit that German copyright is only constituted and shaped by positive law, namely the GG and the UrhG.<sup>206</sup> Nevertheless, the contention of the FCC that it was the nature and intention of copyright law to fade away and be limited makes economic sense and seems to be good policy.

The balancing of the interests of the author and of the public that the FCC demands, however, amounts to a kind of duty to optimize copyright law. One could say that, under the GG, the legislature must always make sure that copyright law is structured and shaped in a way that it contributes in the best way to the benefit of the authors and to intellectual and cultural progress and the well-being of the culture industry.<sup>207</sup>

The limiting influence of European law on German copyright law is immense and growing. The Copyright Term Harmonization Directive contains a mandatory definite limit of life-of-the-author-plus-seventy-years that the German legislature cannot circumvent in any way. Finally, the EU's new Intellectual Property Clause that is looming at the horizon will in all likelihood transform German and European Copyright law significantly, but it is too early to say how. As it seems to be influenced by natural law thinking as well, it might well be that the German balancing test for constitutional copyright will spread to the EU level and thus to the ECJ in this area.

### C. Comparison of the U.S. and German Constitutional Copyright Law

The U.S. and Germany have in common that the genesis and original intent of their constitutional copyright law is mainly unknown and unclear. This thus empowers their respective constitutional courts to develop and shape the crumbs of meaning that the few sentences of copyright law in both constitutions contain. However, in general, the U.S. Supreme Court shows much more deference to the policy considerations of the legislature (with the exception of *Feist*) than the FCC, which evaluates every bit of copyright legislation for its constitutionality.

While the U.S. Constitution contains a textual basis in posi-

tions and its rather fair and benign results when it construed the foundations of German constitutional copyright law. If at the time the other constitutional actors like the parliament and the administration were only able to understand and accept a natural law approach, it might just as well have been the smartest way to write the decisions using natural law jurisprudence.

<sup>206</sup> See MANGOLDT & KLEIN, *supra* note 174 ("[C]opyright as intellectual property owes its existence under German law solely to positive law."). However, it might be a bit too much to state it so rigorously. It is obvious that the FCC's case law itself shaped this area to a considerable degree, using the GG and the UrhG as starting points and quarries for arguments.

<sup>207</sup> See SCHRICKER, *supra* note 148, Introduction, no. 13.

tive law for the time limits of copyrights, the German Constitution does not. The FCC's balancing test, however, inspired by natural law conceptions of copyright, will prevent the introduction of eternal copyrights. Thus, both constitutions have in common a requisite, although undefined, constitutional requirement for a time limit of copyright, while the exact duration and scope of the limit is determined by each nation's respective legislatures. Both in the U.S. and Germany, the constitutional courts would most likely strike down excessively long-lasting (but not formally eternal) copyrights, but this has not yet happened. In contrast, the Copyright Term Harmonization Directive now requires Germany to have a mandatory time limit for copyright demanded by positive law that is higher than the constitution. In another twist, the new Intellectual Property Clause of the EU Charter of Fundamental Rights might beget new European and quasi-constitutional affirmative demands for the extension of copyright.

Both the U.S. and German Constitutions are textually open to covering new copyright subject matter to keep pace with the dynamic progress and development of science and art. The legislatures are thus free to expand the scope of statutory copyright, within certain limits, though. Here, it might make a difference that the American Copyright Clause explicitly mentions the reason for copyright protection ("promoting progress . . ."),<sup>208</sup> whereas the German Constitution grants the copyright law-making power to the Federal Parliament without stating why there even should be such a thing. Moreover, as long as the *Feist* decision in the U.S. (for which there is no textual basis) is upheld, the requirement of originality will exclude some subject matters, like database protection, extensive federal trademark protection and perhaps also the protection of performing artists. Germany's constitution, in contrast, knows no substantial minimum threshold for copyright law, which is why database protection was never a constitutional issue in Germany. This is also the reason that, in Germany, the question never arose whether the legislature could enact copyright-like law using other competences or powers of the constitution. The limitation on new subject matter in Germany might be more subtle; it all depends on the outcome of the balancing test. So far, the FCC has shown no inclination to go in the direction of *Feist*.

#### CONCLUSION

This comparison shows that constitutional copyright law in the U.S., as well as in Germany, is a richly-developed field. It is

<sup>208</sup> U.S. CONST. art. I, § 8, cl. 8.

apparent that concrete constitutional limitations only work if they are sufficiently definitive. Thus the "limited times" provision in the U.S. has yet to have an actual effect, whereas the copyright term limit that is mandatory in Germany, under the Copyright Term Harmonization Directive, is clear enough to invalidate extensions (or block their application) beyond its prescribed limits.

Unsurprisingly, in both constitutional regimes, the constitutional courts manage to come up with additional constitutional limitations to copyright law, such as the originality requirement or the balancing approach. It is hard to tell which limitations are "better" though. The American database industry has not gone out of business just because databases cannot be protected. At the same time, the German levy system on copying devices and blank media has not killed the consumer electronics market nor has the exception for private copying starved authors to death (one would hope).

The fact that U.S. constitutional law has severed all ties with natural law thinking, in contrast to German constitutional copyright law, fits very well with the fact that Congress has much more leeway when it comes to copyright than the German Parliament: if there are no overarching copyright principles rooted in natural law, policy considerations cannot be questioned as much in principle, as when the legislature is forever bound by the eternal idea or nature of copyright law.

This results in the U.S. Supreme Court usually only addressing the big, basic questions of constitutional copyright law (i.e., eternity; originality; the scope of the Copyright Clause; Congress's legislative power).<sup>209</sup> This demonstrates significant deference to the political process, whereas the FCC tends to micromanage German copyright law with its balancing approach (see *supra* the facts of the various FCC decisions, which dealt with many detailed provisions) and reserves to itself the right to second-guess the legislature wherever it wants to. However, even the FCC admits that the German legislature is free to introduce general reforms of copyright law, to take away rights or re-shape them, or to extend or narrow the scope of copyright law—the FCC at least said that it would respect the legislature's role in shaping copyright law, as long as the balancing is done correctly. It remains to be seen if the FCC really manages to restrain itself.

Thus, in the U.S., not all copyright law questions are de facto

<sup>209</sup> However, one should not forget that the Supreme Court, as the highest Federal court, also has jurisdiction to hear copyright law cases that raise no particular constitutional questions. Thus, the Supreme Court is involved in the shaping of copyright law on many levels, but not always with a constitutional angle.

constitutional law questions, whereas in Germany most of them are—due to the balancing approach. This in return means that, in the U.S., the Supreme Court, and thus the Constitution, will not have a large impact on the current world-wide wave of new and stronger copyright protection that is also coming to the U.S. unless there is a fundamental change of copyright law, such as the introduction of some kind of eternal copyright protection. Congress will therefore in all likelihood be able to remodel and patch the Copyright considerably in the future, thus there is always the chance that Congress will, intentionally or inadvertently, distort the balance of the current Copyright Act because of heavy lobbying from corporations or interests groups, and forget about the just interests of the authors and the public.

In Germany, however, where there is also a lot of significant new copyright law being enacted (a new and major Copyright Reform that takes some parts of the rights of consumers away entered into force on January 1, 2008, and the next Copyright Reform is also on the horizon), the FCC's standing case law and willingness to scrutinize the legislature's policy reasons will invite many constitutional challenges. These challenges could all be successful, even in minor respects, because of the blanket balancing approach of the FCC. It could very well be that the FCC might thus be able to stop many little, but nonetheless unfair, distortions and abuses of copyright law whose equivalents the Supreme Court would in all likelihood have to accept. But it is of course also possible that the FCC gets copyright principles wrong in a major area of copyright and thus wrecks the German Copyright Act.

In the end, it remains of course to be seen and open to perennial debate which constitutional copyright law approach leads to the better, more consistent and just copyright law for the authors, the rights-holders, and the public, and which is more democratic.

## WHERE'S THE REMOTE?

### THE IMPORTANCE OF THE LOCATION OF THE REMOTE CONTROL (AND THE ONE WHO USES IT) IN DETERMINING LIABILITY FOR COPYRIGHT INFRINGEMENT FOR REMOTE STORAGE DVRs\*

I. INTRODUCTION.....	145
II. WATCHING WHENEVER I WANT – THE HISTORY AND JOYS OF TIME-SHIFTING! .....	147
III. WHAT'S THE DIFFERENCE BETWEEN SET-TOP DVRs AND RS-DVRs? .....	150
IV. DIRECT OR INDIRECT LIABILITY OR NOTHING TO WATCH ON TV .....	154
V. PUBLIC PERFORMANCE IN YOUR OWN PRIVATE HOME? .....	158
VI. CONCLUSION.....	163

#### I. INTRODUCTION

I live in a tiny studio apartment in Manhattan without my own VCR. Luckily, I have a nice neighbor who has allowed me (for a small fee) to use the VCR located in his apartment. The walls between our apartments are thin, allowing me to use the VCR remote control in my apartment, and to press the record button every Friday night at 9 p.m. to tape *Battlestar Galactica*.<sup>1</sup> My neighbor never uses the VCR, though occasionally might have to plug it back in if his dog pulls the cord out. Is my neighbor a direct copyright infringer?

Since it is no longer the '80s or '90s, we can replace the hypothetical VCR with a DVD recorder, and since it is 2009 we can replace it further with a DVR (digital video recorder). By now most

\* Permission is hereby granted for noncommercial reproduction of this Note in whole or in part for education or research purposes, including the making of multiple copies for classroom use, subject only to the condition that the name of the author, a complete citation, and this copyright notice and grant of permission be included in all copies.

<sup>1</sup> The all-new *Battlestar Galactica* is a fantastic television show that airs on the SCI FI Channel and which everyone should set their DVR to record. Rolling Stone calls it "the best show on TV." Gavin Edwards, *Battlestar is Back*, ROLLING STONE, Sept. 21, 2006, at 41.