the strong tradition of cultural heritage in French copyright law may furnish the necessary conditions to render the copyright legal framework of France conducive to the introduction of a public interest exception to copyright.

C. Germany

The copyright framework of Germany has strong constitutional underpinnings by virtue of its being derived from the basic rights guaranteed under the *Grundgesetz* (Constitution) of Germany.

The economic rights of copyright holders are protected under the right to property in Article 14 of the *Grundgesetz*. Article 14 (2) however takes cognizance of the fact that 'properties impose duties and that its use should also serve the public interest.'[95]

Under Article 3 of the Constitution expropriation is permitted only in the public interest. It may take place only by or pursuant to law which provides for compensation for such expropriation. The compensation shall be determined upon just consideration of the public interest and of the interests of the persons affected.

In addition the moral rights of authors are grounded upon the constitutional guarantee of human dignity under Article 1 and the right to personal freedom of the individual which is inviolable and may only be encroached upon pursuant to a law.[96]

It is therefore evident that as far as the economic rights of the author are concerned, the constitutional underpinning under Article 14 im-

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95 E. Ulmer *Lettre d'Allemagne* [1965] Copyright 275 at 282 "*I believe in particular that the constitutional guarantee of property applies to copyright. The basic law guarantees property. In constitutional language that means that intellectual property is also guaranteed.".*

96 Decision of the Federal Supreme Court, November 26,1945, 15 B.G.H.Z. 249. Recognized the existence of a general right to personality grounded in the Basic Law *(Grundgesetz),* the court reasoned that the expression of ideas is an emanation of the personality of the author and that therefore the author had the right to decide if, and in what form his writings should be distributed to the public.

bues them with a strong notion of public interest and requires the exercise of these rights to be carried out in such a manner as to promote the social good. As Hugenholtz points out the express recognition of the social function of copyright provides a constitutional basis for limiting overbroad copyright protection.

The argument for the limitation of copyright in the public interest gains further momentum under the guarantee of the freedom of expression under Article 5 which as discussed above contains the right to express and disseminate one's opinion, the right of access to information and the freedom of the media.

Hence in comparison with the two jurisdictions discussed above, namely France and England, it appears that the legal basis for the introduction of a public interest exception to copyright is stronger in Germany, owing to the strong constitutional basis of the copyright framework with its emphasis on the social function of copyright.

A consideration of the legislative evolution of the law highlights the consistent interpretation of copyright in terms of its social function as well the emphasis on the need to limit the scope of the exclusive rights of the copyright holders, when it is so required in the public interest.

One instance in which this approach to copyright was reiterated, arose in the context of the debate which concerned the extension of the German copyright term from 30 years to a 50 year period of protection.

A prominent figure among those opposing the extension of the term Professor Ernst Heymann, expressed the view that German law, in contrast with French law, was inspired by social factors; it took account of the interest of the community, to which the interests of the individual should conform and even subordinate itself. He further argued that the period of protection was not envisaged in Germany as a limitation on a presumed perpetual intellectual property right but rather as an additional period prolonging the death of the author. Taking the various interests into account he concluded that **the in-**

terests of the German nation should always take priority in matters of copyright.[97]

> As de Boor noted, *"If we wish to protect the creative personality, it is not sufficient to provide him with a financial reward for his work. Rather personal and cultural interests should be put forward first."*[98]

In a different context he further suggested that the essential task of copyright was the establishment of an equitable balance between authors, commercial intermediaries and the general public.

The foregoing therefore gives an indication that the maintenance of an effective equilibrium between the interests of the freedom of expression and copyright has been a constant concern in the copyright framework of Germany from a very early stage and thus may be considered an inherent characteristic of the basic conceptual framework of German copyright law.

The current framework of German copyright law is contained in the Act on Copyright and Related Rights of 1965[99] as amended.[100]

The Act contains a list of limitations to copyright which have been imposed in the interests of public information in order to serve the needs of cultual life.[101]

These include a specified list of limitations to the exercise of exclusive rights, some of which allow for the free use of copyright-protected material and others which provide for the limitation of rights subject to the right of the copyright holder to the payment of equitable remuneration for such use.

Following the enactment of the 1956 Act the German Federal Constitutional Court was called upon to consider the constitutionality of

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97 E. Heymann *Die Zeitliche Begrenzung desUrhberrechts* (Berlin, Prussian Academy of Sciences,1927) cited in Davis at 189.

98 Hans Otto de Boor *Letters from Germany* (1928-1995) cited in Davis at 192.

99 *Gesetz über Urheberrecht und verwandte Schutzrechte* (*Urhebergesetz)* (1965).

100 Amendments 1972,1985 and 2007.

101 E. Ulmer *Lettre d'Allemagne* [1965] Copyright 275 at 277.

the limitations introduced to copyright, on the basis of the extent to which such limitations could be considered as justifiable in the public interest under Article 14 (2) of the Constitution.

The decisions delivered by the Federal Constitutional Court in these cases exemplify the court's interpretation of the relationship between copyright and the public interest under German law.[102]

For example in the "School-Book Case" which involved s. 46 of the Act the court emphasized that the legislature being bound by the Basic law must, in defining the privileges and duties that make up the content of the right, preserve the fundamental substance of the property guarantee under Article 14 while at the same time also keeping in line with the other constitutional provisions.[103]

It further stated that the recognition in principle of the economic rights to the author for his free disposal does not mean that thereby every conceivable means of exploitation is constitutionally secured. Thus it is for the legislature to establish adequate standards which guarantee an appropriate exploitation and a utilisation that corresponds to the *nature and social meaning of the right.*[104]

The court further stated that the constitutionality of the said provision hinges upon its justification of the public interest.

As Hugenholtz points out therefore, even without directly addressing free speech considerations, the property guarantee under the German Constitution has been held to require that a balance be struck between protecting copyright and the public interest.[105]

However it appears that the Constitutional Court has subjected this balancing of interests to a test of proportionality.

In the Church Music case where the constitutional validity of s. 52 which permitted the unauthorized use of musical works in churches

102 Davis at 204.

103 Federal Constitutional Court July 7, 1971 Kirchen- und Schulgebrauch [1972] 3 IIC 395.

104 Davis at 206.

105 P. Bernt Hugenholtz *Copyright and Freedom of Expression in Europe* www.ivir.nl/publications/**hugenholtz**/PBH-Engelberg.doc at 4.

was considered, the Constitutional court made the following observation.

> *"The legislature is in principle required to attribute the economic control of the creative work to the author and to allow him the freedom to dispose of it at his own responsibility…legislation moreover has the task of taking the interests of the general public into consideration.* ***Yet the power of the legislative provision is not unlimited. Any restrictions on the right of use that is made in the public interest must therefore be supported on legitimate grounds.*** *An excessive restriction that is not dictated by the social demands on copyright cannot be justified by Article 14 (2) of the Basic law…"*[106] (emphasis added)

Thus as pointed out by Davis the basic rule as regards property in the form of intellectual creation is to give exclusive rights to the author. The public interest exception under Article 14 (2) arises in a negative sense and is subject to a balancing of interests on the basis of proportionality. Hence for the public interest to prevail over the interests of the author that interest must be sufficiently important to override the constitutional guarantee of property.

It is evident that the determination as to whether or not a public interest, sufficient to override the legitimate interests of the author exists is a matter for the determination of the court, and hence the court is allowed a considerable level of discretion in the balancing exercise which must necessarily proceed from the application of the proportionality test. Thus this test allows for a measure of flexibility to the judiciary in making a balanced analysis as to what rights should prevail in the interests of the public.

It maybe that the discretion afforded to the judiciary under Article 14 (2) is even broader than that offered under the fair use exception since unlike the four step test which must be observed in making a determination under the fair use exception, the courts are not ham-

106 Decision of the Federal Constitutional Court, October 25 1978, [1979] 84 U.F.I.T.A 317.

pered by any guidelines as to how the balancing exercise must be carried out.

However in a recent instance the courts did take into account the guarantee of the freedom of expression under Article 5 of the Constitution in determining an issue as to the extent to which the limitation of an author's rights for the purposes of quotation could be permissible based on the constitutional guarantee of the freedom of artistic expression under Article 5(3) of the Constitution.

In balancing the interests of copyright and the freedom of expression the Court engaged in a consideration of the significance of the interference of the author's rights and the commercial disadvantage to the author caused by the unauthorized reproduction i.e the quotation. Following such consideration they concluded that since the interference with the author's rights in the circumstances under review were not significant and did not pose a danger of any noticeable commercial disadvantage the economic rights of the author must take second place to the right of the public for artistic analysis.[107]

Hence under this approach it may be argued that the use of quotations of copyrighted material for a socially useful purpose such as the creation of a novel yet derivative work such as illustrated under Hypothetical 3, may be considered permissible use of such material under the German legal framework.

It is noted that an analogy maybe drawn between the methodology used by the judges in the present case and the four step test employed in considering the fair use exception in the US, in terms of the factors that were taken into account in determining as to whether the unauthorized reproduction of the material could be in the public interest so as to override the exclusive copyright.

Thus it appears that the German copyright framework already includes a well-developed mechanism for the balancing of copyright and the rights of the public based upon the concept of property rights as a social good which must be exercised in the interests of society.

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107 Federal Constitutional Court, 29 June 2000, *Germania 3*, 2001 GRUR149.

On the other hand however, the general trend of the German courts towards the interpretation of statutory limitations to copyright has been that limitations may only be considered exceptionally, and particularly in cases where the constitutional rights of the author are confronted with the constitutional rights of others.[108]

This seems to stem from the idea that a restrictive interpretation of copyright exceptions is warranted in order that the author should be given a reasonable share of the financial benefits as a result of his constitutional rights.[109]

This is illustrated in the decision of the German Federal Supreme Court in the *Covered Reichstag* case.[110] The case concerned an art project undertaken by a well known artist which involved the covering of the Berlin Reichstag in fabric. The Defendant took photographs of the covered Reichstag without the permission of the artist and produced and sold postcards of the same. In his defense he claimed that his act came within the exception under section 59(1) of the German Copyright Act which provided that it shall be permissible to reproduce through photography works which are *permanently* located on public ways, streets or places and to distribute and publicly communicate such copies.

In making its determination the Court balanced the interests of the copyright holder against that of the public interest and stated that the exception being a limitation to the social value that copyright usually guaranteed, it should be interpreted narrowly.[111] On the other hand it observed that the copyright holder who agrees to put his work in a public place dedicates his work to the general public who have an interest in taking pictures of public places without a license from the copyright holder. However it concluded that under the exception the public interest takes a step back when the duration of a work is limited

108 *Supra Covered Reichstag* 605-606 as cited in Postel at 146.

109 *Id.*

110 Federal Supreme Court, *Covered Reichstag* GRUR 605 (2002).

111 Holger Postel, *The Fair Use Doctrine in the U.S. American Copyright Act and Similar Regulations in the German Law* 5 CHI.-KENT J. INLTELL. PROP 142, 155.

as it was in this instance and that therefore the Defendant's action did not come within the scope of the exception.[112]

On the other hand the fact that the existing limitations to copyright in German law constitute narrowly defined statutory exceptions which are restrictively interpreted by the Courts, has the result that in certain instances the legitimate interests of the public may be overridden by copyright, notwithstanding the requirement in the Constitution that these rights are to be exercised in a manner so as to promote the social good. For example as Postel points out the exception under section 49(2) of the German Copyright Act which sanctions the use of copyright protected material for the purposes of news reporting is limited to the use of material which has already been publicly disseminated.

Hence under Hypothetical 1 the dissemination of the footage belonging to Sports TV would not be permissible, under German law despite the evident public interest attached to the reporting of such an event.

Thus it is noted that the Constitutional expression of copyright as a social good combined with the guarantee of the freedom of expression within the Constitution has already served to establish within the German legal tradition a strong perception as to the need to balance the competing interests of copyright and the freedom of expression in the public interest, although the manner in which the existing limitations to copyright are framed may in certain instances not enable the achievement of a successful balance between these competing values. As such it may be seen that the prevailing conditions within the German legal framework are exceedingly conducive to the introduction of a broad based public interest exception to copyright.

112 *Id.*