The *Germania 3* Decision Translated: The Quotation Exception before the German Constitutional Court

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Introduction

As the digital era has progressed and as postmodern artistic practices have entrenched themselves, legislatures around the world have been moved to take a fresh look at their exceptions to copyright infringement. The quasi monopoly of copyright has begun to seem altogether too constricting in a time when creative appropriations and the digital cutting, pasting and re-cycling of copyright material are commonplace activities. One area on which legislatures have been focusing is that of quotations. Should an express quotation exception be included in our copyright Acts? If so, what form should it take and how should it be interpreted?

The UK

In the United Kingdom the Hargreaves Report[1] addressed the subject of copyright exceptions. It considered their treatment under EU law, under US law and under UK law and canvassed the possibility of the EU countries adopting a version of the US fair use doctrine. Professor Hargreaves concluded that any such development would entail a 'very protracted political negotiation, against a highly uncertain background'.[2] For this reason he recommended that the UK instead focus for the time

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[1] Professor Ian Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth*, May 2011, Ch 5 (Copyright: Exceptions for the Digital Age).

[2] Ibid 45 [5.18].

being on 'the European system of specific exceptions to copyright'.[3] He made a number of recommendations in this regard.[4]

Subsequently the UK government developed a set of proposals to address the points raised by Hargreaves, one of them being an updating of the copyright exceptions. In a consultation paper it specifically asked whether the 'current exception for criticism and review [should] be amended so that it covers more uses of quotations? If so, should it be extended to cover any quotation, or only cover specific categories of use?'[5]

In December 2012 the Government committed itself to the introduction of a quotation exception [6] and in 2013 it revealed the proposed new section 30A of the *Copyright, Designs and Patents Act 1988.* This section (which is likely to come into effect in 2014) will provide that:

(1) Copyright is not infringed in a copyright work by the use of a quotation from that work for purposes such as criticism or review provided that:
    (a) the work has already been lawfully made available to the public;
    (b) the use of the quotation is accompanied by sufficient acknowledgement (where this is possible); and
    (c) the use of the quotation is fair dealing with the work.
(2) Use of a quotation from a copyright work is not fair dealing unless:
    (a) The use of the quotation is in accordance with fair practice; and
    (b) The extent of the quotation is required by the specific purpose for which it is required. …[7]

The provision will replace (only) the current exception for fair dealing for the purposes of criticism and review. It does not appear that any definition of quotation will be provided.

Europe

Continental Europe has also seen an upsurge of interest in the quotation exception, which is provided for in European copyright statutes.[8] In May 2012 copyright owners, intermediaries, consumers and European Parliamentarians met at the European Parliament to discuss future (harmonised) directions for European copyright laws, one result of that meeting being a draft 'Memorandum of Understanding

[3] Ibid 46 [5.20].

[4] Ibid 49-50 [5.26]-[5.37].

[5] HM Government, *Consultation on Copyright* 105, Consultation question 94.

[6] HM Government, *Modernising Copyright: A Modern, Robust and Flexible Framework: Government Response to Consultation on Copyright Exceptions and Clarifying Copyright Law*.

[7] Intellectual Property Office, *Quotation*, <http://www.ipo.gov.uk/techreview-quotation.pdf>.

[8] For example, the Dutch Copyright Act 1912 art 15a, the German Copyright Act s 51, the Czech Copyright Act art 31, the Scandinavian Copyright Acts s 22, the French Intellectual Property Code L 122-5(3)(a) and so forth.

Concerning the Interpretation of the Right of Quotation'.[9] The fact that interpretation of the quotation 'right' should be so intensively discussed attests to the importance that is placed on it in continental Europe. Key proposals were that:

3. Quotations shall be permissible for the purpose of including pre-existing protected material in a new cultural creation, such as user-generated content.

4. Quotations shall be permissible in the context of an announcement, such as the display of protected material to inform users about contents available on the internet.

5. Quotations shall also be permissible for comparable purposes, in particular for safeguarding freedom of expression and freedom of information, and for scientific and educational purposes.

Some of the suggestions contained in this document are derived from the status quo in countries such as the Netherlands and Germany.

Australia

In Australia too the question of a quotation exception is under discussion. During 2011 a group of copyright experts assembled by the Australian Copyright Council made suggestions concerning the future of Australian copyright law.[10] One of those (tentative) suggestions involved a consideration of a quotation exception as a way of curtailing the copyright monopoly.[11]

Australia had recently been confronted by the consequences of the lack of such a defence. In the case of *EMI Songs Australia Pty Limited v Larrikin Music Publishing Pty Limited* the Australian band Men at Work had been found liable for copyright infringement on the basis that they had taken and used two bars from a very short and well known musical work, composed long ago by an author since deceased.[12] The band had not sampled a sound recording but had played the bar of music themselves in their own recorded song.[13] Even one of the judges who found that they had illegally reproduced a substantial part of the copyright music was troubled by this outcome.[14]

The outcome of that case showed that certain reproductions, even of small parts of a copyright work, can easily fall through the cracks left by the current Australian copyright exceptions, despite the reproduction being for a purpose which most community members would consider benign – namely

[9] Consumers in the Digital Age, Access to Knowledge Network, <http://a2knetwork.org/quotation> (version 0 of September 2012). See also commentary on the draft by Martin Senftleben at <http://a2knetwork.org/quotation-memo#1>.

[10] Copyright Council Expert Group, *Directions in Copyright Reform in Australia* (2011) <http://www.copyright.org.au/pdf/Copyright%20Council%20Expert%20Group%20-%20Paper%202011.pdf>.

[11] Ibid 2-4. It was part of a broader recommendation that the Act contain an exception for non-commercial transformative use.

[12] *EMI Songs Australia Pty Limited v Larrikin Music Publishing Pty Limited* [2011] FCAFC 47.

[13] In other words no issue arose as to the infringement of copyright in subject matter other than works.

[14] *EMI Songs Australia Pty Limited v Larrikin Music Publishing Pty Limited* [2011] FCAFC 47 per Emmett J [100] and [101].

use for the purposes of further artistic work. The decision drew attention to the fact that the Australian law does not appear to confer the protection on quotations that is expressly mandated by article 10 of the Berne Convention.

In 2012 the federal government gave the Australian Law Reform Commission the task of inquiring into future directions for copyright law in that country and in August the ALRC released an Issues Paper on Copyright in the Digital Economy. Question 47 of the Paper asked whether there should be 'a fair dealing exception for the purposes of quotation, and if so, how should it apply?' In May 2013 the Commission issued a Discussion Paper[15] in which it favoured the introduction of a broad 'fair use' exception and the repeal of many of the existing fair dealing and similar provisions. The introduction of such an exception would include the express mention of 'quotation' as one of the 'illustrative purposes', assisting in the interpretation of the broader exception.[16] However, being uncertain that the Parliament would endorse a 'fair use' exception, the Commission suggested an alternative. 'If fair use is not enacted, the *Copyright Act* should provide for a new fair dealing exception for quotation. This should also require the fairness factors to be considered.'[17]

Jurisprudential development

These three recent initiatives across common and civil law jurisdictions must be set against a background of jurisprudential development and application of the quotation concept in the domestic laws of major European states. The Government documents in the UK allude to the very broadly drafted quotation exception in the Scandinavian countries, but do not give an account of the jurisprudence, hence of the application of the exception.[18] Yet a law can be properly judged only when its practical applications are considered.

From a jurisprudential point of view the German quotation provision is undoubtedly one of the best developed in Europe.[19] It has been tested relatively frequently by the courts, indeed by Germany's highest courts, interpreting when and under what conditions the claim that a reproduction is protected as a quotation can legitimately be made. Among other aspects of the exception, the courts

[15] Australian Law Reform Commission, *Copyright and the Digital Economy*, Discussion Paper 79, May 2013 <http://www.alrc.gov.au/publications/copyright-and-digital-economy-dp-79>.

[16] Ibid 216 [10.114]. The naming of an illustrative purpose would "'signal that a particular use that falls within the broader category of 'quotation' is more likely to be fair than a use which does not fall into this, or any other, illustrative purpose category.'

[17] Ibid 14, Proposal 10-3.

[18] *Consultation on Copyright*, above n 6, 102 [7.180].

[19] Zulässige Verbreitung eines Zitats als Motto – Typisch München! NJOZ 2010, 674; Ausschnitte aus alten Spielfilmen in Fernsehfilm – Filmzitat BGH Urteil vom 04.12.1986 – 1 ZR 189/84 (Munich); BVerfG, *Beschluss* vom 29.06.2000 - 1 BvR 825/98 [23]; Zitate eines Comedians in Kundenmagazin einer Drogeriekette, OLG Hamburg 26 Feb 2008 – 7 U 61/07; Filmausschnitte als Zitat, OLG Cologne 13 August 1993 – 6 U 142/92, NJW 1994, 1968; Filmzitat aus einem Werbefilm LG Hamburg, 12 Nov 1996; BGHZ 28, 234 Verkehrskinderlied; KG, GRUR 1970, 616 – Eintänzer; BGH, NJW 1985, 2134 – Liedtextwiedergabe; OLG Munich 17 Sept 2009 – 29 U 3271/09 - Motto als Zitat; OLG Munich 26 March 1998 – 29 U 5758-97 - Stimme Brecht; OLG Cologne 31 July 2009 – 6 U 52/09 - *Zitat eines fremden Textes in einem Kunstwerk;* OLG Brandenburg 9 Nov 2010 – 6 U 14/10 Zitat in einem Kunstwerk.

have considered in detail the question raised most pointedly in Australia – that of derivative creativity, the use of quoted material in a new artistic work.

The Germania 3 decision

One of the most interesting and highest level of the decisions dealing with the exception is that known as the *Germania 3* decision (or the *Stimme Brecht* decision) of the German Federal Constitutional Court. The decision is over a decade old now, but has not received the attention in the common law world that it deserves. In Europe the judgment has been described as '[s]urely the most spectacular example of … a normative interpretation [of copyright limitations]'.[20]

This decision covers two important areas of law. On the one hand it interprets the German *Copyright Act* (*Urheberrechtsgesetz*)[21] and its quotation exception, alluding to the relatively narrow interpretation of the exception by the Federal Supreme Court in earlier decisions. What is unique about the decision, however, is that it goes on to consider the effect on that exception of the German Constitution or *Basic Law* (*Grundgesetz*). The *Basic Law* guarantees the 'freedom of art', within the same section which guarantees the freedom of expression and opinion. This norm, including a reference to the artistic sphere, is present in more general terms in the *International Covenant on Civil and Political Rights*.[22] It is binding on all states parties to that convention; all are interested to see how other member states bring that obligation into effect in their own legal systems. Indeed references to freedom of expression have recently featured as part of the discourse of copyright reform.[23]

Given the attention currently being directed at the quotation exception around the world, it seems an opportune time for this decision to be viewed by a wider audience. It is important, when harmonisation is considered, that all parties have an optimal knowledge of the rationales and principles driving the laws with which harmonisation is sought. When the question of quotation is raised it is important that the breadth or narrowness of the concept becomes part of the legislator's considerations, together with the mechanisms by which the concept will (or can) be applied and controlled.

This article contains a translation into English of the full *Germania 3* decision of the German Federal Constitutional Court and commentary upon it. The facts underlying the case were as follows.

Facts

[20] Bernt Hugenholtz and Martin Senftleben, 'Fair Use in Europe: In Search of Flexibilities', <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1959554>.

[21] Literally the *Authors' Rights Act*, but translated here as the *Copyright Act* since it is the equivalent of the copyright Acts in common law countries.

[22] *International Covenant on Civil and Political Rights* (opened for signature 16 December 1966) 999 UNTS 171, entered into force 23 March 1976.

[23] HM Government, *Modernising Copyright: A Modern, Robust and Flexible Framework: Government Response to Consultation on Copyright Exceptions and Clarifying Copyright Law*, Annex B, 26.

In the 1990s, when he wrote his play *Germania 3: Gespenster am toten Mann*,[24] the German playwright Heiner Müller used extensive quotations from the works of other authors, including Bertolt Brecht, Heinrich von Kleist, Friedrich Hölderlin and Franz Kafka. The material reproduced, for which authorisation was not sought, forms part of the dialogue of the characters in the Müller play. No attempt is made to disguise the copying or quotation; it is expected to be recognised. All quoted material is reproduced in italics in the written text of *Germania 3*.

Not surprisingly, the Brecht estate took issue with the reproduction and dissemination of extracts from his works, alleging copyright infringement. As Heiner Müller had since died, the action was directed at publishers of the play, the litigation primarily concerning the quotation of passages from two of Brecht's dramas – *Coriolan (Coriolanus)* and *Leben des Galilei (Life of Galileo)*. Since a potentially infringing reproduction had clearly occurred, the question for the courts which heard the issue was whether the defence allowed by the German *Copyright Act* to those who reproduce works for the purpose of quotation would save the actions of the publisher in this instance.

A number of courts were involved in the Brecht litigation. The first action in this matter took place in Brandenburg against an unnamed publisher,[25] and was decided at first instance by the State Court (*Landgericht* - LG) Brandenburg against that publisher. On appeal, the Higher State Court (*Oberlandesgericht* - OLG) Brandenburg decided in favour of the publisher on the basis that the quotation exception could be relied upon.[26]

The Brecht estate now took action against the publisher 'K' in Bavaria, where the matter was decided in favour of the publisher by the State Court (*Landgericht*).[27] However, on appeal to the Higher State Court (OLG) in Munich, it was decided that the quotation exception could not be relied on and the publisher had infringed.[28]

Unable to take the matter to the Federal Supreme Court (BGH),[29] the publisher (joined by the widow Müller, who considered that her own financial interests were at stake) took it instead to the Federal Constitutional Court (*Bundesverfassungsgericht*), alleging among other things that the constitutional rights of the publisher had been violated through an overly narrow interpretation of the exception.

The provisions and their interpretation

[24] [*Germania 3: Ghosts at the Dead Man*], Kiepenheuer & Witsch, 1996.

[25] German judgments do not name the parties to the action, giving only their initials. Reports of the judgments do not necessarily communicate even those initials.

[26] OLG Brandenburg: *Rechtmäßige Übernahme von Zitaten – 'Stimme Brecht'*, NJW 1997, 1162.

[27] Statement of the OLG Munich in OLG München: *Übernahme umfangreicher Zitate in Theaterstück* - Stimme Brecht' NJW 1999, 1975, 1975.

[28] OLG Munich in' OLG München: *Übernahme umfangreicher Zitate in Theaterstück* - Stimme Brecht' NJW 1999, 1975.

[29] Statement of Hermann Lindhorst in his note 'Anmerkung zu BVerfG: Übernahme umfangreicher Zitate in Theaterstück - Stimme Brecht' MMR 2000, 686, 689.

The wording of section 51 of the German *Copyright Act*, dealing with quotations, was at the time of the decision as follows:

> **Section 51 Quotations**
>
> Reproduction, dissemination and public presentation shall be permitted, to the extent justified by the purpose, where
>
> 1. individual works are included after their publication [*Erscheinen*] in an independent scientific work to illustrate its contents;
>
> 2. passages from a work are quoted after its publication [*Erscheinen*] in an independent work of language;
>
> 3. individual passages from a published [*erschienenen*] musical work are quoted in an independent musical work.

Number 2 above was of most relevance to this decision since Müller's play clearly fulfilled the requirements for an 'independent work of language' and the Brecht plays had been published. Though subsequently slightly amended, this clause has not undergone any change that is relevant to the judgment.[30]

The first question that the courts had to answer was whether what had taken place was quotation in the sense in which the word is *normally* understood in German jurisprudence. In the OLG Munich the answer to that question had been negative. The reasoning of that court is shown in the following passage:

> A quotation is … permissible only if it appears as evidence supporting the quoting author's own discussions. The freedom to quote is supposed to allow the quoting author to use the borrowed material in aid of his own statement, whether in order to cast a critical light on the quoted work or whether as a point of departure – and particularly to support and explain his own thought process - or whether in the form of readings for the illustration of an independent report. Thus an inner connection with the quoting author's own thoughts must be formed, since the purpose and aim of quotations is never more than to support a person's own exposition or the examination of another's thoughts. … Doctrinal writings and jurisprudence have developed the principle that a quotation is justified only when it appears as evidence supporting the views that are put forward, when it thus serves as an example for the clarification of concurring opinions, for the better understanding of the quoting author's own statements or otherwise acts as a basis for or serves to deepen what is stated. It must also not appear as a mere appendage to the quoting work but must be worked into the text. In the contested case it cannot be established that the quotations adopted by Heiner Müller

[30] As of 2008 the section reads: 'Reproduction, dissemination and public presentation of an already released [*veröffentlicht*] work for the purpose of quotation shall be permitted, to the extent justified by the particular purpose. This is especially the case where 1. individual works are included after their release [*Veröffentlichung*] in an independent scientific work to illustrate its contents; 2. passages from a work are quoted after its release [*Veröffentlichung*] in an independent work of language; 3. individual passages from a published [*erschienenen*] musical work are quoted in an independent musical work.' The amendment to No 2 replaces the requirement of 'publication' with that of 'release', which is, in fact, a lower requirement and easily met by publication of the Brecht plays.

> from works of Bertolt Brecht are evidence for his own statements in the above sense. It is in the nature of a quotation that it, first of all, is not indistinguishably integrated into the quoting work but is distinguishable as a foreign addition. … The adopted excerpts from Leben des Galilei [Life of Galileo] and Coriolan [Coriolanus] are not, in this case, only there to support the purposes of the quoting work; rather they function much more like substitutes for the author Heiner Müller's own statements – to such an extent that they do not serve simply as evidence in the sense mentioned above but replace his own exposition. The extent to which the borrowed extracts independently carry the scene 'Measures 1956' in Müller's work becomes clear if one imagines away both of the Brecht extracts. This part of the work, at any rate, then becomes practically non-viable; the scene collapses.[31]

The passage shows the contours of the quotation concept in German copyright law. Most important is its secondary nature. The quotation must serve the quoting work. Thus it is described as aiding the quoting author, as evidencing, as supporting, as explaining, or as illustrating the quoting material. The passage reiterates a phrase used constantly in cases dealing with quotations – that there must be an 'inner connection' between the quoted material and the quoting work. The latter must be using the former for its own purposes; the quotation must not be present for its own sake and neither must it be a mere annex to the quoting work.

Given that the OLG had not considered the use of the Brecht passages to constitute permissible quotation in the normal sense of the word, the question arose of whether anything in the circumstances of the case could cause section 51 to be applied more generously than the OLG had done. In order to answer this question the provisions of the Constitution were examined.

Because the quoting work was a work of art, the Constitutional Court considered whether Article 5 of the German *Basic Law*, with its articulation of the 'freedom of art' principle, could cause s 51 of the *Copyright Act*, embodying the quotation exception, to be read in a way that was especially favourable to art (and the dissemination of art), despite such a reading being apparently inconsistent with previous interpretations of the section. It is this decision which is now referred to in judgments of the lower courts on the quotation exception in this area.[32]

The wording of article 5 of the *Basic Law*, used by the Constitutional Court in the interpretation of s 51, is as follows:

> **Article 5 [Freedom of expression]**
>
> (1) Every person shall have the right freely to express and disseminate his opinions in speech, writing, and pictures and to inform himself without hindrance from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed. There shall be no censorship.

[31] OLG München: Übernahme umfangreicher Zitate in Theaterstück – Stimme Brecht, NJW 1999, 1975, 1976.

[32] OLG München 14 June 2012 – 29 U 1204/12 - *Mein Kampf*, ZUM-RD 2012, 479; OLG Brandenburg, Judgment of 9. 11. 2010 - 6 U 14/10 - *Literarische Collage*, ZUM 2011, 250.

(2) These rights shall find their limits in the provisions of general laws, in provisions for the protection of young persons, and in the right to personal honor.

(3) Art and scholarship, research, and teaching shall be free. The freedom of teaching shall not release any person from allegiance to the constitution.[33]

In this decision the focus of the Court was on paragraph 3 – art shall be free.

The Decision of the Constitutional Court

The following is a translation of the full decision of the German Constitutional Court as found on the Court's website.[34] After rehearsing the facts, the court gives an account of the decision in the lower appeal court and the arguments of the complainant. It then gives its own judgment.

In order to assist readability, a number of parenthetical references have been removed from the main text to the footnotes. These are marked by the words 'Parenthesis in judgment'. Comments of the present authors appear in square brackets in the text, and in footnotes.

Federal Constitutional Court

- 1 BvR 825/98 -

In the Name of the People

In the proceeding

concerning the constitutional complaint

1. of Mrs M ...,

2. of the Publisher K ... GmbH & Co KG

Practitioners authorised to appear:

Attorneys Prof Dr Peter Raue and colleagues

Rankestrasse 21, Berlin

against the decision of the Higher State Court Munich of 26 March 1998 – 29 U 5758/97

the second Chamber of the First Senate of the Federal Constitutional Court has

in the decision of

Judge Kühling

[33] <http://www.iuscomp.org/gla/statutes/GG.htm#5>.

[34] <http://www.bverfg.de/entscheidungen/rk20000629_1bvr082598.html>.

Judge Jaeger

and Judge Hörnig

unanimously decided on 29 July 2000:

The decision of the Higher State Court Munich of 26 March 1998 – 29 U 5758/97 – breaches the rights which the second complainant has under article 5(3) sentence 1 of the Basic Law. The decision is overturned.

The matter will be referred back to the Higher State Court Munich.

The Free State of Bavaria is to reimburse the second complainant as necessary.

The constitutional complaint of the first complainant has not been accepted for adjudication.

Reasons:

A.

[1]
The constitutional complaint is directed against a civil court prohibition on the reproduction and dissemination of the book edition of a theatre play written by the dramatist and poet Heiner Müller, who died in December 1995. The prohibition applies to the book to the extent that it contains passages from works of Bertolt Brecht.

I.

[2]

1. The first complainant is the widow and sole beneficiary of Heiner Müller.

The book edition of his [Müller's] last play 'Germania 3 Gespenster am toten Mann' was published in 1996 by the second complainant. The play, which occupies 75 pages of text, is divided into 9 scenes which, apart from the opening and closing scenes, are built up chronologically and cover the socio-political situation in the years from 1941 to 1956. In the scene 'Measures 1956' (about 18 pages in length) passages of text from Bertolt Brecht's stage plays are reproduced without the authorisation of the Brecht heirs. At issue are a scene from the *Life of Galileo* (Parable of the Little Monk, approximately 2 pages in length) as well as scenes from *Coriolanus* (altogether about 2 pages in length). They are, like all the interpolated material, distinguished by their italicisation. In the Appendix to the book, under the heading 'References', the sources are stated in a general form.

[3]
2. The rights holders in the works of Bertolt Brecht initially, in an application for an injunction, made an unsuccessful complaint about the use of the Brecht passages and about the part of the text entitled 'The Voice of Brecht'. However, in the trial of the matter — in the decision which is the subject of the present appeal — the Higher State Court in Munich upheld the complaint concerning the Brecht passages and prohibited the second complainant to reproduce or disseminate the book 'Germania 3

Gespenster am toten Mann' by Heiner Müller under threat of legal sanctions, as long as these passages are contained in it.

[The following, up to and including paragraph 8, is written in the subjunctive voice in German, indicating that it is a paraphrase of the decision of the OLG.]

[4]
[According to the OLG] the complaint was justified under s 97 read in conjunction with s 15(1) and ss 16 and 17 of the *Copyright Act* because the present holder of copyright[35] did not agree to the word for word reproduction of the text and this was not covered by the freedom of quotation under s 51 and neither was there a permissible free use under s 24 of the *Copyright Act*.[36]

[The following two paragraphs indicate the principles according to which German courts normally judge whether a reproduction is in fact a quotation, though the Constitutional Court ultimately felt that they had been misapplied.]

[5]
[According to the OLG] the extent of the so-called 'small quotation'[37] which is regulated by s 51(2) of the *Copyright Act* is to be determined by the purpose of the quotation within the context of the quoting work. The freedom of quotation is supposed to facilitate the free intellectual engagement with the ideas of others and also to take a form in which political, scientific or intellectual trends are clarified through the word for word reproduction of individual extracts from the protected works of various authors. But a quotation would be permissible only if it were evidence for the quoting author's own deliberations. The quoting author should be put in the position, through the freedom of quotation, to use borrowed materials to assist his own presentation, whether by throwing a critical light onto the other [quoted] work or by using it as a point of departure (in particular to strengthen and expand his own thought process), or in the form of an extract to elucidate an independent report. Thus, an inner connection with the quoting author's own thoughts must be established; for it is the meaning and the purpose of a quotation always to be no more than a support for one's own statements or to show engagement with the ideas of another person.

[6]

[According to the OLG] in the case at issue it could not be determined that the quotations used by Heiner Müller were to be adjudged as evidence for his own statements. It was in the nature of

[35] Literally, authors' rights, including both the economic and the moral rights.

[36] The doctrine of free use, embodied in s 24 of the German *Copyright Act* but largely defined by the courts, is one of the most important of the exceptions to infringement. This provision exempts from infringement an independent work made by way of a 'free use' of another copyright work. The use of the provision in relation to musical creativity is limited. For its explanation of the free use doctrine see para 8 of the Constitutional Court's decision in the present case.

[37] A 'small quotation' is a quotation which falls under number 2 of the list in s 51. Quotations falling under number 1 (ie quotations for scientific purposes) are referred to as 'large quotations'. Musical quotations which fall under number 3 are considered a variety of 'small quotation'. No particular significance is to be given these days to the notions of 'small' and 'large'. Even 'small' quotations may on occasion be quotations of entire works.

quotation first of all that it could not be indistinguishably integrated into the [new] work but that it must be made visible as a foreign interpolation. There was no need to decide whether the italics on their own were capable of visibly distinguishing the foreign text from Müller's own work; for the recognisability of the foreign extracts implied that in this case they did not have a purely evidential function. The extracts taken from *Life of Galileo* and *Coriolanus* were not only assistance for the purposes of the quoting work, they were rather used in place of the author's own statements in such a way that they did not serve merely as evidence in the abovementioned sense, but replaced his own statements. How extensively the borrowed extracts on their own carried the weight of the scene 'Measures 1956' became clear when the two Brecht texts were imagined away. At least this part of the work then became practically no longer viable; the scene collapsed. Even if it could not be demanded that the quotation should play an entirely subordinate role, the necessary independence of the quoting work required that the weight be placed on the author's own intellectual input. But there could hardly be a question of this [intellectual input] if a significant part of the work, or the whole work, stood or fell with the interpolated parts. The interpolated extracts in any case no longer played the role of evidence when they not only underpinned the quoting author's own independent statements, but rounded out, supplemented or otherwise completed a work that, without them, would have remained a torso.

[7]

[According to the OLG] the interpolated Brecht texts had, to be sure, been worked in to the play scenically; but they served Müller as his own form of presentation and not as a discussion or deepening of his own statements. This being the case, the permissible limit for 'small quotations' under s 51(2) was clearly exceeded. In any event, in cases of doubt, because of the fact that s 51 of the *Copyright Act* is an exception to a right, the decision should come down against the quoting person. Whether Müller had used the art form of collage and whether the quotation right under s 51 of the *Copyright Act* can be relied upon for collages under some circumstances, does not need to be decided, because a 'technique of quoting combination' of the kind seen here is a stylistic device but does not quite reach the level of an engagement with the quoting work.

[8]

[According to the OLG] the incorporation of the Brecht texts in Müller's work was also not a 'free use' in the sense of s 24 of the *Copyright Act*. In judging whether an independent new work has been created in free use of a protected work, the difference between the new work and the individual characteristics of the underlying work has to be considered. One needs to apply quite strict criteria. The protected work must be subordinated to the new work to such an extent that it appears only as the inspiration for the new, independent act of creativity. In cases where the form of the previous work has been extensively adopted this inner difference occurs only when the new work engages intellectually with the older work. In judging whether this has occurred one has to put oneself into the mind of an observer who knows the source work but also possesses sufficient intellectual understanding of the new work. Using these criteria there is no free use in this instance.

II.

[In the following paragraphs the Constitutional Court gave an account of the arguments of the appellants.]

[9]

With their constitutional complaint the complainants assert a breach of article 5(1) and 5(3) and article 14(1)[38] of the Basic Law.

[10]

The appealed decision is argued to offend the guarantee of artistic freedom contained in article 5(3), sentence 1 of the *Basic Law*. The prohibition on use of the *Galileo* quotation means that a key scene in the work – the scene 'Measures 1956' – is destroyed. In this scene Heiner Müller was criticising the state of injustice represented by the German Democratic Republic. At the same time what was happening in his play was a highly stylised argumentation with Bertolt Brecht. The scene described the rehearsals for Brecht's last production, of *Coriolanus,* at the Berliner Ensemble.[39] These rehearsals took place whilst the country was reeling from the uprising in Hungary and at a time when the apparatus of the State (the GDR) was moving against intellectuals. Müller seized on these historically documented rehearsals shortly before Brecht's death, and subjected them to an alienation process. Brecht's two assistants at the time, who to this day represent the political antipodes of Brecht theatre, played a central role. Thus, in the scene 'Measures 1956' historical, political, personal and ideological facts and arguments intersect. Against this historical background and with these historical personalities Müller allows the argumentation with Brecht and his political situation in relation to the figures of power in the German Democratic Republic to unfold. To do this he uses a type of collage of Brecht texts and opposes the 'Parable of the Little Monk' from *Life of Galileo* to *Coriolanus*. Through the use of the short passages taken from the latter play Müller represents the contemptuous speech of the aristocrat Coriolanus, who is seeing his dreams of power founder on the inadequacy of the masses. In the fictional conversation during the *Coriolanus* rehearsal, which plays out against the background of the historical events in East Berlin at the time, their subject, the text of *Coriolanus*, has to be worked in. It forms the counterpoint to the 'Parable of the Little Monk'. The prohibition placed on the quotation of these two passages represents [the complainants allege] a crude attack on the integrity of Heiner Müller's art work and therefore also on Art 5(3) of the Basic Law.

[11]

Along with it [it is argued] goes a breach of the right to freedom of opinion under art 5(1) of the *Basic Law*. The scene 'Measures 1956' is argued not only to be a work of art, but also a highly controversial

[38] Article 14 [Property, inheritance, expropriation] (1) Property and the right of inheritance shall be guaranteed. Their content and limits shall be defined by the laws. (2) Property entails obligations. Its use shall also serve the public good. (3) Expropriation shall only be permissible for the public good. It may only be ordered by or pursuant to a law that determines the nature and extent of compensation. Such compensation shall be determined by establishing an equitable balance between the public interest and the interests of those affected. In case of dispute respecting the amount of compensation, recourse may be had to the ordinary courts: <http://www.iuscomp.org/gla/statutes/GG.htm#1>.

[39] Brecht's theatre company, which he had established with his wife Helene Weigel in East Berlin in 1949.

political argumentation of Müller with Brecht. So not only is the substance of Müller's position covered by Art 5(1) of the Basic Law, but, in this specific case, also the particular form which his art gives to this argumentation.

[12]

Finally, it is alleged that the appealed decision breaches the property right of the complainant. The right to use and to exploit the work in its complete form is [argued to be] a proprietary right under article 14 of the *Basic Law*. Heiner Müller transferred the publication right in his work to the second complainant. The first complainant is receiving royalties from the sale of the works. The property interest of both complainants is claimed to be injured by the prohibition placed on the works in their original form.

III.

[In Part III the Constitutional Court delivered its own judgment.]

[13]
The Bavarian Minister of State for Justice, the complainants from the initial action, the President of the first Civil Senate of the Federal Court of Justice and the P E N Centre of Germany[40] have all made submissions.

B.

I.

[14]
Pursuant to s 93b of the *Federal Constitutional Court Act*, the Chamber has undertaken to decide the constitutional case – a case which meets formal requirements — made by the second complainant, since this [course of action] is indicated under art 5(3) sentence 1 of the *Basic Law* (*Federal Constitutional Court Act* s 93a(2)(b)) for the vindication of their rights. The constitutional complaint is upheld. The requirements of s 93c(1) sentence 1 of the *Federal Constitutional Court Act* have been made out.

[15]
1. The benchmark is above all art 5(3) sentence 1 of the *Basic Law*, on which the complainant can rely as publisher of the book edition of Heiner Müller's play.[41] Article 5(1) is secondary, because, given this form [of expression] chosen by the author [Müller], artistic freedom represents the more specific basic right.[42]

[40] P E N (the acronym stands for 'poets, essayists and novelists') is an organisation formed, originally in the UK in 1921, to promote freedom of expression among other things. The P E N Centre Germany, formed in 1925, is a branch of P E N International.

[41] (cf Decisions of the Federal Constitutional Court Vol 30, 173, 191, 200). Parenthesis in judgment.

[42] (cf Decisions of the Federal Constitutional Court Vol 30, 173, 200; Vol 75, 369, 377). Parenthesis in judgment.

[16]
The constitutional questions which must be addressed in a determination of the present constitutional complaint have already been sufficiently explained in the jurisprudence of the Constitutional Court.[43] It is true that the Constitutional Court has not yet expressed itself specifically on the question of the relationship between freedom of artistic expression and authors' rights. Nevertheless the present scenario can be solved by using the principles developed for both of these areas and the jurisprudence concerning the limitations arising from the hierarchical order of values in the *Basic Law*.[44]

[17]
a) The play *Germania 3 Gespenster am toten Mann* is a 'work of art' in the sense of art 5(3) sentence 1 of the *Basic Law*. It is a part of the time-honoured art form of theatre and — and this applies also to the scene 'Measures 1956' currently under discussion — is the result of the free creative activity of the dramatist Heiner Müller, in which impressions, experiences and imaginings of the author are expressed.[45] The courts which initially considered this case were clearly also working on the assumption that this was art. It is true that they did not make any explicit statements about this, but they did make it sufficiently clear that they regarded the play as a work of art.

[18]
b) Article 5(3) sentence 1 of the Basic Law comprehensively guarantees freedom of activity in the field of art; both the creative process itself [*Werkbereich*] and the process of making the work available [*Wirkbereich*] are protected.[46] The meaning and purpose of this basic right is, above all, to guarantee the free development of the artistic creative process and to preserve it from interference by public power. The protection which is afforded by the freedom of art is not set aside just because the art in question happens to be an artistically expressed political position.[47]

[19]

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[43] (cf, eg, on the freedom of art Decisions of the Federal Constitutional Court Vol 30, 173, 191, 200>; Vol 83, 130, 145 f; on copyright Decisions of the Federal Constitutional Court Vol 31, 229, 238 ff.;Vol 81, 208, 214). Parenthesis in judgment.

[44] Some of the principles expressed in the Basic Law take priority over others. For example the statement made in article 1 – '(1) Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority' takes precedence over the protection of art with which the present case was concerned: BVerfG (1 Senate) 24.2.1971 1 BvR 435/68 – Mephisto, GRUR 1971, 461. See further para 19 of the present judgment.

[45] (cf Decisions of the Federal Constitutional Court Vol 30, 173, 188 ff; Vol 67, 213, 226; Vol 83, 130, 138). Parenthesis in judgment.

[46] (cf Decisions of the Federal Constitutional Court Vol 30, 173, 190). Parenthesis in judgment. This sentence of the present judgment draws, as indicated by the citation, on the 1971 *Mephisto* decision, in which the Constitutional Court stated as follows: 'The guarantee of artistic freedom applies in the same way both to the realm of artistic creativity relating to creation of the work ['*Werkbereich*'] and the realm relating to the work's dissemination ['*Wirkbereich*']. Both realms form an indissoluble unity. Not only artistic activity (the *Werkbereich*), but in addition the presentation and dissemination of the artistic work are fundamentally necessary to produce the encounter with the work, which is also an art-specific process; this '*Wirkbereich*', in which the public is given access to the work, is the foundation on which the guarantee of freedom afforded by art 5(3) has mainly grown': at 189. At page 191 of the judgment the Court makes it clear that protection of the *Wirkbereich* – the area of the work's effect - protects not only the artist but also the publisher and others who disseminate the work.

[47] (cf Decisions of the Federal Constitutional Court Vol 67, 213, 227 f.) Parenthesis in judgment.

The freedom of art is afforded in an unreserved but not unlimited way. The limitations derive from the basic rights of other rights holders (eg from the general right of personality expressed in art 2(1) together with art 1(1) of the *Basic Law*: Decisions of the Federal Constitutional Court Vol 30, 173, 193; Vol 67, 213, 228)),[48] and also from other rights with constitutional status (eg the protection of youth: Decisions of the Federal Constitutional Court Vol 83, 130, 139). Such a limitation can also be derived from the guarantee of property in art 14(1) of the *Basic Law*, which includes the protection of intellectual property and in particular, in this case, copyright. Even property, however, is not guaranteed in an unlimited way, and in the field of copyright [the property guarantee] only grants to the author the economic aspect of this right.[49] Not every conceivable type of possible exploitation is constitutionally guaranteed, but rather the lawmaker must find within the copyright law itself appropriate yardsticks for establishing copyright's limits (based on Decisions of the Federal Constitutional Court Vol 31, 229, 240 f). Such yardsticks may be derived, for example, from the limitation clauses of ss 45 ff [the German exceptions to infringement], whose effectiveness is not contested in the present case.

[20]
If several positions, protected by the *Basic Law*, come into conflict, it is first of all the task of the judge, applying the relevant non-constitutional rules, to lay down the limits of the fundamental rights asserted by one party against those asserted by the other party.[50]

[In the following paragraphs the Constitutional Court criticises the OLG's application of the quotation exception in the context of art. It considers the philosophical underpinning of copyright and states the circumstances under which an artistic quotation may be permissible.]

[21]
c) In its interpretation and application of s 51 no 2 the OLG has fundamentally mistaken the meaning and extent of the freedom of art principle. It does not sufficiently come to grips with the intention of the art and omits the art-specific consideration of Müller's work which is required by art 5(3) sentence 1 of the *Basic Law*.

[22]
aa) The art-specific approach which is demanded by art 5(3) sentence 1 of the *Basic Law* requires, in the interpretation and application of s 51 no 2, a recognition of the inner connection of the quoted passages with the thoughts and reflections of the quoting person, a connection that goes beyond the mere evidence function and is also a means of artistic expression and artistic construction. In relation

[48] For art 1 see above n 29. Art 2 reads: '(1) Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law. (2) Every person shall have the right to life and physical integrity. Freedom of the person shall be inviolable. These rights may be interfered with only pursuant to a law.'

[49] In the common law jurisdictions copyright consists only of economic rights. In Germany however the *Urheberrecht* (Author's Right) – translated here as 'copyright' – includes the essentially non-commercial moral rights. Hence the possibility of the constitutional guarantee applying only to the commercial aspect of the right.

[50] (cf Decisions of the Federal Constitutional Court Vol 30, 173, 197). Parenthesis in judgment.

to artistic works this provision [s 51] is thereby given an area of application which is broader than in relation to other, non-artistic works of language.

[23]
In these matters, it is of basic importance to remember that, upon being made available to the public, a work is no longer solely at the disposal of its [copyright] owner. Rather it enters, as it is destined to do, into the social sphere and can thereupon become an independent contributing factor to the cultural and intellectual picture of the times. Over time it ceases to be the subject of private rights and becomes common property of an intellectual and cultural kind.[51] This is, on the one hand, the internal justification for limiting the period of copyright protection; on the other, this circumstance also leads to the fact that, the more the work fulfils its desired social role, the more strongly it can serve as a point of attachment for artistic engagement. This social link of art is thus simultaneously the precondition for its effectiveness and the reason why artists must accept, to some extent, impingements on their rights by other artists [acting] as part of the society which engages with their art. The limitation provisions of the *Copyright Act* (ss 45ff) serve in the determination of the permissible extent of these impingements. However they too are to be interpreted in the light of the freedom of art principle and must create an equilibrium between the various – also constitutionally protected – interests. Other artists have interests, protected by the 'freedom of art', in being able to engage in an artistic dialogue and creation process in relation to existing works without the danger of financial consequences or consequences for the content of their art. These interests stand in opposition to the right of the copyright owners to prevent the unauthorised exploitation of their works for the commercial purposes of other persons.

[24]
If, as in this case, an insubstantial impingement on the copyright — without danger of any noticeable commercial disadvantage (for example, loss of sales)[52] — is opposed to the artist's right to freedom of development, then the commercial interests of the copyright owner must take a back seat to the interests in use of the work for the purposes of artistic engagement.

[25]
bb) Measured against these considerations, the principles from which the OLG proceeds in its decision on the permissibility of a use of quotations in an independent work of art fail to take sufficient account of the principle of artistic freedom. The OLG does not differentiate sufficiently between the use of quotations in artistic works on the one hand and in other types of language works on the other — types which formed the basis of those decisions of the BGH quoted by the OLG.[53] Through the approach it adopts, the OLG fundamentally misinterprets the protection which art 5(3) sentence 1 of

[51] (cf Decisions of the Federal Constitutional Court Vol 79, 29, 42). Parenthesis in judgment.

[52] (cf on this question Federal Court (BGH), GRUR 1959, 197, 200). Parenthesis in judgment.

[53] (BGH, ibid and BGH, GRUR 1982, 37, 40; cf, on the purpose of a quotation generally: Vinck, in: Nordemann/Vinck/Hertin, *Urheberrecht*, 9th ed., 1998, s 51[4] (agreeing with the appealed decision) und [7]; Rehbinder, *Urheberrecht*, 10th ed, 1998, s 36 I; Schack, *Urheber- und Urhebervertragsrecht*, 1997, [487] - [489]; Schricker, *Urheberrecht*, 2nd ed, 1999, s 51 [10], [17], [22], [40] ff.; Ulmer, *Urheber- und Verlagsrecht*, 3rd ed, 1980, s 67 I and II). Parenthesis in judgment.

the *Basic Law* offers to artists against constraints which are not absolutely required by the opposing fundamental rights of third parties.

[26]
In the context of an independent artistic creation the freedom to use quotations extends beyond the use of the other text as evidence, ie as a means of clarifying concurring opinions, of promoting the better understanding of one's own statements or of justifying or deepening what has been written. The artist may bring copyright texts into his own work even in the absence of connections of this kind, as long as they remain the objects and creative components of his own artistic statement. Here, it is clearly a case of critically appraising the other author (Brecht) as a figure of the times and of intellectual history. In such cases the desire to depict this author - his political and moral stance as well as the intention of his work and its effect in history - by allowing him to express himself through quotations, can be protected by the freedom of art. Whether the quotation – in the chosen form – serves as such an appraisal and not solely as an enrichment of the [quoting] author's own work through the incorporation of someone else's intellectual property, is to be determined on the basis of a comprehensive evaluation of the whole work.

[27]
The OLG has obscured its own vision in that it limits itself in its evaluation to the scene 'Measures 1956', without assessing the scene within the framework of the [quoting] play as a whole. The point it makes — that this scene would collapse and would no longer be viable without the disputed quotations — does not take account of the artistic meaning of the quotations in the context of the play. The OLG also underestimates the meaning and extent of the freedom of art in so far as it does not look in more detail at the use of the quotations as artistic, stylistic devices because it considers that when they are used in such a way there is no engagement[54] with the quoted works. Thus the quotations of extracts from Kleist, *Prinz Friedrich von Homburg* and from other works are not drawn into the overall consideration. [T]he court fails to recognise that Heiner Müller has chosen to interleave his own text with the texts of others as a normal stylistic device; and that he is at the same time incorporating in his own work, on top of the selected themes and texts, their history, colouration and reception as well as their political background so as to create a new whole. The artistic processing of others' texts is not limited to a critical discussion of a statement contained in them, but can take various forms, which the artist selects according to his aesthetic imagination. The permissibility of the use of the foreign text in the framework of an artwork does not depend on whether the artist is 'disputing' with it. Rather the benchmark is simply whether it fits functionally into the artistic creation, is consistent with the intention of the quoting work, and therefore appears as an integral component of an independent artistic statement. The categorisation of the quotation as a (mere) stylistic device does not add anything of itself to the required art-specific consideration of the quoting work; this formal category to which the concepts such as 'collage technique' or 'technique of the quoting combination' are assigned in the contested decision says nothing significant about the artistic meaning of the quotation. It is true that the OLG takes into account in its assessment the fact that Müller has

[54] The term 'engagement' here is a translation of the word '*Auseinandersetzung*', a term of central importance in many judicial discussions of the quotation exception. It is a term which does not have a single clear English translation and which needs to be translated differently according to context. Dictionaries translate the word variously as 'discussion', 'debate', 'argument', 'clash', 'disputation', 'analysis'. The concept of dispute is present in most but not all of these translations. At the least the word suggests an intellectual engagement with or commentary on the material that is quoted.

artistically worked the Brecht quotations into his own work. But the Court does not look in any detail at the contested scene 'Measures 1956' or at what it is saying and, unlike the court at first instance, gives no particular artistic weight to how it is worked into the drama and its position in the play.

[28]
Whether the second complainant could rely in this case on a breach of art 14(1) of the Basic Law can remain unanswered, since art 14(1) does not give the complainant any more extensive protection in any event.

II

[Finally, the Court discussed matters of procedure.]

[29]
The constitutional complaint of the first complainant cannot be accepted for adjudication since the conditions for its acceptance under s 93a *Federal Constitutional Court Act* are not present. Also, the complainant's constitutional complaint is not of basic constitutional interest.[55] The acceptance is also not indicated for the defence of those basic rights which have been identified as having been breached,[56] since the constitutional complaint has insufficient prospect of success.[57] The constitutional complaint is inadmissible.

[30]
The first complainant was not involved in the initial proceedings; nevertheless she is directly affected by the impugned decision,[58] since it has been made impossible for her to exercise her exploitation right in the play in issue to the extent of the orders. However the principle of subsidiarity militates against the immediate lodging of an appeal. This principle requires, prior to lodging of the appeal, that all existing procedural possibilities be used in the specialist courts in order to prevent the expected constitutional breach from occurring.

[31]
The first complainant would have had the opportunity in this case to take part in the initial proceedings on the side of the second complainant pursuant to s 66 ZPO [*Zivilprozessordnung* – Code of Civil Procedure], up until the impugned decision came into force, in order to assert her legal position, which is possibly constitutionally justified, and in order to exhaust her procedural options[59] which she has as

[55] (*Federal Constitutional Court Act* s 93a(2)(a)). Parenthesis in judgment.

[56] (*Federal Constitutional Court Act* s 93a(2)(b)). Parenthesis in judgment.

[57] (Decisions of the Federal Constitutional Court Vol 90, 22, 25f). Parenthesis in judgment.

[58] (cf Decisions of the Federal Constitutional Court Vol 15, 256, 262f; Vol 24, 289, 295; Vol 51, 386, 395. Parenthesis in judgment.

[59] (s 67 Code of Civil Procedure (ZPO)). Parenthesis in judgment.

secondary intervener[60]. Since she did not do that there is no reason now to allow the direct lodgement of a constitutional appeal.

III

[32]
The contested decision of the OLG Munich is to be lifted and the matter referred back to the OLG. The OLG will, in its new decision, need to interpret s 51 of the *Copyright Act* in the light of the constitutional considerations on the principle of artistic freedom.

[33]
The decision on the costs in relation to the second complainant is based on s 34a(2) *Federal Constitutional Court Act.*

(Judges) Kühling, Jaeger, Hörnig

The significance of the decision

The *Germania 3* constitutional decision is interesting in two ways. Even as it criticises the reasoning of the OLG Munich it reiterates in some detail the interpretation that has been given to the quotation concept over decades of German lawmaking. This is a carefully elaborated, rather subtle and relatively narrow concept – different from the implied concepts of quotation that have been put forward in recent documents in the common law world. There, the notion of quotation is scarcely articulated but seems to be imagined as any type of reproduction, irrespective of the role that it plays in the quoting work. So, for example, the UK Government has stated that the following 'quotations' would all be saved by the exception:

> references and citations in research papers, the use of titles to identify sources in a bibliography, and the use of titles and short extracts to identify hyperlinks in internet blogs and tweets.[61]

While a quotation exception of this kind may well be useful, it would not represent any sort of harmonisation with German notions of quotation. This would not be of great importance in Australia, but would be significant in an EU state. An examination of the jurisprudence of other EU states may reveal similar disparities. This is the very issue, in fact, that the draft 'Memorandum of Understanding Concerning the Interpretation of the Right of Quotation', mentioned above,[62] was intended to address. The commentary by Martin Senftleben which accompanies the Draft contrasts the position

[60] (cf Decisions of the Federal Constitutional Court Vol 81, 97, 102f, Decision of the third chamber of the first senate of the Federal Constitutional Court of 28 May 1998, 1 BvR 329/98, NJW 1998, 2663f). Parenthesis in judgment.

[61] HM Government, *Modernising Copyright: A Modern, Robust and Flexible Framework: Government Response to Consultation on Copyright Exceptions and Clarifying Copyright Law*, 28.

[62] Consumers in the Digital Age, Access to Knowledge Network, Memorandum of Understanding Concerning the Interpretation of the Right of Quotation <http://a2knetwork.org/quotation> (version 0 of September 2012).

the Draft promotes with the more traditional view of what a quotation is, clearly having in mind the type of reasoning used by the OLG Munich in this instance:

> In the context of the right of quotation, the term "quotation" is often understood to entail an inherent confinement of the use privilege to a reference that is made for the purpose of discussing and commenting upon the quoted material. …
>
> The German Federal Court of Justice, for instance, requires an inner connection between the quoted material and the line of reasoning of the person making the quotation. In this vein, the Court posited that a quotation should serve as a basis for comment and discussion. A mere reference without inner connection is not sufficient. Similar positions are taken in literature.[63]

In contrast to this interpretation, the Draft suggests that:

1. The term "quotation" is to be given a broad meaning, in the sense of a reference to protected material not necessarily requiring a description, comment or analysis.[64]

This suggested 'broad meaning' is in line with, and perhaps goes even further than, a recent instance in Dutch law where a court allowed, as quotation, the on-screen reproduction of a thumbnail image retrieved from a housing-search database.[65] That case too indicated a lack of uniformity among European jurisdictions. While Hargreaves rightly imagined the adherence to a closed list of exceptions to be less fraught than the introduction of an American style fair use exception, even something as uncontentious as a quotation exception is going to raise its own harmonisation difficulties.

The other reason why the *Germania 3* decision is interesting is, of course, that it represents an almost breathtaking expansion of the quotation exception as previously conceived in German law, but only within certain confines. While not fundamentally altering the concept of quotation outside of the artistic sphere, it promotes a much greater flexibility in the use of the concept when art is involved.

> … the benchmark is simply whether [the quoted material] fits functionally into the artistic creation, is consistent with the intention of the quoting work, and therefore appears as an integral component of an independent artistic statement.[66]

It must still be secondary to the quoting work, but the nature of the necessary relationship with that work is broadened. The freedom of art principle in the Constitution is what has effected this normative

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[63] Consumers in the Digital Age, Access to Knowledge Network, Martin Senftleben, Explanatory notes on MOU Concerning the Interpretation of the Right of Quotation at <http://a2knetwork.org/quotation-memo#1>.

[64] Consumers in the Digital Age, Access to Knowledge Network, Memorandum of Understanding Concerning the Interpretation of the Right of Quotation <http://a2knetwork.org/quotation> (version 0 of September 2012).

[65] See Martin Senftleben, 'Quotations, Parody and Fair Use' in Bernt Hugenholtz, Antoon Quaedvlieg and Dirk Visser (eds), *A Century of Dutch Copyright Law*, deLex, 2012, 359, 373.

[66] Above translation of *Germania 3* [27].

reading of the Copyright statute. Read in this way, a quotation exception would be capable of dealing with the type of situation which was unsatisfactorily resolved in the *EMI* case in Australia.

Later decisions

The *Germania 3* decision has been referred to in later German decisions, and its key statements of principle have been confirmed by the Federal Supreme Court (BGH).[67] Generally speaking, however, defendants have found it difficult to establish the relevance of the decision to their own circumstances. Their problems have arisen partly from their failure to establish that the reproduction concerned was a quotation in the required sense, and partly from the difficulty of proving that the quoting work was a work of art. Their task has been rendered more difficult by the fact that any exception to copyright infringement is to be read narrowly.[68]

In the absence of a 'quotation' the constitutional issue cannot arise. For example, in a 2009 case, extracts from an interview with the well-known film director Klaus Kinski, although they were used in the undoubtedly artistic context of a drama, were not established to be 'quotation' in the relevant sense. This was because the extracts were blended with the sentences of the dramatist in such a way that they lost the separateness that a quotation must always retain.[69]

Similarly, printed extracts from Hitler's *Mein Kampf*, although accompanied by commentary in a literary work, were held in a 2012 decision not to be quotations, since they were insufficiently secondary to the quoting text. The reproduction of the extracts was, rather, the main purpose of the text.[70]

For a while, in 2010, it seemed that even the reproduction of whole newspaper articles might be saved by the exception if they were used as part of a collage in a subsequent work of literature (in this case a description of the author's experiences in a particular region of Germany).[71] The OLG Brandenburg accepted that a work of this kind was a work of art. This decision was, however, overturned by the BGH in 2011 on factual grounds: not all the reproductions in issue were quotations in any relevant sense, and the quoting work was not, in any event, a work of art. An original work of literature and a work of art are not the same thing. In an elaboration of the earlier Constitutional Court comments,[72] the BGH stated that

> the essence of artistic practice is the free creative act, in which the artist's impressions, what the artist has experienced and lived through, are directly represented though a particular language of symbols. … Every artistic activity is a merging of conscious and unconscious processes, which cannot be rationally separated. In artistic creativity intuition, imagination

[67] BGH, Judgment of 30 November 2011 – 1 ZR 212/10 – Blühende Landschaften ZUM 2012, 681.

[68] BGH, Judgment of 30 November 2011 – 1 ZR 212/10 – Blühende Landschaften ZUM 2012, 681 [28].

[69] OLG Cologne 31 July 2009 – 6 U 52/09 - *Zitat eines fremden Textes in einem Kunstwerk.* ZUM 2009, 961.

[70] OLG München 14 June 2012 – 29 U 1204/12 - *Mein Kampf*, ZUM-RD 2012, 479.

[71] OLG Brandenburg, Judgment of 9. 11. 2010 - 6 U 14/10 - *Literarische Collage*, ZUM 2011, 250.

[72] See above translation [17].

> and artistic understanding operate together; the creativity is not primarily communication but rather expression, and indeed the most immediate expression of the artist's individual personality.[73]

These are criteria which only a relatively small proportion of intellectual products are likely to fulfil and it is quite clear that the German courts are not minded to throw open either the 'art' concept or the 'quotation' concept to loose interpretations. Nevertheless, in the traditionally artistic fields of the visual arts, music and creative literature, the quotation exception as expanded by *Germania 3* still has an important role to play.

Conclusion

It is up to the legislators of each country to decide on the copyright exceptions appropriate to it, consistent with its international obligations. In each country it must be decided how the obligation to provide for freedom of expression within the copyright context will be handled. The German freedom of art guarantee is one model that can be drawn on in the drafting of a constitution or even in the formulation of a copyright statute. International obligations of this kind can, for example, inform the concept of fair dealing as it is used in the common law countries.

The traditional interpretation of 'quotation' alluded to in the *Germania 3* case and more narrowly applied in others is entirely consistent with more conventional notions of quotation in the common law countries. This well-established interpretation renders the exception a useful addition to any suite of copyright limitations, especially when it is expanded in the artistic context. Nevertheless, the interpretation is insufficiently broad to perform the role that many would like the quotation concept to play in the digital environment. While the adoption of a quotation exception is wholly desirable and is a move in the direction of the often-expressed goal of harmonisation, any stretching of the concept by one legislature as against another will inevitably reduce, at least in the foreseeable future, the degree of harmonisation that can be achieved.

[73] BGH, Judgment of 30 November 2011 – 1 ZR 212/10 – Blühende Landschaften ZUM 2012, 681 [17].