EU Copyright Law Between Property and Fundamental Rights: A Proposal to Connect the Dots

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Abstract Although scholars and stakeholders have long analyzed and tried to limit the clashes between copyright and fundamental rights caused by the recent developments of EU copyright law, none of their proposed solutions has been proven successful. This chapter is based on the assumption that the cause of this impasse lies in the systematic chaos generated by the incompatibility of EU and national copyright models.

Since its onset, EU copyright law has substantially departed from Member States' common traditions, while Article 17.2 of the European Charter of Fundamental Rights (ECFR) completed the paradigm shift by formalizing the definition of copyright in proprietary terms. Due to the vagueness of CJEU's "fair balance" test and the different approaches of the ECFR and national constitutions to the functions, limits, and hierarchical rank of property rights, this classification has broadened the divide between EU and national case laws and caused several interpretive short circuits before national courts.

The chapter argues that the only way out from the stalemate is a systematic reordering of this otherwise fragmented multilevel framework. To this end, it starts with a description of the main symptoms of the EU paradigm shift (§ 2) and

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R. Caso, F. Giovanella (eds.), *Balancing Copyright Law in the Digital Age*,
DOI 10.1007/978-3-662-44648-5_1

compares the effects of copyright propertization before the CJEU and in selected Member States (§ 3). Then it proposes an integrated interpretation of CJEU's precedents in light of the common constitutional traditions (§ 4) and concludes by providing examples of how the new interpretative framework may help to restore the lost balance on more solid and stable systematic bases (§ 5).

1 The Need to Go Back to the System

In the last two decades, the headlong rush of copyright law towards the achievement of high levels of protection has neglected, if not created, the risk of conflict between authors' prerogatives and users' fundamental rights. To restore the balance that once characterized the discipline, scholars and stakeholders have advocated for legal reforms,[1] proposed to take advantage of the flexibility of the current legislative framework,[2] or supported the creation of model private agreements as tools to leverage, rather than oppose, natural market tendencies.[3] So far, none of these solutions have been successfully worked out. There is an inner and somewhat overlooked reason why all the approaches thus suggested are, and most probably will be, destined to fail. In fact, the ultimate cause of the current *impasse* lies in the systematic chaos generated by the interplay between EU and national legal sources. EU copyright law has substantially departed from Member States' common core, abandoned the paths traced by the civil and common law traditions, and embraced rationales that are far removed from the inspirations of both models.[4] This silent revolution has generated several interpretative short circuits in the practice of national courts, such as the disapplication of exceptions in light of their potential negative impact on the commercial exploitation of the work.[5] The already critical imbalance between exclusive rights and free uses, which are traditionally provided to allow the enjoyment of users' fundamental rights *vis-à-vis* copyright enforcement, has thus significantly worsened. At the same time, the Court of Justice of the European Union (CJEU) has not been able to draw up any clear criteria to be used by national courts when pursuing the "fair balance" mentioned in several EU Directives, given the much greater emphasis placed on broadening the scope of

[1] For a comprehensive overview, see Van Eechoud et al. (2004). See also IVIR (2007).

[2] See, e.g., Hugenholtz and Senftleben (2011).

[3] Especially in the fields of cross-border licensing, collective management, and ISPs' liability. For an interesting analysis of the positions of different stakeholders in the European Union, see Mazziotti (2013).

[4] See *infra*, § 2.

[5] See *infra*, note 84.

the *acquis communautaire* than on providing rules of thumb to systematize the subject.[6] It is not surprising that, when facing such a chaos, the fragmented and atomistic *modus operandi* of copyright scholarship and case law is not of any help in untying the interpretative knots. To complete the picture, Article 17 of the European Charter of Fundamental Rights (ECFR), dedicated to property rights, has formalized the qualification of copyright in proprietary terms by stating, rather cryptically, in its second paragraph that "intellectual property shall be protected."[7] The definition stands in clear contrast with the historical aversion of the civil law tradition towards an extension of property rights to cover intangible goods and with the absence of intellectual property from most of the Member States' constitutions,[8] and it is thus destined to create much misunderstanding in its national implementation. But the problems arising from the clash between the EU and Member States' sources do not end here. The ECFR does not define any hierarchy among rights and liberties protected, while national constitutions have traditionally ranked fundamental rights, either fully or at least up to a certain extent, according to specific value-laden options.[9] For the common constitutional traditions of Member States, property is a right internally limited by its functionalization to social goals, while for the ECFR it is a fundamental liberty that can be subject to limitation dictated by public interests.[10] In those national jurisdictions where constitutional property rules apply also to intellectual property, the propertization of copyright has been used to uphold the legislative limitation of author's rights in light of their social function.[11] On the contrary, the effects of Article 17 on CJEU's case law have been either limited or dangerously contradictory, while the "fair balance" looks at copyright and fundamental rights as equally ranked rights.[12]

With such a chaotic and scattered background, every possible attempt to solve the conflict between copyright and fundamental rights is condemned to produce ephemeral or no results and to be frustrated by further interpretative short circuits. In fact, no balance can be coherently pursued and no legal certainty can be achieved until the elements composing this multilevel framework are properly conceptualized and understood and their interactions resystematized. In this context, as much as the propertization of EU copyright law constitutes the final threat posed by the

[6] As emphasized by Griffiths (2013), p. 77. See also, more generally Van Eechoud (2012), p. 1; Derclaye (2010), p. 247.

[7] On the cryptic nature of Article 17 ECFR, see Geiger (2009), p. 115.

[8] See *infra*, note 21.

[9] On the relationship between the ECFR and national constitutions and, more generally, on the impact of the Charter on the protection of fundamental rights in Europe in light of CJEU's case law, see the overview provided by Advocate General Kokott in Kokott and Sobotta (2010). On convergences and divergences in the multilevel protection of fundamental rights see Besselink (2012), p. 63.

[10] See *infra*, § 4.

[11] See *infra*, § 3.

[12] Ibid.

systematic chaos, it may equally play a fundamental role in building the framework necessary to emerge from the *impasse*.

Starting with the main symptoms of the paradigm shift of EU copyright in the words of legislator and courts (§ 2), this article attempts to trace a possible path for this new systematic reconstruction. A brief diachronic comparison of the effects of propertization in the EU and selected Member States (§ 3) provides the elements necessary to connect the dots and merge the lessons coming from the common constitutional traditions of Member States with the indications formulated by the CJEU (§ 4). The paper concludes with some practical examples of how the new framework may help in reinterpreting EU copyright law in order to restore the lost balance on solid and stable systematic bases (§ 5).

2 The "Propertization" of EU Copyright Law

The use of property rhetoric to support the quest for expansion of the scope and term of protection of copyright is not a new phenomenon. In eighteenth century England, the Stationers' Company, a corporation enjoying full control over printing activities, defines copyright as "undoubted property" to lobby for reclaiming the privileges lost due to the nonrenewal of the Printing Act.[13] After the enactment of the Statute of Anne, which reduces the duration of printing monopolies, a comparable argument is used to advocate for the existence of an absolute and perpetual common law copyright, independent of the rights created by law.[14] In the same span of years, publishers from Paris fight to strengthen their position by claiming the existence of a *propriété literaire*, defined as perpetual natural right,[15] while a few decades later, after the Revolution, authors' rights are statutorily qualified in terms of property rights, which represent the highest expression of the new freedom acquired with the defeat of the *Ancient Regime*.[16] Several American colonies use analogous definitions until the advent of the federal Constitution and the first federal Copyright Act, which opt for a neutral, utilitarian approach.[17] Here also, exactly as it happened in England after the Statute of Anne, local publishers push

[13] The definition was used in the "Bill for the Encouragement of Learning and for Securing the Property of Copies of Books to the rightful Owners thereof." The text is reported by Rose (1993), pp. 36 ff.

[14] *Millar v. Kinkaid*, 4 Burr. 2303, 98 Eng. Rep. 210 (1751), *Tonson v. Collins*, I Black W. 301, 321, (1760), and the most cited *Donaldson v. Becket*, 4 Burr. 2408, 98 Eng. Rep. 251 (H.L. 1774).

[15] Particularly in the *Mémoire de d'Héricourt*. See Edelman (2004), pp. 239 ff.

[16] The same proprietary metaphor appears in the definition of "public domain" used by Le Chapelier in the report on the 1791 decree. See Moyse (1998), p. 1 and his ample bibliographical references.

[17] U.S. Constitution, art. I, section 8, cl. 8.

for an expansion of the scope and term of protection by arguing for the existence of a common law copyright, clearly worded in proprietary terms.[18]

Although the historical process of formation of copyright and *droit d'auteur* shows in both cases the presence of strong property rhetoric, the paths followed by the two models diverge at a very early stage. The most direct explanation of the phenomenon—less political and more technical—lies in the opposite semantic implications of the word "property" in civil and common legal systems.[19] In the Anglo-Saxon tradition, the lexeme is a synonym of ownership or asset and does not represent an autonomous, characterizing legal category. Hence, the qualification of a right in terms of "property" does not carry systematic consequences, nor does it have an impact on its regulation.[20] The characteristics of intellectual property rights descend, in fact, only from their monopolistic nature and the utilitarian rationales underlying their protection. On the contrary, the continental paradigm is heavily influenced by the Pandectist tradition, which limits the subject matter of property to tangible goods, and links the definition of a right in proprietary terms to the application of specific rules concerning the creation, circulation, and protection of the entitlement.[21] According to these dogmas, intellectual property is not a form of property, nor can it ever be. France constitutes an exception, where property is a concept characterized by weak classificatory power.[22] Its scarce cogency explains why the personalist nuance of the *propriété literaire* could predominate and distance author's rights from the property model delineated by the *Code Napoleon* and why the consequences of such a development share very little with the effects of the recent copyright propertization.[23]

French literary property mirrors the sacred link between author and work, where the work represents the materialization of author's personality.[24] This aspect is of such key importance to the development of the model as to have influenced the way that exclusive rights and exceptions are conceptualized. Personality rights, unlike monopolies, are not supposed to be tightly controlled in their exercise, while their superior hierarchical status limits the number of cases where flexible clauses are needed to balance them with other conflicting rights. Consequently, exclusive

[18] *Wheaton v. Peters*, 33 U.S. (8 Pet.) 590 (1834). For a more detailed comment see Joyce (2005), p. 325.

[19] The literature is immense. An essential comparative overview is provided by Gambaro (2011), p. 205. For a broader discussion, see Mattei (2000), pp. 13 ff.

[20] Mostly due to the "property as a relationship" approach. See Gambaro (2011), pp. 220 ff.

[21] For a historical reconstruction, see Schrage (1996), pp. 35 ff.; more broadly, on the objective scope of civil law property, see, in the same book, Mincke (1996), pp. 655 ff.

[22] This is one—and maybe the most important—reason why the French *droit d'auteur* is considered as a bridge between the civil and common law traditions of copyright. On this line, Ginsburg (1990), p. 991; see also Kerever (1989), pp. 4 ff. The historical roots of French exceptionalism are analyzed by Halperin (2008).

[23] As shown by the development of moral rights. See Desbois (1978), pp. 388 ff.; *contra* Lucas (1998), pp. 350 ff.

[24] On the particular relevance of the "sacred bond," see Willem Grosheide (1994), p. 207.

author's rights are shaped in broad and flexible terms, while exceptions and limitations are exhaustively determined by law.[25] Dissimilarly, the Anglo-Saxon model has a strong utilitarian inspiration, where the incentive offered to authors is justified by the social need to create a marketplace for ideas and to stimulate the creation and diffusion of knowledge. Since copyright is a monopoly granted for public goals and not an idiosyncratic natural right, exclusive rights are listed in a close and exhaustive manner, while exceptions are worded as flexible clauses, so as to allow courts the possibility to implement the law according to its underlying goals.[26]

EU copyright law departs from both models. Its pronounced market rationales are rooted in the original lack of competence of the Community in the field, and the consequent need to ground its intervention on the necessity to remove obstacles to the internal market.[27] Born as a sterile creature, EU copyright is unable to embed the philosophical inspirations that have characterized the continental and Anglo-Saxon traditions since their onset.

The shift is already visible even in the earliest consultative documents. The goals of harmonization, according to the first Green Papers and subsequent follow-ups, are to strengthen the internal market and to stimulate competitiveness and investments.[28] Meanwhile, the necessity to balance market needs with the promotion of access and participation to cultural life is confined to mere declamatory statements or introduced in the context of goals of production and commercialization of cultural goods and services.[29] Similar words can be found in the first Directives, which repeatedly mention the need to protect investments,[30] to stimulate the

[25] Strowel (1993), pp. 144–147. For a comparative analysis of the two approaches see Senftleben (2004), pp. 22 ff.; and Guibault (2002), pp. 17 ff.

[26] Similar conclusions can be found in Geller (1994), pp. 170 ff.; Strowel (1993), pp. 250 ff.; Ginsburg (1990), pp. 133 ff.

[27] See, among others, Keeling (2003), pp. 28 ff. The conflict between intellectual property and fundamental freedoms are particularly evident in the early CJEU's case law, e.g. in *Deutsche Grammophon v. Metro*, C-78/70, ECR 487 (1971), *Coditel v. Ciné Vog Films*, C-62/79, ECR 881 (1980), *Warner Bros and Metronome Video v. Christiansend*, C-158/86, ECR 2605 (1988), *EMI Electrola v. Patricia Im-und Export*, C-341/87, ECR 79 (1989).

[28] As in the *Green Paper on copyright and the challenge of technology – Problems in copyright calling for immediate action,* COM (88) 72 final, 17 June 1988, 3; *Follow-up to the Green Paper – Working programme of the Commission in the field of copyright and neighbouring rights,* COM (90) 584 final, 17 January 1991, 2–3; *Green Paper on Copyright and Related Rights in the Information Society,* COM (95) 382 final, 25 July 1995, 10. For further comments, see Van Eechoud et al. (2004), pp. 5 ff.; see also Mazziotti (2008), pp. 46 ff.

[29] *Green Paper on Copyright and the Challenge of Technology, supra* note 28, 5; *Follow-up, supra* note 28, 4; *Green Paper on Copyright and Related Rights, supra* note 28, 10–12.

[30] Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs, OJ L-122, 17 May 1991, 42–46 [hereinafter Software 1 Directive], Recital 2; Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, OJ L-346, 27 November 1992, 61–66, [hereinafter Rental Right Directive], Recital 7; Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and

industrial development,[31] and to remove obstacles to the internal market.[32] Directive 2001/29/EC (InfoSoc) completes the departure from the continental model with two further steps: firstly, the explicit introduction of a utilitarian rationale in its recitals[33] and, secondly, for the first time, the definition of copyright in proprietary terms inspired not by jusnaturalism but by its utilitarian function of promoting and protecting creativity.[34] No correspondent change, however, can be witnessed in the approach to limitations and exceptions. On the contrary, Recital 32 specifies that the list provided by Article 5 should be deemed exhaustive, following the good old continental paradigm. At the same time, Recital 31 rejects the adoption of a pure common law utilitarian rationale and negates the possibility to introduce flexible balancing clauses, by stating that national legislators shall intervene on exceptions only if a lack of harmonization may have an impact on the internal market. Similar arguments are advanced in the Directives enacted after 2001.[35]

The paradigm shift is inspired by the aim of granting to copyright a "high level of protection,"[36] which the EU legislator seems to consider desirable in any case and representing an end in itself. This assumption has led several scholars to affirm the adoption of a new "property logic," according to which author's rights are so idiosyncratic that they need not to be justified in light of any further aim.[37] The use of "logic," instead of "dogmatic definition," is understandably grounded on the almost complete absence of an explicit proprietary qualification of copyright in EU

cable retransmission OJ L-248, 6 October 1993, 15–21, [hereinafter Satellite Directive], Recital 5; Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, OJ L-077, 7 March 1996, 20–28, [hereinafter Database Directive], Recital 7.

[31] Software 1 Directive, Recital 3; Rental Right Directive, Recital 6; Satellite Directive, Recital 9; Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights, OJ L-290, 24 November 1993, 9–13, [hereinafter Copyright Term Directive], Recital 10; Database Directive, Recital 3.

[32] Software 1 Directive, Recitals 4–5; Rental Right Directive, Recitals 1–3; Satellite Directive, Recitals 2, 21; Copyright Term Directive, Recitals 2, 9, 11, 17, 25; Database Directive, Recital 3.

[33] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L-167, 22 June 2001, 10–19 [hereinafter InfoSoc Directive], Recitals 2, 10 and 11.

[34] Id. Recital 9.

[35] See, e.g., Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art, OJ L-272, 13 October 2001, 32–36, Recitals 10, 11, 13, 14; Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, OJ L-157, 30 April 2004, 16–25, Recitals 1, 3, 8, 9, 10; Directive 2011/77/EU of the European Parliament and of the Council of 27 September 2011 on the term of protection of copyright and certain related rights, OJ L-265, 27 September 2011, 1–6, Recital 21. Even in the recent Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works, OJ L-299, 27 October 2012, 5–12, which has different targets, similar rationales are recalled in Recital 4.

[36] InfoSoc Directive, Recital 4.

[37] As emphasized by Peukert (2011), p. 67.

legislative and judicial texts, at least until the advent of the Charter of Nice and the ECFR.

Despite being new, Article 17 of the ECFR does not represent a revolutionary norm. The ECtHR, following the EU Commission, already had the opportunity to apply to intellectual property Article 1 of the first Additional Protocol to the European Convention of Human Rights (ECHR), although without providing any significant systematic explanations.[38] Yet the dry language of the text and the many divergent official translations have raised substantial interpretative questions. The English version of the ECFR states that intellectual property "shall be protected," suggesting an interpretation of Article 17.2 as a constitutional declamation of a maximalist approach to copyright protection. On the contrary, the plain use of the verb "to be" in, e.g., German, Italian, and French (*est*, *wird*, *è*) seems to indicate the mere reception of the existing judicial practice, justified by the inclusion of intellectual property under the competences of the Union after the Treaty of Lisbon. The permanence of a balance between copyright and fundamental rights in EU law may support the second, less alarming interpretation.[39] This does not mean, however, that Article 17 represents a merely descriptive provision without substantial effects. To see this, suffice it to mention the impact of its introduction on CJEU's case law.

In an increasing number of decisions, the Court refers to Article 17 to define copyright as a property—and thus fundamental right—and to operate a "fair balance" between equally ranked rights. Since the ECFR and the ECHR do not set any internal hierarchy, while the majority of national constitutions downgrade the hierarchical rank of property in light of its social function, this trend has naturally magnified the divide between EU and State sources. In addition, although the CJEU has already specified that Article 17.2 does not ensure absolute and unlimited protection to copyright, the vagueness of the balancing criteria has already led the Court to tautologically assert the existence of the balance on the mere ground that the law claims to have taken into account all the interests at stake.[40] At the same time, the weak prescriptive nature of the "fair balance" makes national courts unable to understand and apply the test, marginalizing their role in the process. The consequent judicial inertia leaves unsolved the potential conflict between EU and national constitutional provisions and, with this, the question of the impact of Article 17 ECFR on the discretion left to Member States in adapting EU copyright law to the principles and values inspiring their legal systems.

The divide separating EU and Member States' copyright models becomes more evident still when juxtaposing the effects of copyright propertization in recent

[38] The most relevant decisions are *Dima v. Romania*, App. No. 58472/00 (2005); *Melnychuk v. Ukraine*, (2006) 42 *EHRR* 42; *Anheuser-Busch Inc. v. Portugal* (2005), 44 EHHR 42. See Helfer (2008), p. 1.

[39] Geiger (2009), p. 121.

[40] Id. at p. 77.

CJEU's decisions with those of the equation of copyright and constitutional property in past national experiences.

3 The Different Effects of Propertization: EU vs. Member States

With a few limited exceptions, the civil law tradition excludes the possibility of extending the subject matter of property to cover intangible goods and, thus, intellectual property.[41] At the same time, due to the high degree of specificity and technicality of the subject, courts have generally found it impractical to use property rules to fill gaps in its regulation, thus making its dogmatic categorization in proprietary terms practically useless. Dissimilarly, scholars and a number of national constitutional courts have opened up the category of constitutional property to include an ample range of economic rights, interests, and expectations, including also intellectual property.[42]

Since 1971, the German *Bundesverfassungsgericht* has applied Article 14 GG to uphold the legitimacy of legislative interventions limiting authors' exclusive rights when required by public interest.[43] In the most paradigmatic case, *Schoolbook*,[44] the Court rejected plaintiffs' claim of expropriation, grounded on a provision that allowed the reprint of excerpts from literary, music, and artistic works in anthologies destined to didactic, educational, or religious purposes,[45] stating that the author's freedom to dispose of his economic rights is not absolute, due to the "special nature and character of this (…) right."[46] On the contrary, "in defining the content of copyright according to Article 14 GG, [the legislator] should provide rules adequate to assure an exploitation of the work which is coherent with the nature and social relevance of copyright."[47] These rules usually take the form of exceptions and limitations and guarantee an adequate balance of copyright with private interests of higher hierarchical rank such as, in this case, the interest for young generations to have access to the most relevant literary and artistic works.[48]

[41] See *supra* notes 21 and 22.

[42] For further comments and doctrinal references to the divide between statutory and constitutional property in civil law, with particular regard to intellectual property, see Dreier (2013), p. 94.

[43] See, e.g., 18 BVerfGE 85 (1964); 31 BVerfGE 29 (1971); 31 BVerfGE 270 (1971); 31 BVerfGE 275 (1971); 49 BVerfGE 382 (1978); 79 BVerfGE 1 (1988); 79 BVerfGE 29 (1988); 81 BVerfGE 12 (1989); 81 BVerfGE 208 (1990). For a more detailed analysis, see Braegelmann (2009–2010), p. 99.

[44] *Schoolbook case,* 31 BVerfGE 229 (1971).

[45] § 46, *Urheberrechtsgesetz*, BGBl I (1965).

[46] *Schoolbook*, *supra* note 44, at 241.

[47] Ibid.

[48] Id. at 247–248.

A similar reference to the social function of property in order to justify the otherwise unauthorized use of a protected work appears in the *Broadcast Lending* case,[49] where the *Bundesverfassungsgericht* affirms the legitimacy of a rule that allows the nonprofit reproduction of works for schools that have already acquired a license for single uses. Analogously, the *Church Music* case legitimates the unauthorized performance of music pieces in nonprofit events in light of the "social character of intellectual property," although the Court requires the attribution of fair compensation in order to respect the principle of equitable balance among opposite interests.[50] In the following decades, several other decisions affirmed the validity of this interpretation, using it also to support the interpretative expansion of the boundaries of existing exceptions, like in the recent and famous *Germania 3* case.[51]

German case law is the clearest and most detailed example of the impact of social function on the constitutional propertization of copyright. Other countries, such as France, show similar interpretative trends in several doctrinal contributions, although their courts are relatively silent on the issue.[52] At the opposite side of the spectrum, countries like Italy witness the radical exclusion of the application of constitutional property guarantees on intellectual property rules, in line with the doctrinal aversion against the dogmatic definition of patents, trademarks, and copyright in proprietary terms.[53] As early as in 1978, the Italian Constitutional Court declared the unconstitutionality of the nonpatentability of pharmaceutical products but specified that the reference to constitutional property should be rejected because "the particular characteristics of intangible goods (. . .) suggests the inopportunity to ascribe them to the property model described by Article 42.1 Cost."[54] More than a quarter of century later, the Court dismissed on procedural grounds a claim of unconstitutionality of the reduction of the term of protection granted to pharmaceutical patents, thus avoiding the decision of whether or not the act amounted to an illegitimate expropriation of property rights.[55] Except for a

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[49] 31 BVerfGE 248 (1971).

[50] 49 BVerfGE 382 (1978).

[51] BVerfGE, June 29, 2000, 2001 GRUR 149. For further analysis, see Geller (2009–2010), pp. 907 ff.

[52] See, e.g., Buydens and Dusollier (2008) (especially the contributions of C. Caron (p. 240), and M. Vivant (p. 290), and their broad bibliographical references). However, the *Conseil Constitutionnel* has very recently upheld Act no. 2012-287, which allows the digitalization and reissuing of no longer exploited copyrighted books, on the ground of the fact that the right to property can be limited for reasons of public interests. Cons. Const., décision no 2013-370 QPC, 28 février 2014, JORF du 2 mars 2014, p. 4120.

[53] As clearly shown by Corte Cost., 4 July 1996, n. 236, in *Giur. Cost.,* 1996, 2135. See Moscarini (2006), pp. 161 ff.

[54] "Although the assimilation is possible up to a certain extent, e.g. in case of expropriation of patents under Articles 60 ff. of the R.D. n. 1127/1939" (author's translation). Corte Cost., 20 March 1978, n. 20, in *Giur. Cost*, 1978, 446.

[55] Corte Cost., 21 June 2005, n. 345, in *Giur. Cost.,* 2005, 327.

decision on trademarks,[56] where Article 42.2 Cost. was applied to state that the ownership and enjoyment of intangible goods should be regulated in light of their social functions, and one on copyright,[57] all the other precedents ascribe intellectual property rights to freedom of economic activity and protection of competition.[58]

However, also in those countries where courts and scholars accept the qualification of authors' exclusive rights in terms of constitutional property when the issue at stake concerns the legitimacy of State interventions on copyright law, such a reconstruction is seldom used in cases of conflicts between copyright and fundamental rights in private relationships. Once again, the reason for the divergence may be identified in the traditional judicial deference towards statutory law and the rigidity of exceptions, as shown by the conspicuous number of precedents on the clash between copyright and freedom of expression.[59] In any case, regardless of whether copyright propertization appears only in rulings addressing the constitutionality of copyright statutes, the assumption that its final consequence is the social functionalization and internal limitation of authors' rights, rather than their progressive expansion, remains perfectly valid.

The evolution of CJEU's case law leads, instead, to substantially different results.

In *Laserdisken*,[60] the Court applied for the first time Article 1 of the First Additional Protocol of the ECHR to argue that the protection of copyright as property right represents a case of justified limitation of the freedom to impart and receive information allowed by Article 10 ECHR, which was deemed to be violated by the exclusion of international exhaustion by the InfoSoc Directive. However, no explanation is provided as to the criteria applied for the balance, although the proportionality of the intervention is taken for granted in light of the need to protect copyright.

A completely different approach is adopted in *Promusicae*,[61] in an area—the interplay between copyright enforcement and privacy rights—where the *acquis communitaire* was at that time still underdeveloped. Requested to decide whether EU law obliges Member States to introduce an obligation for Internet Service Providers (ISPs) to communicate users' personal data in the context of civil proceedings, the Court finds that the "fair balance" and other balancing criteria mentioned in the legislative texts, interpreted in light of Articles 17 and 57 of the Charter of Nice, call for a negative answer. These general rules "leave to Member

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[56] Corte Cost., 3 March 1986, n. 42, in *Giur. Cost.*, 1986, 330.

[57] Corte Cost., 23 March 1995, n. 108, in *AIDA*, 1995, 297.

[58] See Moscarini (2006), pp. 162 ff.

[59] See Hugenholtz (2001), pp. 343 ff. But see Geiger (2006), pp. 375, 394–396, reporting a series of decisions from the Netherlands, Germany and Austria where freedom of expression prevails over copyright and trademark. See also Strowel and Tulkens (2005), pp. 287 ff.

[60] *Laserdisken ApS v. Kulturministeriet*, Case C-479/04, [2006] ECDR 30.

[61] *Productores de Música de España (*Promusicae*) v Telefónica de España SAU*, Case C-275/06, [2008] ECR I-271.

States the necessary discretion to define transposition measures which may be adapted to the various situations possible,"[62] in order for them to fulfill their obligation to "take care to rely on an interpretation of the directives which allows a fair balance to be struck between the various fundamental rights protected by the Community legal order."[63] Moreover, "when implementing the measures transposing those directives, the authorities and courts of the Member States must (. . .) also make sure that they do not rely on an interpretation of them which would be in conflict with those fundamental rights or with the other general principles of Community law, such as the principle of proportionality."[64] In this case, the conflict would arise if the Court had opted for a broader interpretation of the communication duties to be imposed on ISPs.

Promusicae may have been read as an imperative call for national courts to apply constitutional clauses horizontally when required to protect fundamental rights *vis-à-vis* copyright enforcement. Instead, the decision ended up representing only the starting point of a path where the concept of "fair balance" has been—maybe voluntarily—left empty, making the balancing criteria useless at a national level but at the same time allowing the CJEU to use them flexibly, according to its contingent policy goals.[65]

This attitude appears crystal clear when comparing *Promusicae* with three similar cases: on one side, *Scarlet Extended*[66] and *Netlog*[67] (2011), concerning the possibility of imposing on ISPs the duty to implement general monitoring systems to check and block the exchange of infringing materials, and, on the other side, *Bonnier Audio*[68] (2012), which looks at the compatibility with the right to privacy of a new Swedish law granting right holders, also in the context of civil proceedings, the right to obtain users' personal data from ISPs in order to identify and prosecute infringers.

Both in *Scarlet Extended* and in *Netlog*, the CJEU specifies that although Article 17.2 ECFR protects intellectual property rights, "there is [. . .] nothing whatsoever in the wording of that provision or in the Court's case-law to suggest that that right is inviolable and must for that reason be absolutely protected."[69] Recalling *Promusicae*, the Court reaffirms that "national authorities and courts must strike a fair balance between the protection of copyright and the protection of the

[62] Id. at para 67.

[63] Id. at para 70.

[64] Id. at para 68.

[65] See the critiques moved by Drassinower (2009), p. 991.

[66] *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM),* Case C-70/10, 24 November 2011.

[67] *Belgische vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v. Netlog NV*, Case C-360/10, 16 February 2012.

[68] *Bonnier Audio AB and Others v Perfect Communication Sweden AB*, Case C-461/10, 19 April 2012.

[69] *Netlog*, para 41; *Scarlet Extended*, para 43.

fundamental rights of individuals who are affected by such measures."[70] The need to protect copyright does not justify the imposition of a general monitoring obligation that would impair, on one side, ISPs' freedom of economic initiative due to its costs and, on the other side, users' right to impart and receive information due to its inability to distinguish between legal and illegal contents.[71] A few months later, *Bonnier Audio* reaches opposite results. According to *Promusicae*, an interpretation of EU copyright law in line with fundamental rights protection excludes the existence of an obligation for Member States to implement communication duties *vis-à-vis* ISPs. States, however, are free to provide otherwise, and thus Sweden is deemed to have correctly exercised its discretion when letting copyright enforcement prevail over users' privacy in the context of civil proceedings.[72]

Nothing in the text of the decisions helps to provide an understanding of why and how the same "fair balance" between privacy and copyright could produce such different outputs in so short a time frame. The vagueness of the balancing criteria seems to reduce CJEU's intervention to mere cosmetic statements, which hardly set a clear direction to resolve conflicts between copyright and fundamental rights.[73] Such blurriness would not hurt if the Court played a neutral role in the creation and development of EU copyright law. But this has long not been the case.

As a matter of fact, the CJEU has repeatedly tried to broaden the scope of EU harmonization and to introduce new limits to State discretion. An example of this attitude can be found in the recent *Eva-Maria Painer* case,[74] where the Court admits that the InfoSoc Directive leaves Member States free to adapt the public security exception to their own needs,[75] but at the same time it circumscribes the scope of the exception with several well-known, but again vague, criteria. Principles and rules, such as proportionality and the three-step test, are listed without providing any further explanation on their specific application in the case at hand.[76] Parallel to this, the goals of the Directive are reduced to the mere assurance of a high level of copyright protection,[77] while the "fair balance" is analyzed only briefly.[78] No reference whatsoever is made to Article 17 ECFR and its possible implications for the balancing exercise.[79]

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[70] *Netlog*, para 43; *Scarlet Extended*, para 45.

[71] *Netlog*, paras 46–50; *Scarlet Extended*, paras 48–52.

[72] *Bonnier Audio*, paras 55–57.

[73] The mere "cosmetic" nature of the CJEU's constitutionalization of copyright law is also emphasized by Griffiths (2013), p. 78.

[74] *Eva-Maria Painer v. Standard VerlagsGmbH et al.*, Case C-145/10, 1 December 2011.

[75] Id. at paras 101–103.

[76] Id. at paras 105–110.

[77] Id. at para 107.

[78] Id. at para 135.

[79] See recently, e.g., *Nintendo Co. Ltd and Others v PC Box Srl and 9Net Srl*, Case C-355/12, 23 January 2014, and *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft GmbH*, Case C-314/12, 27 March 2014.

One might be tempted to argue that the impact of the ECFR on the CJEU has been only slightly more than nonexistent. However, precedents such as *Luksan*[80] depict a completely different scenario.

The *casus belli* here is the decision of the Austrian legislator to grant to producers, rather than to directors, the exploitation rights over cinematographic works. The Court not only finds Austrian law incompatible with the European framework[81] but also uses Article 17.1 ECFR to define the legislative act as a deprivation of property rights legitimately acquired under EU law.[82] Although a proper argumentation in support of the statement is missing, the link between Article 17.1 and 2 is clearly spelled out[83] and creates for the first time a connection between copyright and the ECtHR's case law on property rights. The same property logic emerges in the judicial construction of the mandatory nature of the right to receive a fair compensation in case of private copy exception, which goes beyond what is provided by the InfoSoc Directive, and stands in clear contrast with the extreme favor for private ordering characterizing the field of exceptions and limitations.

The Strasbourg Court's fragmented reading of Article 1 of the First Protocol of the ECHR, coupled with the high technicality of copyright law, makes it hard to predict the consequence of this *revirement*. However, whatever the evolution of CJEU's case law might be, the interpretation adopted in *Luksan* represents a sort of final and last call to take copyright propertization seriously. The need to revise the approach to the problem becomes particularly pressing when faced with the questionable results already caused by the encounter of the new EU paradigm shift with the relatively rigid background of Member States' laws and judicial practices. Vivid examples of these distortions are the use of the three-step test as an additional filter to the application of exceptions,[84] often leading to their practical disapplication, or the rigid reluctance to apply constitutional clauses horizontally and to extend exceptions by analogy when required to satisfy similar balancing needs.[85]

Before the European harmonization, the continental model of authors' rights and its traditional deference towards statutory law have hindered the ability of judges to play an active role in balancing copyright with other conflicting interests.[86] Still, the

[80] *Martin Luksan v. Petrus van der Let*, Case C-277/10, 9 February 2012.

[81] Id. at para 67.

[82] Id. at paras 69–70.

[83] Id. at para 68.

[84] A comparative overview of national cases is provided by Hugenholtz and Senftleben (2011), pp. 18 ff., and by Griffiths (2009), p. 489.

[85] The decision of the Tribunal of Rome in the *Peppermint* case and the final decisive intervention of the national authority for privacy protection constitute some of the most paradigmatic examples of the phenomenon. Ord. Trib. Roma sez. IX civ. 9 February 2007 and 14 July 2007, in *Diritto dell'Internet*, n. 5/2007, 465, with comments of R. Caso and G. Scorza. The case is analyzed in depth in this book by F. Giovanella, who proposes the adoption of an analytical framework based on national cultural influences to understand and implement the balance between copyright enforcement and the right to privacy.

[86] See Hugenholtz (2001), p. 346. See also Strowel and Tulkens (2005), p. 287.

application of constitutional property clauses to copyright has represented an occasion to emphasize the social function of author's rights and the need to pursue an effective balance. Today, the interaction of national path dependence with the vagueness of the concept of "fair balance" and the controversial indications offered by EU Directives have reinforced the passive attitude of the judiciary and made it more inflexible than ever before.[87] At the same time, the uncertainties surrounding the relation of the new EU constitutional property model with Member States' common constitutional traditions have relegated the social function doctrine to the corner.[88] As a result, the clause has never been used in the context of national implementations of EU copyright law, nor has the CJEU ever referred to it when applying Article 17 to cases related to copyright balance.

The inconsistencies generated by the unclear interplay between multilevel sources make it impossible to regulate the conflicts between copyright and fundamental rights in a manner compatible with the backgrounds characterizing all the systems involved. Short circuits and interpretative *impasses* like those affecting EU copyright law can be metaphorically compared to the consequences of not completely understood, and thus mishandled, chemical reactions. In such cases, the most rational way out is to separate and analyze the single components of the process and then to reconnect them in a new, internally coherent interpretative framework.

4 A Proposal to Connect the Dots

With the introduction of the concept of social function, several modern Constitutions have significantly intervened on the hierarchical rank of property, engendering a qualitative mutation in the nature of its limitations, which have become an integral part of the structure of the right.[89] The effects of the innovation have been the same regardless of whether national Constitutions downgraded property to a mere economic right, as in the case of Italy,[90] or defined it in terms of fundamental right, as in the case of Germany, where the link between property and the goals of the new *Sozialstaat* is summarized by the powerful statement *Eigentum verpflichtet* (property obliges).[91] The concept of social function also emerges in judicial

[87] As in Hugenholtz and Senftleben (2011), p. 10.

[88] See *infra*, note 108.

[89] For an analysis of the role played by social function in national constitutions, see Van Banning (2001), pp. 148 ff.

[90] See, among all, Salvi (1994), pp. 9 ff.; Gambaro (1995), pp. 40 ff.; explicitly on the hierarchical downgrade of property rights Natoli (1976), pp. 34 ff.

[91] See Alexander (2003), p. 733; see also Kommers and Miller (2012), pp. 630 ff.

decisions in countries like France, where the Constitution is silent.[92] Decades of precedents have contributed to the development of a complex doctrine, which emphasizes, above all, the variable implications of the clause according to the social relevance of the good(s) owned, or the connection between property and the duty of civil solidarity.[93] As a result, proprietors' idiosyncratic interests are smeared, while property moves away from the category of inviolable rights and the top of the pyramid of rights protected.[94]

Although social function represents one of the most characterizing traits of continental property, the clause does not appear in any of the EU texts, where it is generally substituted by the notion of general/public interest.[95] "General interest" is also the lexeme used in Article 1 of the First Additional Protocol of the ECHR, the content of which is only minimally specified by the ECtHR, due to the Court's high deference towards national socioeconomic and distributive policies.[96] Only those acts that "take the legislature's decision outside the margin of appreciation"[97] are considered inappropriate and disproportionate, while the admissibility of the limitation is assessed on the ground of the existence of a legitimate goal and of the reasonableness and proportionality of the balance between intervention and goals pursued. The evaluation of the Court is centered either on the social function of property, i.e. on the reasons underlying the limitation, or, more often, on the economic loss suffered by the right holder.[98] Due to this tendency, the property depicted by the ECtHR is predominantly a bundle of economic utilities[99]; the missing specification of the interplay between powers, limits, and social obligations

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[92] As clearly stated by the French Conseil Constitutionnel in two historical decisions. Cons. const. 25 July 1989, 89-256 D.C., 53, and Cons. const. 8 January 1991, RIPIA n. 163-1991, 326. See Libchaber (2006), pp. 659 ff.

[93] Recently spelled out by the Italian Constitutional Court, when interpreting Art. 42 Cost. in light of the ECtHR's case law on property rights. Corte Cost., 24 October 2007, n. 348–349, available at www.cortecostituzionale.it.

[94] Van Banning (2001), p. 149.

[95] Nevertheless, scholars draw a parallelism between general interest and social function. See, e.g., Calliess (2007), p. 456.

[96] The Court's clearest affirmation of the deference can be found in *Handyside v. United Kingdom*, 1 EHRR 737 (1976): "*The second paragraph of Article 1 sets the Contracting States as the sole judges of the necessity of an interference*." Similarly, e.g. *Draon v. France,* 42 EHHR 40 (2006), and *Scordino v. Italy,* 45 EHHR 7 (2007).

[97] *Sporrong and Lonnroth v Sweden* 5 EHRR 35 (1983), 69.

[98] For an overview of the ECtHR's case law in the field of property, among all, see Helfer (2008), pp. 7–11. More generally, see Shutte (2004); Çoban (2004), pp. 124 ff.; Harris et al. (2009), pp. 655 ff.

[99] See Allen (2006), pp. 123 ff., analyzing the emphasis put on economic losses in the ECtHR's balancing test. However, the nature of the interest underlying property protection plays an interesting role. The deference towards commercial property, for example, is much less strong than the one shown when the right to habitation comes into play. Compare, *e.g.*, the approach adopted in *Gasus dosier- und fördertechnik GmbH v. The Netherlands*, (1995) 20 EHRR 403 with *Venditelli v. Italy*, (1995) 19 EHRR 464. For a more detailed analysis, see Shutte (2004), pp. 46 ff.

makes Article 1 of the First Protocol a mere guarantee against State interferences, which, as a consequence, says little or nothing about the hierarchical rank of property and its balance with other conflicting rights.

CJEU's decisions, although limited in number, offer more detailed arguments. The first definition of property as fundamental right subject to limitations in light of public interest can be found in *Hauer v. Land Rheinland-Pfalz*.[100] The case represents also the first connection of the Luxembourg Court's case law with the ECtHR's precedents, with the difference that the CJEU explicitly refers to social function as the lowest common denominator of Member States' common constitutional traditions and as the founding element of any legislative interventions on property rights.[101] Five years before, in *Nold*,[102] the Court was even clearer in stating that "if rights of ownership are protected by the constitutional laws of all the Member States [...] the rights thereby guaranteed, far from constituting unfettered prerogatives, must be viewed in the light of the social function of the property and activities protected thereunder."[103] *Nold* recognizes that social function belongs to the common core of Member States' property law and draws internal limits to the structure of the right, allowing EU interventions on national property rights when required by public interest.[104] On the basis of this principle, which was further developed in *Van der Bergh Foods Ltd. v. Commission*,[105] the CJEU has repeatedly found EU interference on national laws justified by the need to pursue socially relevant goals such as the protection of fundamental rights[106] and, to a much greater extent, the correct functioning of the internal market.[107] The more frequent use of market arguments may be causally connected with the original competences of the Union and the late appearance of fundamental rights in the Court's case law.

Several scholars have argued that the advent of the ECFR and its direct reference to the ECHR represent two decisive steps towards the creation of a new EU constitutional property model, which would diverge drastically from the

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[100] *Hauer v. Land Rheinland-Pfalz*, Case C-44/79, [1979] ECR 3727.

[101] Id. at paras 20 and 32.

[102] *Nold v. Commission*, Case C-4/73, [1974] ECR 491.

[103] Id. at para 14.

[104] Ibid.

[105] *Van den Bergh Foods Ltd. v. Commission*, Case T-65/98R [2004] ECR II-4653.

[106] See., *e.g.*, *Alliance for Natural Health et al. v. Secretary of State for Health and National Assembly for Wales*, Cases C-154/04 and C-155/04 (2005), ECR I-6451, which states the admissibility of the restriction to protect public health.

[107] As in, *e.g.*, *Regione autonoma Friuli-Venezia Giulia e Agenzia regionale per lo sviluppo rurale (ERSA) v. Ministero delle Politiche Agricole e Forestal*i, Case C-347/03 (2005), ECR I-3785; *Commission v. Germany,* Case C-113/82, 19 April 1983; *Zuckerfabrik v. Hauptzollamt Aachen et al.*, Cases C-23 to 36/06 (2008), OJ C-158, 2; *Unitymark Ltd, North Sea Fishermen's Organisation v. Department for Environment, Food and Rural Affairs,* Case C-535/03 (2006), ECR I-2689.

personalist-solidarist inspiration of many national constitutions.[108] The absence of an internal hierarchy among fundamental rights, the dilution of social function in the vague concept of general (or public) interest, the qualification of property in terms of fundamental liberty, and the focus on guarantees and minimum economic content of the right might indeed support this fear. Still, the fact that the ECFR eschews a hierarchy and defines property as a fundamental liberty does not necessarily imply the abandonment of the social function clause, as shown by the German Constitution.[109] Similarly, the concept of social function is not completely unknown to European courts, although it has never been properly articulated in their arguments. Last, but not least, Article 6 of the Lisbon Treaty defines common constitutional traditions as general principles of EU law, thus allowing them to play a relevant role in aligning the development of EU constitutional property with the milestones reached by decades of national judicial contributions.[110]

Past national experiences illustrate well how reading copyright propertization through the lens of social function may help in attributing to authors' exclusive rights an indicative hierarchical rank and orienting their balance with conflicting public and private interests. Today, Article 17 ECFR clearly requests national legal systems to overcome the reluctance against this dogmatic categorization and broaden the reach of their constitutional property clauses to cover also intellectual property. At the same time, the indications coming from the EU may also contribute to the "renaissance" of social function. The interpretation of the clause as rule directed only at legislators has historically slowed down, if not blocked, its horizontal application, thus making it impossible for property to share with contracts and torts the same path of "constitutionalization."[111] The situation may—and most probably should—now change in light of the CJEU's recommendations. In *Promusicae*, as well as in its general case law on fundamental rights protection, the Court has clearly stated that not only legislators but also courts are in charge of implementing EU law in a manner that is not conflicting with fundamental rights or other general principles of Community law, such as the principle of proportionality.[112] This implies also the need for a horizontal application of constitutional clauses if required to guarantee the respect of fundamental rights in the context of private relations, and there is no reason to believe that property clauses would constitute an exception. If this were the case, the social function of constitutional property could play a fundamental role in guiding courts when they are requested to rule on conflicts between copyright and fundamental rights. Moreover, in light of

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[108] Rodotà (2005), p. 159, argues that EU law brings the property "constitutional clock" back of a whole century.

[109] Graziadei (2011), p. 194.

[110] The implications of the EU multilevel constitutionalism have been so broadly analyzed by scholars that it is impossible to provide a full account of the wide array of literature on the subject. Suffice it to mention, for a comprehensive overview of the doctrinal and judicial debate on the interplay between the ECHR and national constitutions, Lenaerts (2012), p. 375.

[111] On which, see *infra*, note 133.

[112] *Promusicae, supra* note 61, para 68.

Article 6 of the Treaty of Lisbon, the clause may help to attribute an indicative hierarchical status to author's exclusive rights *vis-à-vis* conflicting right and thus to fill up, on stronger dogmatic bases, the empty spot left by the CJEU in the definition of the meaning of "fair balance," with undoubtedly positive effects for legal certainty and the coherent development of EU harmonization.

The effects of this new systematic reconstruction are potentially numerous and range from a new interpretation of exceptions, limitations, and the three-step test to the correction of the most evident distortions of digital copyright contracts. The development of more sophisticated national judicial approaches may not only avoid interpretative short circuits at a State level but also contribute, with a bottom-up approach, to resolving the inconsistencies affecting CJEU's case law.

5 Potential Effects of the New Systematic Reconstruction

One of the most important roles that social function can perform is to assist judges in developing adequate criteria to follow *Football Association Premier League*,[113] which states that the restrictive interpretation of exceptions should in no way hamper their effectiveness and the fulfillment of their purposes.[114] Once the exception is read as a limit imposed on copyright in light of its functionalization to social goals[115] and once its legal function is clearly spelled out, *Football Association* may support, on a more solid and systematic basis, the extension by analogy of the rule to cases not explicitly provided by law but still sharing the purpose of protecting the same fundamental right. Such an approach would contribute to the creation of even clearer points of reference for the application of the "fair balance" and proportionality test, thus helping to achieve higher legal certainty in a field where inconsistencies are a matter of routine.

It has already been noted that the horizontal application of constitutional clauses on exceptions might be precluded by Article 5.5 InfoSoc and its three-step test, which is deemed to exclude the judicial creation or expansion of free unauthorized uses.[116] The test, in fact, subordinates the implementation of exceptions to specific cases that do not conflict with the normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder. The language of the Directive, which uses the vague phrase "shall be applied," does not shed light on the subjective scope of the provision.[117] This uncertainty is mirrored in the bipolar

[113] *Football Association Premier League Ltd and Others v QC Leisure and Others,* Case C-403/08, and *Karen Murphy v Media Protection Services Ltd, C*ase C-429/08, (2012) EWHC 108.

[114] Id. at paras 163–164. The same argument is used in *Eva-Maria Painer*, *supra* note 74, para 133.

[115] On the same line, see Geiger (2013), pp. 157 ff., who also gives account of the doctrinal contributions on the theory of social function of intellectual property (p. 156, note 9).

[116] Senftleben (2004), p. 118.

[117] InfoSoc Directive, Article 5(5).

approach of Member States, which either interpret Article 5.5 as a rule directed at legislators, and avoid implementing it in their laws, or read it as a rule addressed to judges, thus embedding it in their copyright statutes.[118] Irrespective of the option chosen, a number of national courts have used the three-step test to exclude the application of legally granted exceptions on the basis of their negative impact on the commercial exploitation of the work.[119] Although CJEU's decisions such as *Infopaq II*[120] may suggest an interpretation of Article 5.5 as a mere criterion to scrutinize the legitimacy of the legislative introduction of new limitations, the Court has not taken a definite position on the issue yet, leaving the door open to contrary interpretations.

To read the three-step test as an additional *ex post* filter undoubtedly frustrates the goal of legal certainty that the continental model has always pursued by means of closed and exhaustive lists of exceptions.[121] At the same time, their judicial disapplication can hardly be reconciled with those of CJEU's precedents that assume that the fair balance between copyright and fundamental rights has been realized by the broad and flexible catalog of free uses provided by Article 5 InfoSoc and its national implementations.[122] Although Member States are free to implement the provision according to their national needs, the CJEU still requires an implementation of EU law that is coherent with the goal of protecting fundamental rights (*Promusicae* et seq.) and an interpretation of exceptions that does not hinder the practical fulfillment of their function (*Premier League*). These precedents should logically prevent mere market arguments from supporting the disapplication of exceptions when such rules are used within the borders of their legitimate function, and their implementation is needed to guarantee the enjoyment of users' fundamental rights.

The social function of property may also inspire a more balanced interpretation of the first and third prongs of the three-step test. If the main social function of exceptions is to act as a safeguard to fundamental rights *vis-à-vis* copyright enforcement, the term "special cases" should be read by legislators as including every free use necessary to guarantee their protection. Similarly, the legitimacy of authors' interests should be evaluated on the basis of their proprietary nature and thus by a concept of property protected in light and within the limits of its social function.[123] This suggests the acceptability of those exceptions that regulate the borders of exclusive rights in accordance with their purposes and that can be used to prevent their *de facto* abuse. If the three-step test is meant to be directed also at judges, then the social function doctrine indicates again the necessity for courts to

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[118] On the various national approaches to the test, see Griffiths (2009), pp. 495 ff.

[119] *Supra* note 84.

[120] *Infopaq International A/S v Danske Dagblades Forening*, Case C-302/10, 17 January 2012.

[121] Geiger et al. (2010), p. 119. But see *contra* Cohen Jehoram (2005), p. 359; and Lucas (2010), p. 277, who see the three-step test as a tool to prevent possible abuses of exceptions.

[122] Geiger et al. (2010), p. 120.

[123] See *supra* note 115.

read its first and third prongs in view of the goal of fair balance and horizontal protection of fundamental rights. This implies not only the impossibility of basing on mere economic grounds the disapplication of exceptions required to safeguard the enjoyment of a fundamental right but also the need to extend them by analogy to specific similar cases, even if not contemplated by law, when the purpose of protecting the same fundamental right is at stake.

The new systematic approach to copyright propertization may also contribute to solving the distortions caused by the compression or nullification of users' prerogatives in EULA standardized clauses. With the exception of Directive 2011/83/EC, which introduces information duties on TMPs,[124] the only EU text addressing the issue of copyright contracts is the InfoSoc Directive, which leaves contractual parties free to determine the applicability of exceptions "to ensure fair compensation for the rightholders insofar as permitted by national law."[125] The remission of the copyright balance to contractual determination, which signs a clear departure from the model of imperative exceptions adopted by Directive 96/6/EC on database protection[126] and Directive 2009/24/EC on software protection,[127] is not destined to change soon, notwithstanding the intense round of consultations recently launched by the Commission on the matter.[128] Here, where the conflict between copyright and fundamental rights arises in the context of a private agreement, the interpretative nodes to be solved are whether and to what extent parties can agree on the restriction of legitimate uses and whether or not the negative effects of such a restriction on users' fundamental rights may impact on the validity of the contract, clause excluding the applicability of the exception(s). While the answer is straightforward for that minority of legal systems that declares exceptions mandatory,[129] the issue becomes more problematic when the legislator is silent on the issue.

National courts and scholars agree on the fact that exceptions do not confer subjective rights and thus deny their imperative nature.[130] Dogmatically speaking, the theory is hard to confute. No subjective right exists if, as in the case of exceptions, the biunivocal link between subject and object is missing. While the exclusive right on a specific work arises at the moment of its creation, and

[124] Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, OJ L 304-64, 22 November 2011, Article 5(1)(h) and Article 6(1)(r).

[125] InfoSoc Directive, Recital 45.

[126] Database Directive, Article 15.

[127] Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs, OJ L 111/16, 5 May 2009, Article 5 (2)–(3), and Article 6.

[128] As for the case of the Public Consultation on the Review of the EU Copyright Rules, launched by the Commission in December 2013. The questionnaire is available at http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/docs/consultation-document_en.pdf (last access September 12, 2014).

[129] Like Belgium, Ireland and Portugal. See Guibault (2008), pp. 537 ff.

[130] For a comparative overview, see Baulch et al. (1999). Before the introduction of the InfoSoc Directive, however, a number of national courts ruled in favor of the imperative nature of exceptions. See Guibault (2002), pp. 91 ff.

immediately generates the necessary connection between holder and object of the right, exceptions are generically attributed to an indefinite potential user and on any indefinite potential works. As a consequence, no corresponding obligation arises for the author until the interest materializes in a specific user and in a specific context.

The dogmatic nature of exceptions is closer, instead, to the category of "objective rights," elaborated in Germany at the beginning of the twentieth century on the basis of the *Reflexwirkung* theory and subsequently developed in different forms throughout Europe.[131] An objective right is the reflex of the introduction of legal provisions that mainly pursue public goals, while the right holder is the subject who becomes, in a specific time and circumstance, the target of a protection justified by the safeguard or fostering of the public interest. The term "objective right" is used in clear contrast with the concept of subjective right, which is recognized and protected as a result of the positive legislative evaluation of a specific private, idiosyncratic interest. The main distinction between objective and subjective rights lies in the creation, in the latter case, of a correspondent duty on everyone or on a definite subject, with clear consequences in terms of judicial remedies available.[132] In the case of exceptions, the general interest to achieve a balance between copyright and fundamental rights becomes an objective right and finds application in favor of a specific subject every time the protection of his or her fundamental right(s) is subordinated to the possibility of exercising the exception itself.

In lack of significant case law in the field, the only precedents available to orient the analysis are those concerning the horizontal effect of fundamental rights on contractual relations. Although not all the Member States have experienced similar degrees of judicial development, in the last decade the path of "constitutionalization" of contract law has been followed by an increasing number of countries. Common criteria used in the scrutiny of the agreement are the proportionality of the contractual restriction imposed on the exercise of fundamental rights and the gravity of the prejudice as compared with the goals pursued by the contract, where proportionality plays the most important role.[133] Seeming as if courts would had wanted to draw a parallelism between legal and contractual interventions, these elements show an impressive similarity to the criteria used for assessing the legitimacy of legislative limitations of property rights or, more generally, fundamental rights.

If translated into the area of digital copyright contracts, these judicial doctrines may support the denial of effectiveness of an EULA clause that restricts users' prerogatives attributed by law, when such a restriction is neither proportionate nor necessary to pursue the goal underlying the license contract, which is to authorize otherwise illegitimate uses. In fact, no authorization is needed for acts included in the scope of exceptions, nor can their limitation be deemed essential to the

[131] The *Reflexwirkung* theory originates from Jellinek (1919), pp. 70 ff.

[132] As in Gervais (1961), pp. 246–247.

[133] For an overview of the most relevant judicial and scholarly interventions, see Mak (2008), pp. 45 ff. See also, more generally, Cherednychenko (2007) and Grundmann (2008).

protection of authors' rights, if they are integral to laws that aim to protect the moral and material interests of the author.[134] This does not exclude, however, the need for a case-by-case judicial analysis, which may alter the balance in favor of authors' rights—they being also fundamental rights—if the circumstances so require.

The qualification of exceptions in terms of objective rights makes it hard to justify an *ex officio* judicial intervention on a freely stipulated agreement and has already hindered the effective application of consumer protection tools on EULA clauses compressing free uses.[135] Yet when the application of the exception is necessary for the enjoyment of a user's fundamental right, and the gravity of the prejudice caused by its restriction is not proportionate to the goals pursued by the contract and to the (social) function of copyright law, a judicial enforcement of such terms may result in an indirect violation of the fundamental right, the protection of which underlies the statutory limitation. As a consequence, although the objective right conferred by the exception may not constitute the ground for an independent cause of action, the actual impairment of a user's fundamental right may surely be used as a defense against the licensor's claims. This would allow the "fair balance" between conflicting interests to operate also when their regulation is remitted to private ordering, thus bridging the gap between copyright law and copyright contracts created by the InfoSoc Directive and progressively broadened by the CJEU. Social function, once again, is fundamental to a specification of the content of the balancing test—in this case, the proportionality of the contractual restriction—and to the orientation of its application.

Conclusions

With a more thorough reconstruction of its content and implications in light of Member States' legal framework, the paradigm shift and propertization caused by EU law and the ECFR may turn from a problematic mine zone to a stimulating opportunity to rethink and reframe EU copyright law. A new, systematic approach to the subject, based on a deconstructed analysis of the implications that copyright propertization should have if correctly embedded in Member States' legal systems, may lead to several positive results. First, it may assist national legal formants in solving the most controversial interpretative short circuits generated by the clash between multilevel legal sources. Second, it may ensure more legal certainty in the formulation and application of the criteria to be used when pursuing the "fair balance" between copyright and fundamental rights, at the same time achieving a greater coherence with the values underlying the legal systems involved. Third, it may help national courts to abandon the traditional passive and deferential attitude towards statutory law and gain a more prominent role in the process of developing

(continued)

[134] Guibault (2002), p. 269.

[135] Id. at p. 272.

EU copyright law. A more solid set of State case laws may create a positive bottom-up pressure on EU courts to take more seriously into consideration the relevance of national legal traditions and to avoid the inconsistencies generated by a poorly directed harmonization. If the EU and national dots are reorganized and connected in a more ordered and structured fashion, property may finally cease to constitute a dangerous rhetoric tool and start instead to perform the role of a new, effective, and long-waited systematic framework.

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