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ARTICLE

From Abuse of Right to European Copyright Misuse: A New Doctrine for EU Copyright Law

Caterina Sganga · Silvia Scalzini

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Abstract The great expansion of EU copyright law has paved the way for several rightholders' abusive or dysfunctional conducts, without providing adequate solutions to prevent or remedy them. The answer from EU sources is characterized by extreme fragmentation, with tools mostly borrowed from external bodies of law. Paradoxically, the doctrine of abuse of right has long been neglected as a potential solution, mainly due to its flaws – difficult evidence-taking and weak remedies – and its incompatibility with the discretionary nature of continental authors' rights. Yet, the notion emerges between the lines of several ECJ decisions and finds its way from civil codes to copyright in a number of national courts' precedents. Due to the paradigm shift towards a market-oriented and industry-based inspiration, EU copyright seems now to be open to admitting the possibility of misuse. Starting from these premises, this article argues that a unitary doctrine of copyright misuse may constitute an effective balancing tool for most of the dysfunctional conducts that copyright law and other bodies of law are still unable to resolve. In addition, it may also act as a regulatory paradigm to ensure greater certainty and transparency in the

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C. Sganga (✉)
LL.M, Ph.D.; Assistant Professor
Department of Legal Studies, Central European University, Budapest, Hungary
e-mail: sgangac@ceu.edu

S. Scalzini
Ph.D.; Post-Doctoral Research Fellow
Department of Law, LUISS – Libera Università Internazionale degli Studi Sociali Guido Carli, Rome, Italy
e-mail: sscalzini@luiss.it

judicial development of key principles and rules of EU copyright law. To this end, this paper (a) proposes a four-prong test of abusiveness, incorporating criteria of proportionality and reasonableness inspired by the normative function(s) of exclusive rights; and (b) offers new perspectives on potential remedies and on the positive impact of the doctrine on the systematization of the current legislative framework.

Keywords EU copyright law · Copyright misuse · Proportionality · Fair balance · Freedom of contract · Fundamental rights

1 Introduction

Driven by a set of uncoordinated forces, EU copyright law has departed from the common core of Member States' traditional models to develop along inadequately defined rationales, and without the guidance of coherent principles and dogmas. The fragmented advancement of the harmonization process has intervened to pursue a few, mostly industry-oriented goals with no real intent to build a consistent system. This silent revolution has led to the progressive abandonment of well-established copyright doctrines before state courts, and to unpredictable, contradictory results in the definition of fundamental matters such as – to name a few – the boundaries of exclusive rights, their balance with other private and public interests, and the spaces left to freedom of contract.

While legislative interventions have been scattered and the road towards the creation of a unitary EU copyright title still appears long and rough, despite the recent proposals to modernize the EU copyright rules, the ECJ has taken the lead and is progressively broadening the scope of the *acquis communautaire*. However, its tendency to proceed through teleological assumptions rather than providing rules of thumb to systematize the subject has resulted in a similarly fragmented patchwork of interpretative outputs, leaving basic questions unsolved or without a uniform answer.

One of the least investigated examples of this phenomenon is the treatment of rightholders' abusive conducts. The definition of abuse of copyright remains completely blurred, national approaches are not harmonized, and the various external bodies of law that have intervened in the field present inconsistent outcomes. In this regard, it is enough to compare the results reached by antitrust law in the context of abusive refusal to license works protected by copyright with the failing attempts to rebalance end user license agreements (EULAs) by means of consumer protection law and its rules on unfair contractual terms and information duties.

The relative lack of interest on the part of EU scholars in the problem comes as no surprise. Only a few Member States address copyright abuse in their statutes or case law, and this is justified by the bare compatibility of the notion with the author-centric, natural law approach that inspires the continental model of *droit d'auteur*, where the balancing role is played by narrowly defined exceptions and statutory or mandatory licenses. Yet, other elements show the presence of a countervailing trend. Although it is never categorized under a single label, the concept of abuse has emerged in several ECJ decisions since the early stages of construction of EU copyright law, particularly between the lines of cases targeting the uncontrolled expansion of exclusive rights beyond their statutory core, when these attempts

clashed with the four Community freedoms or with antitrust rules. At a national level, a limited but still significant number of courts have resorted to the doctrine of abuse of right in order to tackle excessive or distortive uses of copyright law, predominantly in cases of unfair contractual arrangements or judicial enforcement claims.

Typically, the notion of abuse intervenes when the rightholder's conduct significantly broadens her controlling power, often taking advantage of non-regulated grey areas, resulting in the creation of conflicts between copyright and other rights or public/private interests. The criteria used for the assessment vary depending on the area of law involved; however, one element seems to bond together and characterize the otherwise heterogeneous responses, namely the focus on conducts deviating from the functions pursued by copyright law (dysfunctional conducts). Yet, there has never been a consistent judicial development of the elements of the tests of abusiveness, nor have courts sufficiently elaborated on the functions of copyright, with a view to systematizing the scattered indicia offered by legislators, and differently interpreted by a tough, century-long doctrinal debate. With such weak features and a fragmented nature, it is no wonder that the doctrine of abuse has never gained any relevant place in the European copyright arena.

If consistently applied, though, that doctrine – renamed here as "copyright misuse" to emphasize its broader coverage[1] – could act as an additional tool to tackle distortive uses of copyright and strike a fair balance between exclusive rights and conflicting interests. Its advantage lies in the fact that it would operate as a flexible limitation inside the structure of copyright, instead of acting as an "external" constraint, as in the case of limitations and exceptions. As with private law, it would perform the function of a general clause, which would residually intervene in distortions and unbalances left unanswered by EU copyright law, which are not already adequately addressed with the help of external sources. As with every other general clause, it would also provide guidance in the systematic and teleological interpretation of existing norms, making it a perfect fit for the unevenly harmonized EU copyright framework and the numerous inconsistencies and lacunae affecting its judicial development.

Before being capable of performing this role, however, the doctrine of abuse of copyright requires a thorough reordering, which connects its various epiphanies and translates their commonalities into a well-defined test of abusiveness. This analysis should also allow instances of abuse of copyright *stricto sensu* to be distinguished from cases of abuse of dominant position originating from the exercise of copyright. In fact, although the interface of copyright/competition law is one of the areas where the language of abuse has made the most frequent appearance, the notion of abuse of dominant position is not dogmatically homogeneous with that of abuse of a subjective right, for it entails a situation of market dominance characterized by specific features, which are the actual focus of the abusiveness test. Thus, while the judicial precedents in the field may be used as analogical inspiration for the definition of the notion of dysfunctional conduct, bringing abuses of dominant

[1] *See infra*, paragraph 3.

position committed by copyright owners under the umbrella of the doctrine of abuse of copyright would inevitably result in a systematic fallacy.

In addition to that, the doctrine needs clear guidelines on how to define its main measurement tools, that is, the functions of EU copyright law and the exclusive rights it grants. Scholars have long debated the issue, with no agreement and unsatisfactory results; and while it is possible to identify a common denominator in the cryptic definitions offered by the ECJ, this embryonal outcome needs to be supplemented with more systematic references in order to offer a reliable, comprehensive starting point for future judicial developments. In fact, one of the positive effects of the proposed doctrine would be to compel scholars and courts to spell out the rationale and the functions of the institution, guiding the whole system towards more consistent and transparent outputs.

To set the stage, this article starts with an overview of the fragmented approach of EU sources to rightholders' dysfunctional conducts, underlining their common traits against their different treatment (Part 2). Part 3 moves on to the comparison of the epiphanies of abuse of copyright, and abuse of dominant position through the exercise of copyright, in selected national experiences and at the EU level. Then, it sketches the various judicial attempts to define the function(s) of EU copyright, identifies their common core, and broadens the scope of the analysis by providing systematic references to what the functions of copyright are – or should be – according to the current *acquis communautaire*. Building on these elements, Part 4 proposes a systematization of the subject and enucleates the common elements of the test that should characterize a unitary and autonomous doctrine of EU copyright misuse, which may operate as a general, interstitial theory to tackle dysfunctional conducts not yet regulated via other means. To conclude, the article provides brief examples of the potential positive impact of the general clause for a more consistent and balanced interpretation of unsettled issues in the EU copyright system.

2 EU Sources and Rightholders' Dysfunctional Conducts: A Fragmented Patchwork

In the process of constructing EU copyright law,[2] dysfunctional or abusive conducts of copyright holders have been taken into consideration several times, albeit always with a fragmentary approach, and rarely under a single theoretical label.[3] The trend that characterizes their regulation is indeed twofold: on the one hand, they have been limited – in specific circumstances – through the application of external bodies of law, such as fundamental freedoms, competition law and consumer law; while on the other hand, they have not received adequate consideration and answers from IP law.

[2] For the purposes of this study the term "EU copyright" refers to exclusive rights categorized as authors' rights and neighboring rights, unless it is differently specified. The issues concerning copyright collective management will not be discussed.

[3] *Inter alia see* Geiger (2013), Hilty (2015).

Since the very beginning, the ECJ has developed various tools to ease the tension between copyright – territorial and exclusive in nature – and the principles and law of the Treaties.[4] The need to respect the national rules governing the system of property ownership (now Art. 345 TFEU) and the provision of the protection of industrial and commercial property as an exception to the principle of free movement of goods (now Art. 36 TFEU) have required a delicate balancing exercise, which led the ECJ to sanction the distorted use of copyright when it negatively impacted on the construction and the functioning of the internal market. The "existence/exercise dichotomy", together with the regulatory notions of "specific subject matter" and the "essential function" of intellectual property rights (IPRs),[5] have practically served the purpose of defining the boundaries of IPRs and applying EU law to cases where exclusive rights were exercised transnationally with the aim of expanding their statutory core beyond the boundaries traced by law, and thus beyond what was necessary to perform their functions. The earlier applications of such doctrines mostly affected situations in which copyright holders "were relying on territorial IPRs in order to recreate national boundaries to prevent parallel re-imports, often to maintain price differences between different national markets".[6] Here, the ECJ had to determine whether copyright was exercised with the purpose of circumventing EU rules. The application of EU law was thus aimed not only at the creation of the internal market, but also at avoiding rightholders' dysfunctional conducts aimed at blocking competitors' freedom in actual or potential secondary markets.[7] This position was clearly based on the assumption that the commercial exploitation of copyright represents not only a source of remuneration for its holder but also "*a form of control of marketing*".[8]

In order to draw the area of application of EU law, the Court admitted derogations from the free circulation of products "to the extent to which they are justified for the purpose of safeguarding rights which constitute the [untouchable] specific subject-matter of such property".[9] What was outside the subject matter, and thus dysfunctional, constituted a conduct whose regulation was subject to the requirements of the Treaty.

This reasoning was applied particularly in the development of the notion of Community exhaustion.[10] For instance, in *Deutsche Grammophon*, a case where the rightholder tried to partition the internal market through a licensing scheme, building a net of exclusive national distributors of sound recordings, the ECJ considered it "repugnant to the essential purpose of the Treaty" that the exercise of

[4] *See* Strowel and Kim (2012), 121 ff.

[5] *See* Keeling (2004), p. 54; Oliver (2003), p. 315 ff.

[6] Westkamp (2014), p. 41.

[7] *Cf also* Godt (2014), p. 213.

[8] *See* Joined Cases C-92/92 and C-326/92, *Phil Collins v. Imtrat Handelsgesellschaft mbH e Patricia Im- und Export Verwaltungsgesellschaft mbH e Leif Emanuel Kraul v. EMI Electrola GmbH* [1993] ECR I-05145, para. 21.

[9] Case C-78/70 *Deutsche Grammophon Gesellschaft mbH v. Metro-SB-Großmärkte GmbH & Co. KG.Deutsche Grammophon v. Metro SB* [1971] ECR 487, para. 11.

[10] On the development of the doctrine *see* Schovsbo (2012), p. 174 ff.; Ubertazzi (2014).

the exclusive right of distribution could allow the rightholder to prevent the marketing of a product in a Member State "on the sole ground that such distribution did not take place on the national territory".[11] Conversely, in cases concerning the freedom to provide services, like *Coditel I*,[12] the exhaustion doctrine was excluded because the power of a copyright holder of a cinematographic film to require fees for any showing of a movie, and to fix geographical limits on its exploitation, was considered part of the essential function of copyright in this kind of work. Since the need to protect the copyright owner's right to be (actually) remunerated was considered more important than the interests protected by the Treaties, their rules on fundamental freedoms were not applied, so as not to hinder rightholders' conducts that were in line with the ECJ's interpretation of the functions of copyright.

Even when the exhaustion principle was codified into secondary legislation as an internal limitation to the distribution right, its application, however, required a definition of the functions of copyright in order to deal with dysfunctional conducts that expanded exclusive rights to block competitors' and users' activities. An example comes from *UsedSoft*,[13] where the Court stated that rightholders' freedom of contract cannot override the principle of exhaustion to block the secondary market of used software, since exhaustion itself may be excluded only to the extent necessary to safeguard the specific subject matter of copyright. Here the case revolved around the possibility of Oracle to label as a non-transferable license, instead of a sale, the agreement authorizing the download and installation of its software for an unlimited period of time upon the payment of a lump sum. This would have avoided the application of exhaustion, which is limited by law to instances of sale or other transfers of ownership of tangible goods. In response to what clearly constituted a dysfunctional conduct, the ECJ forbade the contractual restriction of further distribution of the software on the basis that it went beyond the specific subject matter of copyright, in light of the fact that Oracle could already obtain a "remuneration corresponding to the economic value of the copy of the work of which it is the proprietor"[14] from the first sale, regardless of the qualification of the contractual arrangement.

In *Football Association Premier League (FAPL),* the Court gave the same answer (although not directly involving copyright) with regard to a conduct restricting the cross-border availability of football matches through an artificial contractual portioning of the internal market. Here, the ECJ ruled that the exercise of an IPR through licensing could not "go beyond what is necessary to ensure *appropriate remuneration* [for each use] for those right holders",[15] because the specific subject

[11] *Deutsche Grammophon*, paras. 12–13. Similarly, Joined Cases 55/80 and 57/80 *Musik-Vertrieb Membran and K-tel International v. GEMA* [1981] ECR 147.

[12] Case C-62/79, *SA Compagnie générale pour la diffusion de la télévision, Coditel, and others v. Ciné Vog Films and others* [1980] ECR 881.

[13] Case C-128/11, *UsedSoft GmbH v. Oracle International Corp* [2012] OJ C 287, pp. 10–11.

[14] *UsedSoft*, para. 45 and 63.

[15] Joined Cases C-403/08 *Football Association Premier League Ltd and Others v. QC Leisure and Others*, and C-429/08 *Karen Murphy v. Media Protection Services Ltd* (*FAPL*) [2011] ECR I-09083, para. 116.

matter of IP does not ensure in principle the possibility of obtaining "the highest possible remuneration"[16] from the exploitation of the work.

Another area where the ECJ has intervened to sanction the abuse of exclusive rights is where such dysfunctional behaviors have affected the trade between Member States and distorted competition within the internal market. In particular, in *Magill*[17] and *IMS Health*[18] the Court applied competition law rules on cases of unjustified refusal to license by holders of dominant positions, where the aim of preventing competitors' access to a secondary market was judged to go beyond or against the essential function of IPRs, and thus to constitute an abusive conduct that had to be sanctioned. With respect to how competition law de facto sanctioned a distorted exercise of copyright, its intervention could only target the abuse of a dominant position. It was the market dominance that made possible a competition law assessment of the refusal to deal, thus forcing the ECJ – as it will be further explained in Part 3 – to elaborate specific criteria in order to correlate competition law and copyright law goals. In *Magill* the Court stated that the exercise of copyright by the proprietor "may, in exceptional circumstances, involve abusive conducts",[19] which are more frequent when exclusive rights confer too much (informational) power to rightholders. This is particularly recurrent in cases of technical or informational works, characterized by a low threshold of creativity and a low degree of substitutability for consumers – two features that allow a monopoly over raw information and a market dominance that requires an institutional response. In fact, competition law has come into play mostly in this area, while it is unlikely that it will be used to tackle abusive conducts in refusals to deal that involve cultural or artistic works, given their nature of having incomplete substitutes (as they usually rely on personal preferences of users) and the fact that the mere ownership of copyright does not confer market dominance as such.[20] In those cases, potential rightholders' abuses/misuses are more likely to be resolved by other means.[21]

While the ECJ demonstrated its capability to react against dysfunctional exercises of copyright through the application of EU primary law and the principles of the EU economic legal order, EU secondary legislation raises more questions than the answers it has been able to provide to rightholders' abusive conducts. The proposal to modernize the EU copyright framework, moreover, does not seem to introduce substantial changes on this issue. Conceptualized to harmonize national legislations and to regulate copyright within new information and communication technologies, EU copyright development has proceeded in a jagged and sectorial manner,[22] making the functions of the institution more

[16] *FAPL*, para. 108.

[17] Joined Cases C-241/91P and C-242/91P, *Radio Telefis Eirean (RTE) and Independent Television Publication Ltd (ITP) v. Commission* [1995] ECR I-743.

[18] Case C-418/01 *IMS Health GmbH & Co OHG v. NDC Health GmbH & C. KG* [2004] ECR I-503, [2004] 4 CMLR 1543.

[19] Magill, para. 96.

[20] *See* Drexl (2013), pp. 41 and 77.

[21] *See also* Ghidini (2010), p. 224.

[22] On the harmonization process *see* Van Eechoud (2009), Hugenholtz (2013).

blurred. Despite the obligation to safeguard the "fair balance of rights and interests",[23] it has strengthened rightholders' exclusive rights and freedom of contract, and multiplied the occasions of possible misuses of copyright, without providing suitable tools to prevent them and to counterbalance the opposing rights and interests.[24] In addition, rightholders – mainly producers, publishers, employers, broadcasters – appear to be the protagonists of EU copyright law, while the role of the author is no longer at the core.[25] This means that EU harmonization has strengthened the position of subjects whose interests are mostly directed to the maximization of profits, and who – unlike authors – typically enjoy strong bargaining power, thus increasing the imbalance of protection between different stakeholders. An example of this trend is the provision of several layers of exclusive rights in order to protect investments rather than creativity, such as numerous neighboring rights and copyrights on useful creations like databases, software and industrial designs,[26] which contaminate with an industrial logic a system that does not have "pro-competitive anti-bodies".[27] Along the same lines, one may mention the concentration of the exercise of the rights in the hands of industry,[28] or the expansion of the scope of exclusive rights as far afield as to control the single act of fruition by the end user in the digital environment.[29]

Apart from the principle of exhaustion, EU directives do not propose effective mechanisms to counterbalance the expansion or the distorted use of exclusive rights.

One of the most telling examples comes from Art. 5 of Directive 2001/29/CE (InfoSoc), which contains a long and exhaustive[30] list of optional exceptions and limitations, but does not provide tools to protect users' interests in the case of attempts by rightholders to abnormally extend their prerogatives. In fact, exceptions and limitations do not confer enforceable rights on users,[31] and in most cases they can be overridden by contracts,[32] thus giving rightholders the opportunity to restrain them without having to fear the intervention of copyright, contractual or consumer law remedies if the agreement is freely negotiated. Finally, their application is subject to the three-step test,[33] which has been interpreted as requiring judicial

[23] *See* recital 31 of Directive 2001/29/CE.

[24] On the unbalanced features of EU copyright *see* Ghidini (2013).

[25] On this topic *see* Ginsburg (2002), p. 61. *See also* Nérisson (2012), p. 129 ff.

[26] *See*, *inter alia*, Reichman (1994), Falce (2012), p. 1 ss.

[27] Ghidini (2001) p. 15.

[28] Suffice it to mention the entitlement to exercise all the exclusive rights in favor of the employers (unless otherwise provided by contract) provided by Art. 2.3 of Directive 2009/24/EC and by Recital 29 of Directive 96/9/EC. *See also* Art. 2.5 of Directive 2006/115/EC.

[29] The large scope of some exclusive rights is underlined by Dusollier (2005), p. 201. This control is also enabled by technological protection measures, *see infra*.

[30] *See* recital 32 of InfoSoc Directive.

[31] Member States and national courts generally do not consider exceptions and limitations as subjective rights. For an overview *see* Hilty and Nérisson (2012a), (b).

[32] Only few Member States (*e.g.* Belgium and Portugal) declare exceptions mandatory. *See* Guibault (2002).

[33] *See* Art. 5.5 InfoSoc Directive.

review of the application of exceptions already in force.[34] This reading, coupled with the narrow interpretation of exceptions and limitations requested by the ECJ,[35] built a system that does not offer any room for flexibilities,[36] and is inherently unable to limit rightholders' prerogatives and to answer to abuses/misuses. The effects of such rigidity are particularly visible in the judicial approach to the issue of the legitimacy of "new uses" of – often freely available – protected works enabled by technology but not mentioned in the Directives (e.g. thumbnails, linking, indexing). In the absence of flexible general clauses, national and EU courts have had to resort to general contract law,[37] general principles of civil law[38] or the questionable re-definitions of the scope of exclusive rights[39] in order to prevent rightholders from exercising copyright in a manner that deviates from its core and aims only at blocking new services and activities without real personal gain.[40] This trend has therefore given rise to a range of variegated responses, which have neither enhanced the interpretative consistency nor the legal certainty of EU copyright law.

The sclerosis of the system has sometimes been tempered by the recourse to a fundamental rights argument.[41] Although only used sporadically, the tool has contributed to tackling dysfunctional conducts, by seeking a balance between interests having different berths. In *Painer* the ECJ, citing its holdings in *FAPL*, pointed out that the (necessarily narrow) interpretation of Art. 5 InfoSoc "must also enable the effectiveness of the exception thereby established to be safeguarded and its purpose to be observed",[42] by striking a "fair balance" between the right to freedom of expression of users and the authors' reproduction right.[43] Similarly, in *Promusicae*,[44] *Scarlet Extended*[45] and *Netlog*[46] the Court limited the possibility of imposing filtering, monitoring and user-identification obligations on ISPs, in light of

[34] For a comparative overview *see* Hugenholtz and Senftleben (2011), p. 18 ff. *See also* case C-5/08 *Infopaq International A/S v. Danske Dagblades Forening* (*Infopaq*) [2009] ECR-06569, para. 58; *FAPL*, *supra* note 15, para. 91.

[35] *See Infopaq*, *supra* note 34, para. 56.

[36] On this issue *see* Geiger and Schönherr (2014), p. 440.

[37] German courts, for instance, ruled that the use of some available images online could be justified on the existence of an implied license given by the right holder. *See* German Federal Supreme Court, I ZR 69/08 *Vorschaubilder,* 29 April 2010; and German Federal Supreme Court, I ZR 140/10 *Vorschaubilder II,* 19 October 2011. On this topic *see* Pihlajarinne (2012).

[38] Spanish Supreme Court (Tribunal Supremo), 3 April 2012, No.172/2012.

[39] Case C-466/12, *Svensson v. Retriever Sverige AB* [2014] ECLI:EU:C:2014:76. For a comment *cf* Arezzo (2014).

[40] As an example, for an overview on claims against news aggregators and search engines *see* Scalzini (2015).

[41] *See* in general on this issue Griffiths and L. McDonagh (2013); Godt (2014).

[42] Case C-145/10 *Eva-Maria Painer v. Standard VerlagsGmbH and Others* [2011], ECR I-12533, para. 133.

[43] *Painer*, paras. 134–135.

[44] Case C-275/06 *Productores de Música de España v. Telefónica de España SAU* [2008] ECR I-271.

[45] Case C-70/10 *Scarlet Extended SA v. Société belge des auteurs, compositeurs et éditeurs SCRL* [2011] ECR I-11959.

[46] Case C-360/10 *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v. Netlog NV* [2012] ECLI:EU:C:2012:85.

the need to guarantee freedom to conduct a business, customers' data protection and freedom to receive and impart information. However, the doctrine is anything but reliable and foreseeable in its result, as testified by *Bonnier Audio*,[47] where the "fair balance" between copyright and users' privacy led to opposite results.

The advent of the EU Charter of Fundamental Rights (CFREU) has created substantial interpretative problems and uncertainty, weakening the capability of the instrument to address with consistency the broad range of dysfunctional conducts caused by the unbalanced multilevel copyright framework. Following an approach already adopted by the ECtHR,[48] Art. 17(2) has legitimized the protection of IP as fundamental right to property, but without providing any indication of potential limitations to the right or of its hierarchical position in the scale of rights and values enshrined in the Charter. This, coupled with the few references to national values and principles in EU decision-making,[49] has contributed to reinforcing the position and protection of rightholders' prerogatives, without providing any rule of thumb to avoid or solve their clashes with fundamental rights of potential counterparties.[50] In addition, other balancing tools provided in the CFREU, such as the prohibition of abuse of rights under Art. 54[51] and the provision on the scope and interpretation of rights and principles of Art. 52,[52] do not offer any further guidance on the criteria to be applied in the balancing exercise.

The harmonization in the field of IPRs enforcement suffers from a similar lack of countermeasures against rightholders' abuses/misuses. Directive 2004/48/EC on the enforcement of intellectual property rights (IPRED) envisages a "high, equivalent and homogeneous level of protection in the internal market",[53] but also binds Member States to encompassing measures, procedures and remedies that shall "be effective, proportionate and dissuasive (…) and to provide for safeguards against their abuse" (Art. 3(2)). If read in conjunction with Art. 11, which provides for the possibility (not the obligation) for national judicial authorities to issue injunctions against infringers, one could argue that this rule obliges Member States "to limit injunctive relief to cases in which the enforcement of IP rights would meet the function of the related IP system".[54] Yet, despite the clear wording of the legislative text, the mainstream interpretation identifies in the strong and uniform level of protection of IP the goal of the Directive,[55] thus denying that IPRED paves the way to a more flexible and function-based approach to situations in which copyright enforcement unduly affects counter-interested parties.

[47] Case C-461/10 *Bonnier Audio AB et al. v. Perfect Communication Sweden AB* [2012] ECLI:EU:C:2012:219.

[48] For an overview on the impact of EU fundamental rights on IP, *see* Ohly, 2013.

[49] On this aspect *see*, *e.g.*, Anagnostaras (2014), p. 111.

[50] On this topic *see* Geiger (2009).

[51] It is indeed limited only to reinforce the limitation already enshrined in the Charter. *See infra*, para. 3.

[52] *See infra*, para. 3.

[53] *See* Recital 10 of IPRED.

[54] *See* Hilty (2015), p. 390. The safeguards are also indicated in some recitals of the Directive (2, 12, 14).

[55] *See* Stamatoudi (2014), p. 528 ff.

However, the main example of the fragmented and insufficient approach of EU law to the treatment of copyright abuses/misuses lies in the regulation of technological protection measures (TPMs), which enable rightholders to enforce legislative or contractual rules on the distribution and use of content in the digital environment.[56] Although required due to the threats posed by the Internet and the digitization of copyright content, this system is not adequately designed to compel rightholders to respect the balance set by the law.[57] In fact, Art. 6 InfoSoc not only fails to define the interplay between TPMs and exceptions and limitations to copyright, but leaves to private autonomy the determination of the boundaries of the application of TPMs, without taking into due account the potential differences in the parties' bargaining powers, especially in the case of EULAs.[58] Commentators[59] have defined the provision as a blanket license to potential copyright misuses in the contractual and technological definition of the boundaries of exclusive rights, with consequences such as the restraint of the freedom of contract of counter-interested parties and other non-enforceable interests.[60] Through contract and technology, indeed, rightholders are enabled to decide on access to and use of their works, with the risk of unduly affecting other private and public interests.

A response to the issue has come from EU consumer law, the application of which has been made possible by the fact that the online commercialization and distribution of digital protected works often take place through individual standard license agreements[61] that limit the consumption powers over digital content and juxtapose the status of end user with the status of consumer.[62] Directive 2011/83/EU on consumer rights obliges the "trader" to provide the consumer with specific information on the functionality of digital content, including the applicable TPMs and their impact on interoperability,[63] thus creating an osmosis between the two disciplines when the exercise of copyright holders' contractual autonomy, enforced by TPMs, unilaterally prevents the full enjoyment of the protected content by the end user/consumer.

However, while consumer law might be the right answer to the need to protect consumers' expectations with regard to digital content, it does not necessarily solve problems that may arise from the unenforceability of end users' claims under copyright law vis-à-vis rightholders' misuses. The most immediate example comes from the possibility that the rightholder may override the private copy exception by contracts and TPMs. Article 5(2)(b) InfoSoc, which admits this free use, requires that the rightholder receives "fair compensation", which in many Member States takes the form of a levy on media and devices. Since the same work can also be

[56] *See* European Consumer Law Group (2005), p. 9.

[57] On this topic *see* Caso (2004), *passim*; and for a focus on the effects of such unbalances on the national implementation of the InfoSoc Directive, *see* Favale (2008)

[58] *See also* De Werra (2003), p. 326.

[59] *See*, in particular, Heide (2003), p. 2; Dusollier (2005), p. 202 ff.

[60] On this issue *see* in particular Guibault (2002).

[61] On the interplay between copyright law and consumer law *see* in particular, Guibault (2017).

[62] On this topic *see* Mazziotti (2008), Stazi (2012).

[63] *See* Arts. 5(1)(g) and (h) and 6(1)(r) and (s).

licensed on an individual basis[64] and reinforced with TPMs, it may happen that the end user is charged twice for the same use, first with the burden of the levy and then with a license fee.[65] In this way, EU copyright law practically allows a misuse, without providing any means to prevent it.

On the whole, it is evident that the approach of EU sources to rightholders' dysfunctional conducts is characterized by extreme fragmentation. Yet, these interventions still testify to a change in the conceptualization of copyright, which is losing its discretionary character and is now open to accepting the possibility of misuses. The paradigm shift could happen thanks to the intervention of several concurring factors. First and foremost, the need to build a highly competitive single market has pushed EU law towards a much more market-oriented approach, which in turn has led to the application of external bodies of law to copyright matters. On the other hand, the socio-economic changes that have occurred due to the rapid development of new communication and information technologies have posed the need to develop tools capable of rebalancing the opposing interests involved in the regulation of copyright.

These scattered responses leave unfilled gaps in protection, which might be more effectively and coherently addressed if approached under a single theoretical label. However, in order to verify whether and to what extent the construction of a well-defined doctrine of abuse/misuse of EU copyright is not only advisable but also conceivable, it is first necessary to analyze the current responses provided under the label of "abuse of copyright" in the EU and national experiences.

3 The Doctrine of Abuse in EU and National Copyright Laws

3.1 National Examples

Despite the references made by the TRIPS Agreement,[66] the term "abuse" or "misuse" does not belong to the language used by Member States' copyright laws, with the exception of France, where the *Code de la propriété intellectuelle* (CPI) bans the manifest abuse of moral and economic rights by the author's heirs (Arts. L. 121-3 and L. 122-9), against which any person interested in the use of the work may claim access to it in court, and obtain any appropriate measure.[67] Similarly, but without labeling the conduct as abuse, Spain and Portugal react

[64] Unless the Member State clearly excludes the possibility for a rightholder to authorize and charged the reproduction. *See* Case C-463/12 *Copydan Båndkopi v. Nokia Danmark A/S* [2015], not yet published, para. 63.

[65] This problem has been raised by Guibault (2017).

[66] Articles 8 and 40.2 TRIPS, authorizing Member States to take measures to prevent and remedy abuses, especially in case of anti-competitive licensing practices; and Art. 41, targeting the abusive recourse to enforcement procedures. Yet, the text does not provide any definition of abuse or specification on the "appropriate measures" that can be implemented in response. *Cf.* Hilty (2015), p. 384. *See also* Ullrich (2004); Drexl (2014), p. 282 ff.; Bakhoum and Conde Gallego (2016), p. 548 ff.

[67] Carre (2012), p. 315. *Cf. also* Caron (1998), pp. 16–18, Lucas and Lucas (2006), p. 349, p. 428, referring to the social dimension of moral rights post-mortem.

against the heir's refusal to authorize the republication of out-of-print or posthumous works with the provision of mandatory licenses.[68]

Aside from these cases, some commentators classify as rules against misuse the provisions, harmonized under Art. 6 InfoSoc, which oblige rightholders to remove TPMs when they prevent legitimate free uses of the work.[69] The qualification is objectionable, for the remedies provided are more mediated than those usually set forth for other abusive behaviors. Yet, despite how stretched this labeling might be, it helps emphasize how much the system of checks and balances enshrined in copyright law already enlists the prevention of abuses of exclusive rights as one of its goals. Following the same rationale, other contributors qualify as provisions against copyright misuse a number of exceptions and limitations, as well as the rules providing for mandatory licenses.[70]

Contrary to the silence of copyright acts, many national civil codes include general clauses sanctioning the abusive exercise of subjective rights.[71] Countries like Italy limit the rule to property law and acts that willfully cause damage to others (Art. 833 CC), with a provision that is nevertheless so narrow that its judicial application is sporadic and basically non-existent in the field of copyright.[72] Other Member States adopt a broader approach, albeit with similarly weak effects on IP law. One of the most interesting examples comes from the Netherlands, where a general provision (Art. 3:13 CC) exemplifies as abuse any exercise of right that (a) does not have any other purpose than to damage another person, (b) has a different purpose than that for which it was granted, or (c) creates an unreasonable disparity between the interests which are served and those which are damaged. The rule moves beyond the mere *alterum non laedere* principle and, by sanctioning behaviors that contradict the function of the right or substantially alter the balance set by law, also allows an *ex post* readjustment of legal relations beyond the borders of contract law, and without the constraints imposed by tort law, which would require the proof of the tortfeasor's negligence or intent.[73] Similar structures, introducing a functional, *ex post* evaluation of the rightholder's behavior based on proportionality and reasonableness, can also be found in countries like Lithuania,[74] where, in addition, the notion of abuse appears in rules such as those preventing the exercise of moral rights in a manner that may unreasonably prejudice the prerogatives of the owner of the material support that carries the work.[75] Amongst others, the Polish Civil Code (Art. 5) bans exercises of a right that go against its

[68] Hilty and Nerisson (2012a, b), p. 65.

[69] *Id.* at 21, mentioning examples from Croatia (Art. 98 Copyright Act), Germany (Sec. 95b) and Belgium (Art.79bis(4)). *See* Gilha 2012, 333, Dreier and Specht (2012), 442, Vanbrabant and Strowel (2012), 119.

[70] *Cf.* Trampuž (2012), p. 869.

[71] For a comparative analysis of the doctrine and its emersion in national experiences *see* Perillo (1995); Voyame et al. (1990); Sajò (2006), p. 29 ff.; Gambaro (1995); Bolgàr (1975); Byers (2002), p. 392 ff.

[72] Sica and D'Antonio (2012), 541. No cases have been reported so far.

[73] Broadly Guibault (2002), 281 ff.

[74] Mizaras (2012), p. 644.

[75] This is particularly the case for the exercise of moral rights in software and databases (Art. 14(3) Copyright Act). Similarly in the French CPI, Art. L. 111.3(2).

socio-economic purpose; the Portuguese Civil Code (Art. 334) qualifies as illegitimate the behavior of a rightholder who crosses the boundaries set by good faith or the socio-economic purpose of the right; and the Spanish Civil Code (Art. 7.2) denies protection in the case of abuse or antisocial use of a right that, regardless of the holder's intent, causes damage to others. Abusive conducts are grounds for liability in tort and may be used as defense against infringement or, more generally, against a claim of protection of the right.[76]

In other countries abuse of right is a judge-made doctrine, which stems from the general clause of civil liability. In Belgium the notion of fault helps courts to extend the doctrine from conducts intentionally and solely directed to harm others, to exercises of the right that are (a) harmful to others and not beneficial for the rightholders, (b) disproportionally harmful if compared to the benefit generated, or (c) the most damaging use among those that would have created similar advantages. In this context, a use of the right that diverts it from its function is more prone to be considered unreasonable and faulty, and thus to tilt the balance against the rightholder.[77]

Belgium is also one of the countries where courts have shown less resistance towards the application of the doctrine on copyright law. The disproportion between harm and advantages caused by the enforcement of a claim led the Brussels Civil Court[78] to grant an injunction against the distribution of counterfeited goods, but to deny it against the catalogue reproducing them, as its withdrawal would have generated a greater economic prejudice to the defendant than the economic gain it would have brought to the plaintiff. A similar argument supported two other decisions: one rejecting the claim over a logo by an employer who allowed his employee to use it for over 15 years;[79] and another postponing to the end of the theatre season the enforcement of the right of a choreographer, who waited until a few days before the competitor's premiere to bring his plagiarism case in court.[80] To avoid distortive effects, courts have rejected claims that have pursued objectives diverting from the function of copyright law, as in the case of rightholders who have tried to prevent the parallel import of their products by challenging on the ground of copyright infringement the importer's use of logos[81] or the reproduction of user manuals.[82] Regardless of whether or not the claim was well-founded, the doctrine of abuse of copyright has allowed courts to decide on the basis of the results which the copyright enforcement would have achieved, and thus to opt for a functional and policy-based approach to judicial decision-making.

[76] *Supra* note 70.

[77] For the references to the Belgian Civil Code *see* Vanbrabant and Strowel (2012), p. 154. *See* Brussels Civil Court, 4 March 2009, IRDI, 2009, p. 197.

[78] Brussels Civil Court, 5 January 1996, IRDI, 1996, p. 97.

[79] Commercial Court Brussels, 26 May 1993, *RDC.*, 1994, p. 651.

[80] Brussels Civil Court, 27 February 1998, A&M, 1998, p. 143, confirmed by Brussels Court of Appeal, 18 September 1998, ibidem.

[81] Brussels Civil Court, 27 October 1999, unpublished, in Buydens (2001), p. 434, note 44, focusing on the purpose of copyright law.

[82] Brussels Civil Court, 10 October 1997, DAOR 1998, p. 64; Brussels Court of Appeal, 28 January 1997, A&M, 1997, p. 262.

Apart from the Belgian example, the doctrine of abuse of copyright has not often made it into national courtrooms. In Germany, sporadic decisions have denied injunctions as abusive claims.[83] In the Netherlands the concept appears in parties' arguments, mostly as a defense against infringement, but does not find its way to the final decision, as in *Dior v. Evora.*[84] The only area where the doctrine is widely used is the case of abusive exercise of architects' moral rights against the owner of the work. Here, injunctions are usually denied as disproportionate measures in the light of the interests involved.[85] More recently, Belgian[86] and Greek[87] courts have also sanctioned abuse of moral rights by architects. Along the same lines, the notion of abuse has been used in Greece as a balancing tool between conflicting interests as in the case of the unjustified refusal of a co-author to authorize the commercial exploitation of a song.[88] With a similar aim, the lack of proportionality and fairness in the conduct led the court to define as abusive and thus dismiss the claim of the author, who had waited too long to challenge the validity of a copyright assignment, and consequently induced the defendant's reliance on the stability of the agreement.[89]

French courts seem reluctant to develop a notion of abuse of copyright that could go beyond the narrow provisions of the CPI, and this regardless of the fact that the *Cour de Cassation* has confirmed the validity of the theory several times, also outside the borders set by the Code. In the *Chiavarino* case,[90] the Court qualified as abusive the use of moral rights to obtain remuneration, with a clear diversion of the rights from their legislative function. Between the lines, the judicial resolution required authors' rights to be exercised with reasonableness and proportionality, and used their normative rationale as a tool to reestablish the copyright balance, without the need to resort to external concepts such as public interest.[91] The same arguments returned, with regard to economic rights, in *Sté TF1 v. Sté Editions Montparnasse*,[92] where the Court of Cassation defined the plaintiff's contractual practice as not "*l'exercice normal des droits exclusifs (…) mais un abus de ce droit*".[93] The concept of "normality", which also recurs in the three-step test, hints at the function

[83] Jena CA, MMR 2008, 408 [413]. For a comment *see* Dreier and Specht (2012), p. 437 ff.

[84] In Supreme Court, 20 October 1995, NJ 1996, 682, §3.10.

[85] As in Amsterdam Court of Appeal, 26 July 2001, BR 2002, 536; Leeuwarden Court of Appeal, 17 March 1999, BR 2000, 71; Leeuwarden Court of Appeal, 17 March 1999, BR 2000, 71; Pres. Rb. Leeuwarden, 29 November 1994, BR 1995, 443; Rb. Assen, 17 November 1992, AMI 1993, 191; Rb. Middelburg, 28 August 1992, KG 1992, 307.

[86] The rule is present in Belgium as well (for reasons of safety, hygiene or fitness (Brussels Civil Court), 22 January 1997, A&M, 1997, p. 391). *See also* Buydens (2001), p. 429 ff.

[87] Multimember Athens Court of First Instance, No. 2028/2003; One-Member Court of First Instance of Athens, No. 276/2001; Multimember Thessaloniki Court of First Instance No. 13300/2004.

[88] One-Member Athens Court of First Instance No. 36247/1999. *Cf.* Kallinikou (2012), p. 469.

[89] Court of Cassation, No. 1009/2007.

[90] Supreme Court, 1st Civil Division, 14 May 1991, 89-21.701, 151 RIDA 1992, pp. 273 ff.

[91] Caron (1998), p. 20.

[92] Supreme Court, Commercial Division, 26 November 2003, 00-22.605, Bulletin 2003 IV, No. 178, p. 195.

[93] *Id.*, at 197.

of the right as a paradigm for the evaluation of its exercise, tailored to the market sector involved.[94]

One of the most recent and well-reasoned decisions using the general clause of abuse of right to sanction the anti-social exercise of authors' rights comes from Spain. In *Megakini.com v. Google Spain*,[95] where the plaintiff aimed to prevent Google from reproducing snippets of its website in the search results on the ground of copyright infringement, and claimed infringement damages, the Tribunal Supremo used the three-step test (Art. 40bis of the Spanish intellectual property law (TRLPI)) as a means to incorporate within copyright law general clauses taken from the civil code, such as the principle of good faith, the prohibition of abuse of right (Art. 7.1 and 7.2 of the Spanish Civil Code) and the doctrine of the *ius usus inocui*, borrowed from real property, which allows the harmless use of the good by non-owners when necessary to prevent the abusive exercise of property rights. The Tribunal read the terms "normal" exploitation and "legitimate" interest through the lens of abuse and good faith, and concluded that not only did the test not ban the applicability of the *ius usus inocui* doctrine to allow Google's reproduction of snippets and cache copies, but Megakini's claims had to be rejected as abusive anyway because they were neither grounded in a legitimate interest of the author nor were they necessary to defend the normal exploitation of the work. As a general note, the Tribunal Supremo pointed out that the closed nature of the list of exceptions could not be read so rigidly as to create distortive results, and copyright law could not be diverted from its function insomuch as to disproportionately harm third parties.[96]

Although the doctrine of abuse has gained some momentum in the past decades, especially in response to the increased degree of protection and scope of copyright law, it still faces reluctance and skepticism in several national jurisdictions.[97] In fact, the continental model of authors' rights contemplates a bundle of rights that are commonly considered absolute and discretionary, two features that are inherently incompatible with the notion of abuse/misuse,[98] as is the case for any other (absolute) personality right. Such a reading is further reinforced by the restrictive interpretation of the exceptions and limitations and the three-step test.[99]

This reluctance is particularly visible in the field of copyright contracts, where it is even rarer to find precedents that use general clauses such as good faith and fairness to correct imbalances. Also, in the case of standardized contracts like EULAs, where consumer protection could come into play, there is little or no trace of the application of unfair terms or unfair practices rules.[100]

[94] *Ibidem.*

[95] *See supra* note 38. *See* the comment of Xalabarder (2012), p. 162 ff.

[96] *Id.*, fund. 5, ruling #8.

[97] *Cf.* Caron (1998), pp. 10–14.

[98] With regard to the terminological selection and the differences between international, EU and US sources *see* Hilty (2015), p. 380.

[99] *See supra* notes 32–36 and related text. In favor of a use of the test as constraint *see* Lucas (2010); Cohen Jehoram (2005).

[100] On the weakness of consumer protection in the digital environment *see* CSECL-IViR-ACLE (2001, particularly pp. 275 ff).

In contrast, but not surprisingly, the area in which the notion of abuse recurs more often is competition law. Here the focus is not on the abuse of copyright as a subjective right, but on a dysfunctional exercise of exclusive rights that results in an abuse of dominant position. Along these lines, several decisions in Germany[101] and France[102] qualify as abusive cases of refusal to license (especially if the work is informative or functional), obstacles to interoperability or reverse engineering, and generally uses directed at falsifying competition. Similarly, copyright statutes make explicit reference to competition issues in Spain,[103] with particular regard to software, and in the Netherlands, where a refusal to license may constitute an abuse of dominant position.[104] In the UK[105] competition rules also often feature in copyright cases, both as a claim and as a defense.[106] Needless to say, these decisions are often inspired by the example set by the EU.

3.2 The EU Experience

As already discussed in Part 2, the concept of abuse of copyright has emerged between the lines of several ECJ decisions. In order to draw a line and systematize the national epiphanies with the answers provided at the EU level, it is now useful to look back at those cases, with a more specific focus on the definitions that the Court offers of dysfunctional conducts and, consequently, of the functions of copyright.

The precedents can essentially be split into two groups, the first one dealing with the interplay between copyright and fundamental freedoms, and the second with the clash between copyright and competition law. Not unexpectedly, the market-based nature of the two subjects has heavily influenced the content and structure of the notions of abuse, misuse and functions of copyright that emerge from the Court's case law, coloring them with very specific features.

The first time that the ECJ placed emphasis on the rightholder's behaviors was in its landmark *Deutsche Grammophon*[107] decision, where the Court initially introduced the doctrine of "specific subject-matter" of exclusive rights, stating that the protection of copyright vis-à-vis fundamental freedoms is limited to the core of the right(s).[108] This notion had the merit[109] to shift the focus towards the use, and

[101] The most relevant is German Federal Supreme Court NJW-RR 2009, 1047 [1049].

[102] As in the database case Supreme Court, Commercial Division, 4 December 2001, Bulletin 2001, IV, no. 193 p. 185. *See also* Carre (2012), pp. 342–343.

[103] *Cf.* the overview of legislation and case law provided by Xalabarder (2012), pp. 972–973.

[104] Article 24 of the Dutch Competition Act. *See* Gravenhage Court of Appeal, 30 January 2000, AMI 2000, p. 73; Administrative High Court for Trade and Industry, 8 January 2003, LJN AF2794. *Cf.* Guibault and van 't Klooster (2012), pp. 714 ff.

[105] In fact, the UK Copyright Act contains a direct reference to competition law (Sec. 144).

[106] *Attheraces Ltd v. British Horseracing Board Ltd* [2007] ECC 7 (CA). *See also Murphy v. Media Protection Services Ltd* [2008] FSR 33, and *Football Association Premier League Ltd v. QC Leisure* [2008] FSR 22.

[107] *Deutsche Grammophon*, *supra* note 9.

[108] *Id.*, para. 13.

[109] Albeit criticized by commentators as underdeveloped, cryptic, valueless or wrong. *See* the literature review by Ramalho (2016), pp. 68 ff.

potential abuse, of entitlements that had always been defined as sacred and absolute, especially in the continental tradition. Its subsequent development has gone hand in hand with that of the essential function doctrine, with a turn that has intimately connected the scope of exclusive rights with the functions they are designed and granted to perform.

This link is particularly visible in *Coditel I* and *Coditel II*,[110] where, as already explained, the Court tailored the definition of the essential function of copyright to the characteristics of the cinematographic sector.[111] In this sense, the Court implicitly qualified as functional to the realization of copyright goals – thus not abusive – a conduct that allows the rightholder to obtain a reasonable economic return from the commercialization of her work. A very similar argument appears in *Metronome Musik*.[112] Here, in rejecting a claim of incompatibility of the Rental Right Directive with the freedom to pursue a trade in the rental business, the Court qualified as the specific subject matter of copyright the guarantee "that authors and performers can receive appropriate income and amortize the especially high and risky investments required particularly for the production of phonograms and films",[113] since "in the absence of such a right, it is likely that the remuneration (…) would cease to be properly guaranteed, with inevitable repercussions for the creation of new works".[114]

In general terms, the ECJ identifies the core of copyright in "the protection of the moral and economic rights", and more specifically of paternity, integrity, performance and reproduction,[115] which entails the commercial marketing of the protected work, *inter alia* by means of license agreements.[116] However, economic rights are not unlimited in reach. Their scope is circumscribed by what is necessary for them to perform the function for which they are granted. In this sense, the Court is clear in limiting the protection to the normal exploitation of the work. It implicitly identifies the function of economic rights as that of ensuring only an "appropriate remuneration"[117] or a "satisfactory share" of the market,[118] as no legal source suggests the inclusion of the possibility to extract the maximum profit possible from the work.[119] This is where the border stands between use and abuse, although this

[110] Case C-262/81 *Coditel v. CinéVog Films II* (*Coditel II*) [1982] ECR 3381.

[111] *Coditel I*, *supra* note 12, paras. 13 and 14.

[112] Case C-200/96, *Metronome Musik GmbH v. Music Point Hokamp GmbH* [1998] ECR I-1953, referring to *Musik-VertriebMembran*, *supra* note 11, paras. 10 and 15, and Case C-58/80 *Dansk Supermarked v. Imerco* [1981] ECR 181, para. 11.

[113] *Metronome*, para. 22.

[114] *Id*., para. 24.

[115] Case 158/86 *Warner Brothers and Another v. Christiansen* [1988] ECR 2605, para. 13.

[116] In this sense *see Phil Collins*, *supra* note 8, para. 20, *Musik-Vertieb Membrane*, para. 12, and *FAPL, supra* note 15, para. 107.

[117] *FAPL*, para. 108. The same language is used by *UsedSoft*, *supra* note 13, para. 63.

[118] *Warner Brothers*, paras. 15–16, and *Metronome Musik*, para. 16.

[119] This may be defined as a consolidated principle, clearly expressed in *FAPL*, para. 94; *Coditel I*, paras. 15–16; *Musik-VertriebMembran*, paras. 9 and 12; *Phil Collins*, para. 20; Case C-115/02 *Rioglass and Transremar* [2003] ECR I-12705, para. 23 and the case law cited; Case C-222/07 UTECA [2009] ECR I-1407, para. 25 and the case law cited.

terminology is never employed to address the issue. In fact, to read such language one had to wait until the development of the copyright/competition case law.

At the outset, the application of antitrust rules in the field created a wave of doctrinal skepticism because it had always been commonly accepted that, unlike in the case of patents, copyright law leaves little room for anticompetitive behaviors, due to the particular nature of its subject matter. Yet, beginning in the 1990s when copyright protection extended to technical or functional works and collections of data, losing flexibility in favor of a more proprietary, patent-like and industrial-oriented approach, antitrust complaints became more and more common.

The contradiction inherent in the intervention of competition rules over a monopoly purposefully created by law required the Court to specify that the mere existence of an IPR did not create a dominant position, nor its use an automatic abuse.[120] To the contrary, Art. 82 EC (now Art. 102 TFEU) could only be invoked in "exceptional circumstances",[121] which the ECJ tailored to the specificities of copyright in *Magill*. A refusal to license by a dominant position holder constituted an abuse if it prevented, without an objective justification, the release of a new product for which there was a potential consumer demand, blocking the entry of competitors into a secondary/downstream market, which the rightholder wanted to reserve for herself.[122] Significantly, while the first element of the test looked at consumer welfare, as is typical for competition law, the second and third prongs used concepts linked to the specific subject matter and essential function of copyright. They pointed at the borders beyond which the exercise of exclusive rights lost the aura of necessity and proportionality concerning their goals, leading to an imbalance between harms and advantages that demanded external intervention. In the following years, with a series of decisions culminating in *IMS Health*,[123] the Court reinforced the already strong market emphasis by requiring that the product or service refused was essential for the potential licensee's business, absent any potential substitute.

Although the intervention of competition rules may indeed be inconsistent with the ontology of IP law, the two bodies of law share the goal of incentivizing innovation and fostering the development of an efficient market for the creation and dissemination of new works.[124] This is the reason why the ECJ strove to formulate a test that could ensure the fulfillment of these aims and the preservation of the functions of both disciplines. To this end, prioritizing the criterion of the

[120] The approach dates back in time. *See* case C-24/67, *Parke Davis v. Probel* [1968] ECR 55; *Deutsche Grammophon*, para. 16; case C-247/86 *Alsatel v. Novasam* [1988] ECR 5987, para. 20.

[121] The first attempts to define such exceptional factors very much copycatted the content of Art. 82 EC. Case C-238/87, *AB Volvo v. Erik Veng* [1988] ECR 6211; case C-53/87, *CICCRA and Maxicar v. Renault* [1988] ECR 6039. *See also* Schmidt (2002), p. 214.

[122] *Id*., paras. 54–56.

[123] *IMS Health*, *supra* note 18, anticipated by Case T-504/93, *Tierce Ladbroke SA v. Commission*, [1997] ECR II-923, and Case C-7/97 *Oscar Bronner GmbH & C. KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co KG & Mediaprint Anzeigengesellschaft mbH & Co KG* [1998] ECR 7791. *Cf*. Derclaye (2003) and her ample bibliography.

[124] Broadly on the point Guibault (1997), p. 11, and Rowland and Campbell (2002), p. 24 ff.

development of a new product was fully justified, since it was directed at blocking a behavior that, by hindering creativity and the distribution of its products, runs against both the goals of competition law and the incentivizing function of copyright law. In contrast, forcing a copyright holder to license her work to a copycat competitor would have eliminated the incentive offered by the legal monopoly, without generating any added value.

These considerations, together with the structural difference between abuse of copyright (as a subjective right) and abuse of a dominant position through the exercise of copyright, explain why the criteria used to determine the presence of a dysfunctional conduct in copyright/competition law cases share little or nothing with the variables considered, *inter alia,* in copyright/fundamental freedoms cases. A dysfunctional exercise of copyright that results in an abuse of dominant position requires criteria of assessment that are necessarily sector-specific, since they are first of all directed at determining the presence of a market dominance that goes beyond the IP monopoly conferred by law. Such factors cannot be similar to those used for cases of pure, direct abuses or misuses of subjective rights. Yet, although the sector remains outside the scope of a general doctrine of *stricto sensu* abuse of copyright, the ECJ's case law on the copyright/competition law interface remains relevant for it shows, once again, how the notion of abusiveness revolves around the functions that the institution is meant to perform, bringing forward the idea that copyright may be subject to limitations that go beyond what is explicitly provided by law when its exercise generates distorted effects. More generally, this suggests that any attempt to define a general doctrine of copyright misuse should first carefully define its scope, in order not to encounter dogmatic fallacies; then it should adequately reflect the characteristics of the area of law touched by its intervention, since the details of the operation of the test of abusiveness may require adjustments on the basis of the functions of the two (or more) bodies of law involved and of the way they interact. Suffice it to compare, in this sense, the different manifestations of copyright misuse in consumer contracts versus, for example, in the context of court proceedings.

More recently, the focus on dysfunctional conducts has emerged in decisions that led to highly innovative results, such as *UsedSoft v. Oracle*,[125] where – as seen in Part 2 – the Court abandoned the formalistic reading of Art. 4(2) Directive 2009/24 in favor of an economic and functional evaluation of Oracle's business strategy and its coherence with the systemic goals of copyright.[126] Exhaustion – *Usedsoft* reiterates – may be excluded only to the extent necessary to pursue the core aims of copyright, which implies that the legal system protects the rightholder only so long as she exercises her exclusive rights in a manner consistent with the functions for which they have been granted. By banning the attempt to control a secondary market, the ECJ suggests again, this time *a contrario*, that the function of copyright is not that of ensuring the maximum profit possible, but that of guaranteeing an appropriate remuneration, capable of being enough of a reward for the creative effort, and enough of an incentive for future creative endeavors.

[125] *UsedSoft*, *supra* note 13.

[126] *Id*., paras. 62–63, following *Metronome Musik*, para. 14; case C-61/97 *FDV* [1998] ECR I-5171, para. 13, and *FAPL*, para. 106.

On this basis, a joint reading of the European and national experiences may constitute a fertile ground to further elaborate on the notion of abuse/misuse of copyright, and to verify whether and to what extent the doctrine may bring a meaningful contribution to EU copyright law and the search for its much needed consistency and balance.

3.3 Connecting the Dots

The emersions of the notion of abuse/misuse in the field of copyright depicts a highly scattered framework, where a number of tools intervene to sanction rightholders' behaviors, which, without formally breaking any norm but just exploiting the exclusive rights conferred on them by law, drive the implementation of copyright rules towards imbalanced and distortive results. Their sources range from copyright statutes and competition rules to general private law clauses, and their focus is similarly differentiated: here it is the dysfunctional or harassing presentation of claims in court; there it is the stipulation of contracts with the clear intent of expanding the scope of exclusivity and limiting competition; in other cases, it is the unreasonable exercise of moral rights, which hinders the circulation or use of the work. Each of these tools aims at preserving different interests against copyright enforcement: competitors and consumer welfare come into play in the case of competition rules or fundamental freedoms; the general interest in access to knowledge, incremental creativity and development of new creations finds its voice through those provisions or court decisions limiting the enforcement of moral rights or rejecting preposterous judicial claims. The remedies are also quite diverse, for they oscillate from the mere defense provided by general civil law clauses to independent causes of action in the case of violation of competition rules, or that of copyright rules sanctioning the abuse of moral rights. And the list may continue, as well as the potential classification criteria.

Yet, it is not impossible to draw a *fil rouge* that connects all of the responses in a more systematic fashion, and finds their minimum common denominator. In fact, the targeted conducts can be classified along a spectrum that ranges from rare cases of pure abuse, which entail the willful causation of damages to others, to different shades of misuse, darker or lighter depending on the degree of departure of the behavior from the function(s) of the right exercised, the reasons why it has been conferred, and the interest it is meant to protect. The focus on the functions of copyright characterizes the ECJ case law; it can be read between the lines of the injunctions denied before national courts; and it represents one of the main rationales that commentators use to explain the provisions on abuse contained, *inter alia*, in the French CPI. What is more challenging, though, is to identify them, as the scarce legislative references and the often cryptic judicial responses make their definition fragmented and equivocal.

In an attempt to sketch a minimum baseline from the indications provided by national and EU courts, the function of moral rights may be identified in the protection of the author's honor and reputation, and this justifies the limited powers offered to the heirs, or the limitations to the architect's caprices. Economic rights are granted to ensure an "adequate" or "appropriate" remuneration from the exploitation of the

work, not the largest profit possible, especially when in detriment to the interests of other subjects. The exclusivity has the function of providing a reasonable incentive for authors to keep on creating, that is, to guarantee the possibility to live on the returns on their creations. In addition, the granting of economic rights is supposed to ensure the development of an efficient market for the creation and dissemination of new works.[127] In any case, as the ECJ case law specifies, the function(s) of copyright – and thus the scope of exclusive rights – is subject to adaptation in response to the characteristics of the work and the market sector involved.

EU copyright law lacks a provision like the IP clause of the US Constitution,[128] which clearly functionalizes IPRs to the pursuit of higher goals, such as the progress of science and useful arts. However, the preambles of its Directives and the texts of the *travaux préparatoires* provide sufficient references for courts to elaborate on, which go beyond the call for a "high level of protection"[129] that has long been emphasized as the main goal of harmonization, which has transformed copyright to an "end it itself".[130] As a first step, the functions of EU copyright should be distinguished from the goals pursued by copyright harmonization. While the two surely influence each other, in fact, they do not fully overlap. This distinction helps to put aside the internal market rhetoric, and to focus on the pure functions of exclusive rights.

Traces of the continental model emerge every time the EU legislator sets as a function of copyright that of providing an "appropriate remuneration"[131] to authors as the "reward"[132] for their creative works, to safeguard their dignity and independence.[133] This is often coupled with the goal of securing a "fair" return on investment for producers and the like, and for all rightholders to derive "a legitimate profit" from the exercise of their economic rights.[134] The adjectives used are already indicative of the rejection of a model of absolute protection, as correctly emphasized by the ECJ. In addition, the Directives recurrently point out the functionalization of copyright to broader goals. They can be grouped around two intertwined nodes influencing each other: on the one side, the achievement of a sustainable level of intellectual creation,[135] and of sufficient investments to finance the creative industry, which is responsible for the production and distribution of creative works, but it also contributes to growth and job creation;[136] and on the other

[127] Broadly on the point Guibault (1997), p. 11, and Rowland and Campbell (2002), pp. 24 ff.

[128] Article I, Sec. 8, cl.8.

[129] The reference makes its first appearance in Recital 9 InfoSoc, and is later reiterated, *inter alia*, by Recital 21 IPRED, Recital 11 of the Term Directive (2006/116/EU), and Recital 14 of the Orphan Works Directive (OWD, 2012/28/EU).

[130] In these terms Peukert (2011).

[131] OWD, Recital 5.

[132] Recently reaffirmed by the Commission's Communication "Towards a modern, more European copyright framework", COM (2015) 626 final, p. 2.

[133] InfoSoc, Recital 11.

[134] IPRED, Recital 2.

[135] Term Directive, Recital 11.

[136] Software I Directive (91/250/EEC), Recital 2; Database Directive (96/9/EEC), Recitals 9, 11–13; Rental I Directive (92/100/EEC), Recital 8; Term Directive, Recital 11; Resale Directive (2001/84/EC), Recitals 3, 11, 13; InfoSoc, Recitals 2 and 4; IPRED, Recital 1.

side, non-economic functions[137] such as "the widest possible dissemination of works",[138] also worded as access to knowledge or culture,[139] coupled with cultural goals such as the promotion of cultural expression, identity and diversity.[140] The validity of this interpretation is confirmed by the most recent proposal for a Directive on Copyright in the Digital Single Market,[141] which summarizes the goals of copyright around the same two pillars (Recital 2). Significantly, the cultural goals are not functions attributed to exceptions and limitations, but to the granting of exclusive rights. This confirms that EU copyright has a social function, and that the rights it confers should be exercised accordingly to receive full protection vis-à-vis other interests and rights.

While it is up to the legislator to make sure that copyright rules are capable of pursuing their declared functions, the presence of unregulated (or under-regulated) areas is always prone to give rise to dysfunctional conducts, which can be controlled only by courts on a case-by-case basis. The history of national and EU copyright shows a fragmented, often ineffective approach to the problem, yet with responses that share remarkable common traits. Despite the abusive, dysfunctional nature of the conducts involved, however, the doctrine of abuse of copyright emerges only in a limited number of decisions, showing the scarce judicial confidence in its effectivity and features.[142] Such a skepticism is possibly caused by the fact that the theory appears hazy, and lacking a clear independent identity. To achieve it, and to benefit from its untapped potentiality, two elements are required: on the one hand a general theory that builds on the status quo in order to define the main constituting steps of a foundational abusiveness test, able to work as a general residual clause; and on the other, remedies that go beyond a mere defense in the limited instances regulated by Art. 3.2 IPRED. Only once this independence is achieved will it be possible to judge whether or not the doctrine may play any useful role in the EU copyright arena, and under what terms.

4 A New EU Copyright Misuse Doctrine

The idea of introducing a general clause on abuse in copyright law is certainly not new. In its relatively long doctrinal history, it has followed the same ups and downs as the general theory of abuse of right in private law. The reasons for its failure are mostly related to the difficult evidence required and the weak remedies offered. Parties generally find it hard to meet the burden of proof of the rightholder's intent

[137] Explicitly defined in this terms by the Commission's Communication "The management of copyright and related rights in the internal market", COM (2004) 261 final, p. 6.

[138] IPRED, Recital 2.

[139] OWD, Recital 20.

[140] InfoSoc, Recitals 12 and 14; CMO, Recital 3; OWD, Recitals 18 and 23.

[141] Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market – COM (2016) 593 final.

[142] This happens despite its resemblance to an equitable instrument. *See*, in this sense, Hilty (2015), p. 380.

to damage, or of the prejudice they have suffered, per se and compared to the rightholder's advantage. In fact, the lack of criteria to determine the function(s) of the right makes it even more difficult to demonstrate that the rightholder's conduct has had effects that depart from the institutional objectives of copyright.[143] In addition, an abusive conduct will seldom give rise to an independent cause of action, while its normal use will be that of a mere defense against infringement. Commentators add other critiques, such as the incapability of the doctrine to guide the judicial balance with clear criteria that can help foresee its outcome.[144] Those who also oppose it on dogmatic grounds point out its incompatibility with the three-step test because the abuse would operate as an open-ended, judge-made exception in disguise.[145] While the last objection may be rebutted by noting that the doctrine of abuse does not behave as an exception, but as a balancing tool that defines the scope of exclusive rights on the basis of their functions, the other critiques may be tackled only by defining in greater details the elements of the test and the range of remedies available in case of misuse.

As already explained above, the doctrine this article proposes does not aim to substitute, but rather to complement existing solutions, by acting as a general clause that builds on the criteria developed by the ECJ and national courts to tackle dysfunctional conducts. More generally, and also with regard to the dogmatic construction of the notion of abuse in some of the Member States, the most proper label to define it would be that of copyright misuse, to emphasize the coverage of a broader range of conducts, which goes beyond the strict borders of purely illicit or illegitimate behaviors (*contra ius* and *non iure*).

On the basis of the EU and national "common core" of functional approaches traced in Part 3, an instance of copyright misuse would be found in case of (a) an exercise of a moral or economic right; (b) that constrains or prejudices the qualified interest of a counter-interested party; (c) in a disproportionate manner; and (d) without an objective justification based on the function of the right (reasonableness). Let us briefly elaborate on each of the four cumulative prongs.

Prong (b) summarizes almost all of the instances of dysfunctional use of copyright as it covers a range of potential effects of the rightholder's conduct (from mere limitations to stronger constraints and damages) on the "qualified interest" of another subject. The concept of "qualified interest" is meant to cover both subjective and objective rights, thus referring not only to the clashes between copyright and (other) fundamental rights and freedoms, but also to cases where the exercise of a moral or economic right conflicts with public goals or the public interest that are pursued – at that time and circumstance – through the protection of the contingent interest of a specific individual.[146]

[143] Strowel (2008), pp. 296–298.

[144] *See*, *e.g.*, Geiger (2007), p. 63, who argues that using fundamental rights as balancing tools brings the advantage of providing a hierarchy of rights and values, which is missing in the doctrine of abuse of right.

[145] In the national scholarships, an example comes from Benabou (2002), pp. 83–84.

[146] For a definition of objective right and the implications of the theory for copyright exceptions and limitations *see* Guibault (2002), p. 269. On the general theory *see* Gervais (1961), pp. 246–247.

The key part of the assessment is represented by prong (c), which introduces a proportionality test that, as in national judicial precedents, enquires into the balance between the benefit gained by the rightholder and the harm (or, better, negative effects) caused by her conduct.[147] In order to provide transparent and stable criteria, such an assessment – which we may label "absolute" – is coupled with the "relative" evaluation of prong (d), which completes the test by adding the filter of reasonableness of the behavior, measured in objective terms. This last step weighs the proportion between harms and benefits by limiting the latter to what the rightholder can expect from a normal exploitation of the work, defined on the basis of the function(s) of the right. A conduct that is disproportionate in absolute terms will not require any further investigation. On the contrary, a conduct that passes the proportionality test can still be found to be unreasonable after limiting the rightholder's benefits to what she could have extracted from the work according to the function(s) of the right exercised. The more the aim of the rightholder's conduct departs from it, the less reasonable and justifiable the conduct will be.

The shift of the focus towards the functions of exclusive rights, as the key measure for an assessment that uses a clearer proportionality test and a straightforward notion of reasonableness, may represent the most reliable tool to prevent distortions such as those exemplified at the beginning of this study. Moreover, the role of the doctrine as a general clause may assist courts in interpreting general principles and balancing criteria, thus contributing to the internal consistency of the system rather than being an exception to legal certainty – a critique always moved against the notion of abuse of right.[148] For instance, its function-based approach may effectively guide the performance of the proportionality test entangled in the concept of "fair balance", and help to overcome the uncertainties created by Art. 17(2) CFREU and the ECtHR's case law.[149] Instead of being weighed against a generic copyright title, the conflicting right would be balanced with the specific exclusive right at stake, whose scope and protection would be limited to the extent necessary for it to perform its function. The result would be more precise and fact-specific, as the assessment would allow a distinction between different works when defining the breadth of exclusive rights, and examine the reasonableness of private exploitation schemes in light of the characteristics of the market sector involved. Similarly, the doctrine may inspire a balanced application of the three-step test, by linking the notion of "normal exploitation" to the actual function of the economic right(s) at stake, and assessing the legitimacy of the copyright owner's interest on the basis of the coherence of its conduct with the function(s) the same right(s) are called to perform. This would allow value-laden considerations to be taken into account that go beyond the classic impact-on-the-market argument, which has long dominated the interpretation of the test as a strict

[147] On the role of the proportionality principle in this context *see* Strowel (2008); Van Gerven (1992), p. 305.

[148] *See* Sayde (2014), pp. 167–214.

[149] On the interpretative problems created by Art. 17.2 ECFR *see*, e*x multis*, Griffiths and McDonagh (2013), Geiger (2009). Similarly, with regards to the case law of the ECtHR on the application of Art. 1 of the First Protocol ECHR to intellectual property, *see* Helfer (2008), pp. 11 ff.

constraint on the application of exceptions, with unidirectional, detrimental effects on the outcome of the copyright balance.

The doctrine finds ample legal ground in Arts. 52 and 54 CFREU, which, respectively, prohibit the abuse of rights and provide guidelines on the interpretation of rights and principles contained in the Charter, such as the proportionality principle. At the level of secondary EU law, its introduction responds to the Member States' obligation to prevent abuses in IP enforcement, and contribute to the pursuance of the "fair balance" required by several copyright Directives.[150] Yet, the doctrine takes a step forward compared to these starting points. It does so if compared to Art. 54 CFREU, because its application goes beyond the case of destruction or excessive limitations of the Charter's rights and freedoms caused by the exercise of another fundamental right. Similarly, it builds on the ECJ's doctrine of abuse of law, but puts less emphasis on the intention to unduly obtain an advantage from EU rules by manipulating them,[151] and more on the dysfunctional nature of the exercise of rights.

Thanks to the broader systematic reordering it entails, the new doctrine of copyright misuse may be linked to a broader range of remedies than those usually stemming from the application of traditional abuse of right clauses. First and foremost, the doctrine would help in the implementation of Art. 3.2 IPRED, but would also broaden the range of conducts that justify the dismissal of a formally grounded claim, covering not only claims that are abusive per se, but also actions requesting protection for dysfunctional conducts classifiable as misuse under the four-prong test. Forms of abuse not covered by any legislative provision may still constitute a cause of action every time that tort law rules apply, that is when the rightholder's behavior is intentionally directed to cause harm without gaining a minimal objective advantage, when a real damage is effectively proven. In addition, it is theoretically possible to envisage the rise of independent causes of action in other unregulated cases of misuse. A paradigmatic example may come from the case of double payment for the private copy of a protected work,[152] where a claim for restitution of the second undue payment may be envisaged when the "fair balance" between the harm caused to authors and the fair compensation[153] is distorted by the rightholders' restrictions via TPMs and contracts, imposed despite the existence of a centralized public levy.[154] Independent causes of action may arise also in the context of copyright contracts. As happened in the *UsedSoft* case, a functional interpretation of the agreement may constrain freedom of contract in order to make contracts consistent with copyright rules and goals. Once the doctrine is used to interpret the general clauses provided by national contract laws and EU consumer

[150] As in the 11th Recital of the InfoSoc Directive.

[151] Case C-110/99, *Emsland Starke GmbH v. Hauptzollamt Hamburg-Honas*, [2000] ECR I-11569, paras. 52–54.

[152] *See supra* note 64.

[153] *See* Case C-467/08 *Padawan v. SGAE*, [2010] ECR I-55.

[154] The presence of TPMs may influence the amount set as a levy by Member States, as also stated in *Copydan*, *supra* note 64.

protection law, such as the concept of "unfairness",[155] it will be possible to sanction any clause that entails a copyright misuse through the remedies provided by national laws for unfair terms, violation of the duty of objective good faith, and such like. Along these lines, the doctrine would also help in tackling the issue of the contractual overriding of exceptions and limitations, when a dysfunctional contractual exercise of copyright disproportionately and unreasonably constrains the counterparty's fundamental right(s).[156] In fact, as already explained, the clause would offer transparent and uniform criteria to detect misuses, leading the balancing exercise to consistent national outputs.

5 Conclusions

In recent decades, the development of EU copyright has had a number of pathologic effects, mostly due to the expansion of exclusive rights and their public and private enforcement, and has opened the door to several abusive conducts of copyright owners without providing adequate countermeasures. In fact, the answers of EU law to rightholders' dysfunctional behaviors, as shown in Part 2, have been fragmented and mostly ineffective, while the contribution of national courts – aside from remarkable exceptions – has been negligible, due to the inconsistencies created by the interaction of multilevel sources in the construction of the EU copyright model.

Despite the type of behaviors involved, legislators, courts and scholars have almost completely neglected the doctrine of abuse of right as a potential response, mainly due to its incompatibility with the traditionally discretionary and absolute nature of authors' rights. Yet, the brief analysis conducted in Part 3.1–3.2 has shown a countervailing trend, where the notion of abuse of copyright emerges between the lines of several ECJ decisions and national courts' precedents. This paradigm shift could happen as a consequence of the market-oriented and industry-based inspiration of EU copyright law, which has caused the individualist and sacred nuance of authors' rights to fade away, leading towards a conceptualization of copyright that is now open to admit the possibility of misuses.

Even if fragmented, these responses share a common denominator, which allows them to be classified along a *fil rouge* in a systematic fashion (Part 3.3). However, their scarce number proves the little (or no) judicial trust in the capability of the doctrine to cure the distortions affecting contemporary copyright law. The paper identifies the reason for this skepticism in the fact that the theory lacks a clear independent identity, because it provides neither a generally applicable test of abusiveness nor a set of remedies that goes beyond the mere defense against infringement claims. To repair these flaws, and in the belief that the doctrine of copyright misuse could be of great help in tackling most of the dysfunctional

[155] Directive 93/13/EEC on unfair terms on consumer contracts.

[156] As it may happen, for instance, in the case of a contractual restriction of the reproduction of works for purposes such as criticism, comment, news reporting, scholarship or research. *See* Guibault (2002), p. 265. This is a theoretical hypothesis that does not take into account the reluctance of courts in such interventions on copyright contracts. On the horizontal application of fundamental rights *see*, *inter alia*, Mak (2008), Brueggemeier et al. (2010).

conducts identified in Part 2, filling the gaps left uncovered by the harmonization process, and achieving more balanced results in the construction of the EU copyright model, Part 4 builds on the lessons learnt from the ECJ case law and the experiences of national courts to propose a four-prong test of abusiveness, incorporating criteria of proportionality and reasonableness inspired by the normative function(s) of exclusive rights; offers new perspectives on potential remedies against misuses; and provides brief examples on the positive impact of the doctrine on the systematization of EU copyright law.

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