Systematizing and rebalancing EU copyright through the lens of property

Caterina Sganga·

For decades now, the propertization of copyright has been viewed as the ultimate cause of many of the distortions affecting contemporary copyright law, and the enclosure of knowledge that has ensued. Although traces of this phenomenon are also present in the EU copyright harmonization, scholars have classified it as a dogmatically incorrect and merely rhetorical use of the proprietary label, hence not worthy of technical analysis, but only of repudiation and correction of its effects. Running counter to majority opinion, and building on a range of positive national examples of application of property rules and constitutional property doctrines in copyright matters, this article proves that property may become the systematic framework needed to solve a wide array of the most compelling balancing and interpretative problems affecting EU copyright law.

· Associate Professor, Department of Legal Studies, Central European University (CEU, Budapest). Email: sgangac@ceu.edu

1. Introduction

For decades now, the propertization of copyright has been viewed as the ultimate cause of many of the distortions affecting contemporary copyright law, and the enclosure of knowledge that has ensued.[1] US scholars link the phenomenon to the extension of the term of protection, the broad reading of exclusive rights, and the strict implementation of the fair use doctrine.[2] EU scholars criticize EU copyright harmonization for being tainted by an inappropriate "property logic", which contaminates the interpretation of copyright rules with a rhetoric of absolute protection.[3] Yet, in contrast to the US, EU courts seem to ignore the phenomenon, while the doctrine only attacks the rhetorical use of the proprietary label, judging it dogmatically incorrect and hence not worthy of technical analysis, but only of repudiation and correction of its effects.[4]

The reasons for such a divergence are manifold, the chief one being the traditional rejection of the notion of intangible property in civil law systems. This approach has never witnessed substantial changes, not even after the Europeanization of the discipline and the modernization of property doctrines. Today, however, the features of EU copyright harmonization suggest that the time has come to reconsider this aversion and "take the propertization of copyright seriously", that is to verify its technical grounds and analyze its consequences. In fact, EU copyright law has leaned towards a high level of protection of rightholders, triggering new

[1] As in J.Boyle, "The Second Enclosure Movement and the Construction of the Public Domain" (2003) 66 Law Contemp.Prob. 33.

[2] For an essential literature overview, see M.Carrier,"Cabining Intellectual Property through a Property Paradigm" (2004) 54 *Duke L.J.* 1 (2004),pp.8-12.

[3] See A.Peukert, "Intellectual Property as an End in Itself" (2011) 33(2) E.I.P.R. 67.

[4] T.Dreier, "How much "property" is there in intellectual property? The German Civil Law perspective", in H.R.Howe-J.Griffiths (eds), *Concepts of Property in Intellectual Property Law* (Cambridge:CUP,2013),p.116

imbalances between copyright and other rights, interests and socio-cultural policy goals. In the most cited manifesto of this maximalist trend, Recital 9 of the InfoSoc Directive,[5] the approach is justified by the proprietary nature of copyright. Art.17(2) CFREU formalizes this qualification, including the protection of intellectual property (IP) under the Charter's property clause, with no mention of the limitations in the public interest provided under Art.17(1) CFREU. Meanwhile, the harmonization proceeds via patchworked interventions, with no attempt to build a unitary framework. Its regulation has departed in many respects from the common core of Member States' copyright laws, creating a hybrid, market-oriented system whose mixed features have increased the risk of interpretative short-circuits, and deprived it of external reference to cure its lacunae and ambiguities. The CJEU's rampant harmonization has intervened only in circumscribed sectors, without tackling the most challenging pitfalls of the system but increasing, instead, its degree of fragmentation, while its cursory references to Art.17 CFREU have reinforced the negative impact of the property rhetoric without bringing any systematic contribution. The most prominent victims of these inconsistencies are the definition of core economic rights, the scope and flexibility of exceptions, and the criteria used to perform the "fair (copyright) balance".

Against this chaotic background, the scarce interest in copyright propertization and the systemization of EU copyright is staggering. While national scholars have engaged in comprehensive reconstructions of the discipline, at the EU level no such effort has ever been properly made, with the laudable exception of the Wittem Code.[6]

[5] Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L 167/10 [InfoSoc].

[6] Wittem Group, European Copyright Code (2010), available at www.copyrightcode.eu. See P.B.Hugenholtz,"The Wittem Group's European Copyright Code", in T.E.Synodinou (ed), *Codification of European copyright law* (The

This paper makes a first attempt to fill this gap. Running counter to majority opinion, it starts from the assumption that property may become the systematic framework needed to solve a wide array of the most compelling balancing and interpretative problems affecting EU copyright law.

Part II sketches the main traits and rationales inspiring the EU legislation and the CJEU's judicial harmonization, highlighting their hybrid nature, weak compatibility with national copyright models, and distortions caused by lack of systematic guidance. Then, it investigates the foundations of the "property logic" critique, commenting on the references to property in legislative and judicial texts and their implications, and shedding light on the cryptic Art.17(2) CFREU. Part III analyses examples of property rules used in national statutes and cases, and of constitutional property doctrines applied in copyright matters, comparing their results with the effects of the property rhetoric on the EU model. This exercise helps dispel the doctrinal oversimplification of the alleged effects of the phenomenon, by distinguishing between rhetorical arguments and technical qualifications when assessing its impact on the drafting and interpretation of national copyright rules. Part IV connects the dots, verifying whether a technical copyright propertization could carry positive systematic and balancing effects on the development of EU copyright law.

Hague:Kluwer, 2012), pp.339-354.

2. EU copyright law: hybrid, unsystematic and affected by a "property logic"

a. The mixed traits and rationales of harmonization

i. In secondary law…

Before the Lisbon Treaty entered into force, the EU did not enjoy any competence in the field of IP.[7] Compelled to find other grounds for its interventions, the legislator linked them to the creation and functioning of the internal market. This has legitimized an economic approach to the subject, characterized by extreme pragmatism, the use of a-technical concepts, and a combination of rules and rationales that merge the main national models with little care for the overall consistency of the system.[8]

From the earliest days, copyright harmonization has been based on the need to strengthen the internal market and remove obstacles to its functioning,[9] incentivize the development and competitiveness of creative industries,[10] create new jobs,[11] and protect and stimulate the

[7] Broadly see A.Ramahlo,*The Competence of the European Union in Copyright Lawmaking*, (Berlin/Heidelberg:Springer,2016), pp.9-13.

[8] In this sense see M.van Eechoud,P.B.Hugenholtz et al.,*Harmonizing European Copyright Law. The Challenges of Better Lawmaking* (The Hague:Kluwer,2009),esp.p.297.

[9] Eg Directive 91/250/EEC on the legal protection of computer programs [1991] OJ L122/42 [Software I],Recitals 4-5; Commission, Green Paper "Copyright and Related Rights in the Information Society",COM (1995) 382 final [GP InfoSoc], paras 11-12; Directive 92/100/EEC on rental right and lending right [1992] OJ L 346/61 [Rental I],Recitals 1-7.

[10] Software I,Recital 3;Directive 96/9/EC on the legal protection of databases [1996] OJ L 77/20 [Database],Recital 9.

[11] GP InfoSoc,paras 16-18; InfoSoc,Recitals 4 and 10.

investments of producers of creative works.[12] Other goals, such as the promotion of access and participation in cultural life,[13] are confined to marginal statements, and the "cultural dimension" of copyright is limited to its role as a tool to recognize, protect and stimulate the production of the common cultural heritage by guaranteeing authors adequate remuneration.[14] With the advent of horizontal directives, the blend of inspirations and hybrid traits becomes more problematic. A utilitarianism closed to the Anglo-Saxon tradition seems to take the lead, justifying copyright as a tool to incentivize creative endeavors and ensure the widest possible dissemination of the work.[15] Yet, the economic approach remains dominant. The discipline aims at providing a "satisfactory return on investment" to industrial rightholders and a "legitimate profit" to individual creators,[16] judged enough to safeguard their independence and dignity.[17] Subjects whose diverging national regulations do not impact on cross-border transactions, like moral rights, are excluded from EU intervention.[18] This approach could suggest a departure from the civil law model, were it not coupled with a continental-style qualification of originality in terms of individual creativity and a provision of exceptions in closed lists.[19] None of these choices is

[12] Software I,Recital 2; Database,Recital 11;InfoSoc,Recital 4.

[13] Commission, "Green Paper Copyright and the Challenge of Technology", COM (88) 172 final,paras 1.4-4.5.

[14] GP InfoSoc,paras 13-15.

[15] InfoSoc,Recital 10.

[16] Directive 2004/48/EC on the enforcement of intellectual property rights [2004] OJ L157/32 [IPRED],Recital 2.

[17] Id.,Recital 10.

[18] InfoSoc,Recital 19, but already in the Database Directive, Recitals 2-3 and 28.

[19] Database, Art.3.1, Software I, Art.1.3. On exceptions, see the closed list of Art.5 InfoSoc. Similarly L.M.C.R.Guibault, *Copyright Limitations and Contracts, An Analysis of the Contractual Overridability of Limitations on Copyright* (The Hague:Kluwer, 2002), pp.17-19; M.R.F.Senftleben, *Copyright, limitations, and the three-step test: an analysis of the three-step test in international and EC copyright law* (The Hague:Kluwer,2004)

justified by continental personality-based arguments, though. Exceptions, for instance, are narrowly defined in order to "reflect the increased economic impact that [they…] may have", and ensure that their fragmentations do not create obstacles to the internal market.[20] Even the "high level of protection" of copyright, linked to its proprietary qualification, is not an adhesion to the continental model, but is explicitly connected to the utilitarian role of copyright as an incentive to creativity, and to the neo-classical economic theory of property as a tool to prevent market failures.[21]

Subsequent documents show a higher consideration of the cultural dimension of copyright, identifying among its functions fostering cultural diversity, identity and heritage, in line with Art.167 TFEU.[22] Also here, however, cultural policy goals are positive by-products of interventions fully directed at pursuing internal market objectives,[23] even in texts that are fully motivated by cultural policies, such as the Orphan Works Directive.[24] At the same time, however, more market-oriented texts refer to collective management organizations[25] and creative industries[26] as promoters and nurturers of cultural diversity; exceptions are justified by

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pp.38-39; A.Strowel, *Droit d'auteur et copyright. Divergences et convergences* (Paris-Bruxelles:Bruylant-LGDJ,1993),p.114.

[20] Infosoc,Recitals 31 and 44.

[21] As in Senfltleben,Copyright,p.31.

[22] Commission, Communication "The management of copyright and related rights in the internal market", COM (2004) 261 final,para 1.1.1.

[23] As in Commission, Communication "Creative content online in the single market",COM(2007) 836 final,p.4; Communication **"**A Single Market for Intellectual Property Rights", COM(2011) 287 final**,**pp.4-7.

[24] Directive 2012/28/EU on certain permitted uses of orphan works [2012], OJ L299/5 [OWD],Recitals 2-3.

[25] Directive 2014/26/EU on collective management of copyright and related rights [2014] OJ L84/72,Recital 4.

[26] Communication "Trade, growth and IP", COM(2014) 389 final, p.10.

a blend of social and internal market rationales;[27] and the extension of the term of protection for performers[28] and the provision of legal tools that guarantee fair remuneration for authors and performers against industrial rightholders are based on economic considerations, with no emphasis given to their individual (social) rights.[29] To complete the picture, licenses are the elective tool to realize both market and non-market goals, such as the digitization and dissemination of out-of-commerce works by cultural heritage institutions,[30] or the cross-border use of protected materials for teaching purposes.[31]

The overlaps of normative justifications, coupled with the cherry-picking of definitions and rules taken by both national archetypes, makes it impossible to classify EU copyright law under any traditional model, and bolsters the negative effects of its lack of systematic order. This is crystal clear from the CJEU's copyright case law, and particularly in its most recent rampant harmonization.

ii. … and in the CJEU's case law

The earliest decisions applying primary EC law to national copyright rules presented a vivid market-based narrative, based on pure economic arguments, to the detriment of conceptual

[27] This is particularly visible in the Proposal for a Directive on Copyright in the Digital Single Market, COM (2016) 593 final [Proposal for a CDSM Directive],Recitals 5,18,19.

[28] In Directive 2006/116/EC on the term of protection of copyright and certain related rights [2006] OJ L372/12, Recital 5.

[29] Proposal for a CDSM Directive,Recitals 40-44.

[30] Id.,Recitals 22-23.

[31] Id.,Recital 17 and Art.4.2.

precision and the consideration of non-market goals.[32] Once the Court was called to interpret secondary law,[33] the utilitarian inspirations of the directives, albeit colored with economic nuances, penetrated through its teleological interpretations. In over sixty cases that the Court has ruled on between 2006 and 2017, this shift contributed to highlighting the hybrid nature of the EU copyright model, the frictions between its rationales and rules, and the incalculable or even distortive effects of its unsystematic harmonization.[34] For our purposes, it will be enough to sketch a few telling examples.

The first case in point comes from the definition of the notion of originality. Despite the voluntary silence of the EU legislator, in *InfoPaq* the CJEU decided to generalize the requirement set by the Software and Database Directives, ruling that a work is protectable if it represents the author's own intellectual creation.[35] Further decisions leaned even more towards the continental model, requiring that the creation reflects the author's personality, thus excluding that investments (or the Anglo-Saxon "sweat of the brow") could alone justify the protection of functional works, in clear contrast with the economic rationales of several directives.[36] However, this position was never justified by any deference towards the continental

[32] Pointed out in the Opinion of AG Gulmann in *Radio Telefis Eirean (RTE) and Independent Television Publication Ltd (ITP) v Commission* (C-241-2/91P) [1995] ECR I-743,paras 36,50.

[33] From *Metronome Musik GmbH v Music Point Hokamp GmbH* (C-200/96) [1998] ECR I-1953,para 22.

[34] As in M.Leistner, "Europe's copyright law decade: Recent case law of the European Court of Justice and policy perspectives" (2014) 51(2) C.M.L.Rev.,pp.559-560; M.Favale,M.Kretschmer,P.L.C.Torremans, "Is There a EU Copyright Jurisprudence? An Empirical Analysis of the Workings on the European Court of Justice" (2016) 79(1) M.L.Rev. 31

[35] *Infopaq International A/S v. Danske Dagblades Forening* (C-5/08) [2009] ECR-6569, paras 34-35,40-42.

[36] E.g. *Football Association Premier League Ltd and Others v QC Leisure and Others* and *Karen Murphy v Media Protection Services Ltd* (C-403-429/08) [2011] ECR I-09083 [FAPL],paras 97-98; *Eva-Maria Painer v Standard*

notion of authorship (which was largely neglected), but by the need to avoid distortions in the internal market.[37]

Similar features characterize the evolution of the criteria used to determine the infringement of the right of communication to the public. From *SGAE* on, the notion of "new public" and the profit-making activity of the alleged infringer play a determinant role,[38] with a functional reading that departs from the continental tradition, for it draws the boundaries of the right by looking at the economic impact of the conduct and not at its technical characteristics, with the only aim of protecting rightholders' economic interests.[39] The market-oriented inspiration and high flexibility of these parameters gave rise to unpredictable and distortive results,[40] culminating in *Svennson*,[41] which stretched Art.3(1) InfoSoc to cover indirect acts such as hyperlinking every time they grant access to a new public compared to the original website. Despite the risk of chilling effects on online behaviors underlying the undue and uncertain expansion of the provision to weblinks,[42] *GSMedia* confirmed the position, trying to strike a

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VerlagsGmbH and Others (C-145/10) [2011] ECR I-12533, paras 42,89; *Bezpečnostní softwarová asociace v Ministerstvo kultury* (C-393/09) [2010] ECR I-13971, para 48; *Football Dataco Ltd and Others v Yahoo! UK Ltd and Other*s (C-604/10) EU:C:2012:115, ruling no.1

[37] Infopaq, paras 40-42.

[38] *Sociedad General de Autores y Editores de Espa*ña *(SGAE) v Rafael Hoteles SA* (C-306/05) [2006] ECR I-11519.

[39] As emphasized in the Opinion of AG Trstenjak in *Società Consortile Fonografici (SCF) v Marco Del Corso*, (C-135/10) EU:C:2012:140, para 25.

[40] Particularly visible in the diverging outcomes of *OSA — Ochranný svaz autorský pro práva k dílům hudebním os. v Léčebné lázně Mariánské Lázně as* (C-351/12) EU:C:2014:110 and *Reha Training Gesellschaft für Sport- und Unfallrehabilitation mbH v GEMA* (C-117/15) EU:C:2016:379.

[41] *Svensson v Retriever Sverige AB* (C-466/12) ECLI:EU:C:2014:76.

[42] Opinion of AG Wathelet in *GS Media BV v Sanoma Media Netherlands BV and Others* (C-160/15) EU:C:2016:644,paras 78-79

balance between copyright and conflicting freedoms/rights through the introduction of additional filtering criteria,[43] such as the infringer's knowledge or reason to know the illicit nature of the content linked – an element presumed if her activity is profit-making.[44] With a functional approach lacking any systematic precision, the CJEU used exogenous factors relevant at most to the application of exceptions (the profit-making nature of the activity), or completely alien to copyright, for knowledge or intention do not even matter to find an infringement. How much this solution could engender distortive effects is visible in *Filmspeiler*, which sanctioned the multimedia player's provision of add-ons that facilitate the finding of freely available websites streaming unlicensed content.[45]

The potential uncontrolled expansion of the right, triggered by the economic-based reading of its scope, is a phenomenon that also characterizes the case law on the right of distribution. After *Peek&Cloppenburg*, which excluded the application of Art.4(1) InfoSoc to the use of a designer chair in a shop window, clarifying that not all the forms of commercial exploitation of a work are covered by copyright and that the scope of exclusive rights should be defined in light of their essential function,[46] *Donner*[47] and *Dimensione Direct Sales*[48] extended the provision to cover all supply chain activities, including preparatory acts, such as offers or targeted advertising, even if they do not materialize in actual sales.

[43] *GS Media*,paras 30-31.

[44] Id.,paras 47-50.

[45] *Stitching Brein v Jack Frederic Wullems* (C-527/15) EU:C:2017:300.

[46] *Peek&Cloppenburg KG v Cassina SpA* (C-456/06) [2008] I-2731,paras 34-35.

[47] *Criminal proceedings against Titus Alexander Jochen Donner* (C-5/11) EU:C:2012:370.

[48] *Dimensione Direct Sales Srl v Knoll International SpA* (C-516/13) EU:C:2015:315.

The hybrid nature of EU copyright is also visible in the field of exceptions. The goal of avoiding internal market distortions and providing a high level of protection to copyright require their strict reading which, however, should not hinder, in a utilitarian perspective, the fulfillment of their goals and the balance between copyright and conflicting interests.[49] Following the same approach, *Deckmyn* harmonizes the notion of parody not, as is usual, to eliminate obstacles to the internal market, but to ensure that the exception can uniformly perform its function of protecting freedom of expression across the Union, by banning any more restrictive interpretations.[50] Similarly, *Ulmer* creates an additional limitation, beyond the exhaustive list of Art.5 InfoSoc, to make sure that the exception provided by Art.5(3)(n) can be properly implemented and perform its role.[51] However, these laudable attempts still clash with the rigid market-based approach to the three-step test (Art.5(5) InfoSoc), interpreted strictly as *ex post* filter to the application of exceptions, to ensure that their operation does not unreasonably prejudice the economic exploitation of the protected work.[52]

Against this fragmented, unpredictable, and dangerously slippery background, the peculiar propertization of EU copyright adds only another layer of complexity to an already challenging puzzle.

[49] FAPL,paras 97-98.

[50] *Johan Deckmyn and Vrijheidsfonds VZW v Helena Vandersteen and Others* (C-201/13) EU:C:2014:2132,paras 17-20.

[51] *Technische Universität Darmstadt v Eugen Ulmer KG* (C-117/13) EU:C:2014:2196,para 43.

[52] *ACI Adam BV and Others v Stichting de Thuiskopie* (C-435/12) EU:C:2014:254,para 25.

b. How much property is there in EU copyright law?

In the four decades of EU copyright history, the few traces of systematic classification converge towards its definition as a property right. They are, however, largely inconsistent, and surely not an example of technical precision.

i. Legislative hints

Copyright is defined as property in the preambles to the InfoSoc Directive and the IPRED, with statements that are too concise to carry little systematic meaning. Recital 9 InfoSoc connects the proprietary qualification to the need to grant a high level of protection to copyright, using the connector "therefore", as if the former would be the effect and not the reason for the latter. Recital 32 IPRED adds only a reference to Art.17(2) CFREU as a further ground for the "full respect" of IP rights. Apart from these formal declaratory statements, the directives do not show any sign of propertization. The fact that EU law has not yet covered areas where property rules have traditionally played a role at a national level reinforces the perception that the propertization of EU copyright law is limited to a rhetorical phenomenon, with no technical implications.

Recently, the proprietary qualification has emerged in preparatory materials, as in the explanatory memorandum to the proposal for a Directive on Copyright in the Digital Single Market.[53] Here, the Commission connects the improved bargaining power of authors and performers to "a positive impact on copyright as a property right, protected under Art.17 [CFREU]", and draws the same connection between the position of other rightholders and the

[53] Proposal for CDSM Directive, p.9.

measures proposed "to improve licensing practices, and ultimately rightholders' revenues".[54] Once again, the declamatory references to property are not followed by any systematic consequence.

ii. Art.17(2) CFREU

Due to its cryptic text, Art.17(2) CFREU creates more interpretative problems than it solves.

Instead of introducing the IP clause under a separate provision, as in several national constitutions,[55] Art.17(2) places its dry "intellectual property shall be protected" in an article devoted to the right to property. This classificatory decision is not unprecedented, as in the 1990s the European Commission of Human Rights declared that IP enjoyed the protection offered by Art.1 of the First Protocol (P1) of the ECHR,[56] and the ECtHR followed the same approach in 2005.[57] However, the Strasbourg Court's extension of the notion of property under the ECHR has never covered only IP, and stretched instead to claims, administrative licenses, and even welfare benefits.[58] Against this backdrop, the Praesidium's decision to limit the addendum of Article 17 only to IP has left commentators puzzled. Both the explanations to the Charter[59] and the comment prepared by the Commission's Network of Independent Experts on

[54] Ibidem.

[55] Inter alia, Portugal (art.42(2)), Sweden (ch.2 s.19); Slovakia (art.43(1)), Slovenia (art.60), Czech Republic (art.34), Russia (art.44(1)).

[56] On copyright, *Aral v Turkey*, App. No. 24536/94, ECHR:1998:0114DEC002456394 (1998, admissibility decision).

[57] *Anheuser-Busch Inc. v Portugal* (2007) 44 EHRR 42;*Melnychuck v Ukraine*,App.No.28743/03 (ECHR 5 July 2005); *Dima v Romania*, App.No.58472/00 (ECHR 16 November 2006).

[58] Noted also by L.Helfer, "The New Innovation Frontier? Intellectual Property and the European Court of Human Rights"(2008) 49 Harvard Int'l L.J. 1 2008, p.17.

[59] Praesidium, Explanations relating to the Charter of Fundamental Rights [2007] OJ C-303/17, p.23.

Fundamental Rights[60] justify the choice with the aim to emphasize the growing importance of IP for the Union, as if its qualification as a fundamental right (to property) could be based on "its economical weight and the activism of the Community legislator" instead of on its nature and objectives.[61] Yet, apart from its debatable basis, Art.17(2) CFREU has given rise to quite the contrary result, for not only has it triggered a heated doctrinal debate, but it has also increased public skepticism against IP rights and their perceived unbalanced protection.[62]

The text of the provision raises several interpretative questions. The emphasis on the right ("intellectual property shall be protected") and not, as in other CFREU provisions, on its subject ("everyone has the right to") seems to turn the spotlight on investments more than on the creator, pointing to a property model deprived of the personality-based traits that characterize the continental propertization of authors' rights.[63] At the same time, the lexeme "shall be protected" and the missing reference to the limitations of Art.17(1) CFREU have raised doubts as to the hierarchical rank attributed to IP, leading some scholars to argue that the Charter had

[60] EU Network of Independent Experts on Fundamental Rights, Commentary of the Charter of Fundamental Rights of the European Union, http://ec.europa.eu/justice/fundamental-rights/files/networkcommentaryfinal_en.pdf, June 2006, pp.165-166.

[61] Praesidium, Explanations, p.23.

[62] In this sense C.Geiger, "'Intellectual Property shall be protected!?'–Art. 17(2) of the Charter of Fundamental Rights of the European Union: a mysterious provision with an unclear scope" (2009) 31(3) E.I.P.R., p.113.

[63] M.Vivant, "L'intérêt général servi par une reconnaissance éclairée des droits de propriété intellectuelle", in M.Buydens and S.Dusollier (eds), *L'intérêt général et l'accès à l'information en propriété intellectuelle* (Bruxelles : Bruylant, 2008), p.204.

imposed not only a negative institutional guarantee for existing entitlements, but a new positive obligation on the EU legislator to broaden the number and scope of exclusive rights.[64]

This interpretation, however, would run counter to the drafting history of the provision, and to the ECtHR's and CJEU's case law, which have never attributed absolute protection to property rights. In addition, other translations of the Charter use the plainer verb "is", and the Praesidium's explanations limit the rhetorical power of the provision by specifying that IP is not a special, absolute form of property, and that Art.17(1) CFREU also applies, "as appropriate", to the second paragraph.[65] Still, the silence of Art.17(2) as to the possible functionalization of IP to other social goals remains problematic. Not only has the provision no normative pretense, but its text remains an empty statement that leaves without guidance those who are called to interpret EU copyright rules, particularly now that the Charter has acquired the same cogent value of the Treaties (Art.6(1) TFEU). In fact, the obscure language of the provision has reinforced the property logic that depicts EU copyright as an end in itself, based on a rhetorical understanding of property as an absolute right that does not need any justification nor have any functionalization.[66] Recitals 9 InfoSoc and 23 IPRED reflect this approach, assuming that a high level of protection is always required and can only lead to positive socio-economic results. The same interpretation emerges between the lines of some of the CJEU's decisions.

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[64] Geiger, Intellectual Property, p.115; J.Griffiths-L.McDonagh, "Fundamental rights and European IP law: The case of Art 17(2) of the EU Charter", in C.Geiger (ed), *Constructing European Intellectual Property Achievements and New Perspectives* (Cheltenham/Northampton:Edward Elgar, 2013) p.82.

[65] Praesidium,Explanations,p.24.

[66] Geiger, Intellectual Property,p.116;Griffiths-McDonagh, Fundamental right,p.81. See also J.Drexl, "Constitutional Protection of Authors' Moral Rights in the European Union", in K.S.Ziegler (ed),*Human Rights and Private Law, Privacy as Autonomy* (Oxford:Hart Publishing,2007),p.159.

iii. The CJEU's case law

The CJEU's case law in the field of copyright best illustrates the nature and different effects of copyright propertization.

Already in 1981, the Court rejected the doctrinal argument that excluded the proprietary qualification of copyright due to its moral rights component, and limited its focus to economic rights.[67] The classification, however, did not carry any systematic consequence. In fact, subsequent decisions defined copyright as a bundle of exclusive rights strictly defined by law, and not an all-encompassing right like traditional civil law property. Along these lines, *Warner Bros* denied recognizing exclusive rights beyond those granted by national or EC law,[68] while *Peek&Cloppenburg* refused to extend them beyond their legislative boundaries.[69]

Peek&Cloppenburg is also remarkable for its rejection of the absolute property logic based on Recital 9 InfoSoc in favor of a more balanced approach, but again with a teleological and not systematic reasoning. The same a-technical reference to property appears every time the Court deals with the copyright balance, particularly after the advent of the Charter of Nice and later CFREU, as in *Laserdisken*, where the CJEU justified the restriction on the freedom to receive information with the need to protect copyright as "part of the right to property",[70] or *Promusicae*, with its uncommented cursory reference to Art.17 CFREU,[71] followed by a

[67] *Musik-Vertrieb Membran and K-tel International v GEMA* (C-55/80 and 57/80) [1981] ECR 147,paras 12-13.

[68] *Warner Brothers Inc. and Metronome Video ApS v Erik Christiansen* (C-158/86) [1988] ECR 2605,para 18.

[69] Peek&Cloppenburg,paras 37-39.

[70] *Laserdisken v Kulturministeriet* (C-479/04) [2006] ECR I-8089,paras 62-65.

[71] *Productores de Música de España v Telefónica de España SAU* (C-275/06) [2008] ECR I-271,para 62.

number of similar examples.[72] The only exceptions are *Scarlet Extended* and *Netlog*, where the CJEU excluded that Art.17(2) CFREU attributes inviolability and absoluteness to IP rights,[73] in line with *Metronome Musik* and its affirmation of the social function of (intellectual) property as the basis for the legislative limitations of proprietary prerogatives in the public interest.[74]

These omissions could not avoid leading to inconsistent, unpredictable decisions. Suffice it to mention here, again, the opposite reading of Recital 9 Infosoc offered in *Peek&Cloppenburg* and *Dimensione Direct Sales*,[75] the different output of the "fair balance" in *Promusicae* and *Bonnier Audio*[76], despite the similar factual landscape, and the precedents advancing the strict reading of exceptions and the three-step test.[77] Only in *Luksan* did the CJEU engage in a holistic reading of Art.17 CFREU, admitting the application to IP of both the guarantees and limitations enshrined in Art.17(1), and qualifying the national denial of exploitation rights to a film director, who had them granted by EU law, as a deprivation of "his lawfully acquired property right".[78] However, the reasoning was once again too concise to provide effective systematic guidance. An attempt in this sense came from *SCF*, where the Court distinguished exclusive

[72] *Coty Germany GmbH v Stadtsparkasse Magdeburg* (C-580/13) EU:C:2015:485,para 29; GS Media,para 31; *Tobias McFadden v Sony Music Entertainment Germany GmbH* (C-484/14) EU:C.2016:689,para 80.

[73] *Scarlet Extended SA v SABAM* (C-70/10) [2011] ECR I-11959,para 43; *SABAM v Netlog NV* (C-360/10), EU:C:2012:85,para 41.

[74] *Metronome Music*,para 21. Similarly *Sky Österreich GmbH v Österreichischer Rundfunk* (C-283/11) EU:C:2013:28,paras 23-24.

[75] *Dimensione Direct Sales*,para 33.

[76] *Bonnier Audio AB v Perfect Communication Sweden AB* (C-461/10) EU:C:2012:219

[77] As *Infopaq*,para 58; OSA,para 40;ACI Adam, paras 25-27*; Public Relations Consultants Association Ltd v Newspaper Licensing Agency Ltd and Others [Meltwater]* (C-360/15) EU:C:2014:1195,para 23.

[78] *Martin Luksan v Petrus van der Let* (C-277/10) EU:C:2012:65,para 70.

economic rights from remuneration rights, qualifying the first as "preventive in nature", that is requiring the author's consent for any protected use of the work, and the second as "compensatory in nature",[79] for they grant only the right to be remunerated for the use. The distinction recalls the dichotomy property-liability rules, but clearly defines copyright as a bundle of negative rights – a feature characterizing monopolies rather than property – with no further explanations.

The approach does not change in the case of entitlements originating from the EU, such as the *sui generis* right. While its functional similarity to a property right over information[80] could have facilitated the recourse to the proprietary framework to guide its implementation, the case law on Art.7 Database just bears the traces of a strong property logic, as proven by its expansion to cover indirect transpositions of the database, or its use as mere inspiration, with no systematic reference to property law.[81]

AG Opinions offer more theoretical hints than judgments do, showing how frequently parties advance proprietary arguments in copyright cases, and how much the CJEU is reluctant to discuss them in the decisions. In *Foreningen* the Opinion depicts copyright as a dualist bundle comprising "a number of proprietary and moral rights".[82] In *Uradex* it takes the use of the terms "owners and holders" instead of authors and producers as a sign of the intent to emphasize the

[79] SFC,para 75.

[80] Similarly E.Derclaye,*The legal protection of databases. A comparative analysis* (Cheltenham/Northampton: Edward Elgar,2008), p.50.

[81] The most articulated analysis of the issue is in *Football Dataco,*paras 13,14,35-36.

[82] Opinion of AG La Pergola in *Foreningen af danske Videogramdistributorer v Laserdisken* (C-61/97) [1998] ECR I-5157,footnote 2.

importance of the economic ownership of a work instead of its personal link with the author.[83] In *Scarlet,* it evidences the connection between propertization and a high level of protection,[84] and in *Sky Österreich* it defines the exclusion of fair compensation in the case of minimum prejudice as an application of the principle of *de minimis* impairment of property from the public power, justifying the rule as a proportionate limitation of property in light of its social function.[85]

The scarce attention devoted by the CJEU to systematic questions in favor of functional, policy-based interpretations[86] deprives EU copyright law of a framework that could dispel the risks posed by the propertization rhetoric, ensure consistency, fill in gaps and stabilize the copyright balance. At the same time, it leaves national courts without guidance to manage the interplay between their copyright laws and a model that, due to its market-oriented rationales and hybrid traits, may act as "legal irritant" for the transplanting systems, with inevitable distortive effects. Up to now, the doctrinal answer to the EU's proprietary labelling of copyright has swung between neglect and its consideration as a clumsy dogmatic mistake. However, it is not too late to verify, by looking at other national experiences, whether the empty property rhetoric may instead be turned into an opportunity of systematic reordering.

3. The thousand faces of copyright propertization: national experiences

Doctrinal critiques of copyright propertization often make the mistake of oversimplification, linking the phenomenon to specific consequences, without verifying whether their assumptions

[83] Opinion of AG Ruiz-Jarabo Colomer in *Uradex v RTD and BRUTELE* (C-169/95) [2006] ECR I-4973,para 46.

[84] Opinion of AG Cruz Villalon in *Scarlet Extended*,paras 76-78.

[85] Opinion of AG Bot in *Sky Osterreich*,paras 29,48-50,75.

[86] This is also the opinion of AG Trstenjak in *SCF*, para 102.

can be effectively generalized. The history of national copyright models would already prove them wrong.[87] A few examples of the operation of property concepts and rules and of constitutional property clauses in selected national experiences will suffice to show that the propertization of copyright is not a new phenomenon, and its implications are various and far from being as negative as depicted by the mainstream literature. For the sake of conciseness, the comparison will focus on three test-beds: France, for its role as a model for the continental tradition and historical openness towards the concept of literary property; Germany, as a system whose local doctrine and strict private law dogmas have strongly opposed the propertization of copyright; and Italy, as a second-generation system whose blend of French and German influences leads to different and interesting results.

a. Private law property

At a statutory level, France is the only country that uses the term *propriété litteraire et artistique* to label authors' rights.[88] The *Code de la Propriété Intellectuelle* (CPI) classifies such *propriété* as *incorporelle*, distinct from the civil code bipartition between movable and immovable property, to avoid conceptual frictions, underline the need for a specific regulation, and justify the limited duration and scope of the rights. The term "propriété" returns in the provision devoted to joint authorship settings (Article L.113). While the CPI does not refer directly to the civil code rules on *copropriété*, their application by analogy is a consistent

[87] I delve more extensively into these historical evidences in C.Sganga, *Propertizing European Copyright. History, Challenges and New Opportunities* (Edward Elgar Publishing 2018), Chapter 2, pp. 50 ff.

[88] *Loi 57-298 du 11 mars 1957 sur la propriété litteraire et artistique*, JORF 14.3.1957,2723, later codified in 1992 in the *Code de la propriété intellectuelle (CPI), Loi 92-597 du 1 Juillet 1992*, JOFR 3.7.1992,8801.

judicial practice. [89] This has resulted, *inter alia*, in the request for unanimous consent for the assignment of economic rights,[90] and in the parallel exclusion of the applicability of provisions unfitting to the hybrid characteristics of literary property, such as the co-owner's right to individually enjoy and defend the property and to exit from the co-ownership (Art.815 Code). Provisions of the CPI adapt civil code property rules to authors' rights, as in the case of Art.L.113-3(4) CPI, allowing co-authors to separately exercise their exploitation rights if their participation was of different genres, Art.L.113-4 CPI, derogating from accession and attributing the *propriété* of the composite work to the creator, or Art.L.113-5 CPI, granting original ownership to the coordinator of a joint work. In the case of marriage, the CPI excludes authors' rights from falling under community property, but uses civil code rules to regulate the exploitation of profits, assignment, consideration of the spouses' contribution, and the residual attribution of the usufruct of economic rights to the surviving spouse.[91]

Not every aspect of French propertization is so systematically consistent, though. An example comes from the judicial development of the *droit de destination*, originated from the broad interpretation given to the concise definition of literary property, which attributes to the author the "exclusive right to exploit his work in whichever form he desires" (Arts.L.111-1-L.123-2 CPI), as including every use not explicitly excluded by law. This reading has led to theorizing an extension of the rightholder's control beyond the first sale of the work, implying a

[89] Since CA Paris, 27 February 1918, Gaz.Pal. 1918,I,125. More recently Cass.2 April 1996, JCP G 1996,IV,1238; Cass, 15 February 2005, 3 RIDA 2005,415.

[90] CA Paris, 7 June 1995,1 RIDA 1996,270; CA Paris, 2 April 2003,JurisData n.2003-206143.

[91] See the overview provided by A.Lucas,H.J.Lucas,A.Lucas-Schloetter,*Traite de la propriété littéraire et artistique* (4th ed., Paris:LexisNexis,2012),pp.163-168.

proprietary, *erga omnes* effect of the contractual limitations imposed on the uses of the copy.[92] Similarly, it has allowed rightholders to prohibit the public exhibition of an already alienated sculpture, or the appearance in a movie advertisement of a lawfully acquired poster.[93] Unlike the technical use of property rules, the *droit de destination* is a doctrine derived from an orthodox application of a tangible property principle – the overarching, absorbing scope of ownership – ill-suited to the features of copyright law. Its existence proves, within a single system, the difference between systematic and rhetorical propertization, where the first uses property as an adaptive framework, while the second applies its general principles "as is", in the belief that no proprietary qualification can be attributed to an entitlement should this mirror application prove impossible.

Not only do systems with an uncontested acceptance of the notion of literary property show these trends. The Italian example is paradigmatic. The influence of the German doctrine led to the elimination of any trace of proprietary language from the 1941 law on authors' rights,[94] while new detailed rules decreased the need to resort to the civil code, which also moved the provision on authors' rights to Book VI on Labour, again following the German qualification of exploitation rights as a form of salary for the author.[95] Still, several articles of the copyright statute present proprietary traits, from the all-encompassing definition of Art.12 to the independence of each economic right (Art.19) and, before the InfoSoc Directive, the open-ended general definition of the right of reproduction, interpreted similarly to the *droit de*

[92] As also confirmed by the Cour de Cassation from Cass.22 March 1988,4 RIDA 1988,295.

[93] Cass.15 October 1985,3 RIDA 1986,124; CA Anvers,29 March 2010,1 A&M 2010,489.

[94] Legge 22 Aprile 1941,no.633, GU 16.4.1941,no.166.

[95] See LC.Ubertazzi (ed), *Commentario breve alle leggi su proprietà intellettuale e concorrenza* (4th ed,Padova:CEDAM, 2007), p.36.

destination in France.[96] The statute also refers explicitly to civil code property rules, predominantly in the field of co-ownership, to regulate cases of indistinguishable/inseparable contribution (Art.10 l.aut), the transfer of quotas between co-authors (Art.1103 c.c.), the majority needed for the exercise of economic rights (Arts.1108 ff. c.c.),[97] and all aspects linked to the communion between the author's heirs (Art.115 l.aut).[98] Economic rights can be subject to security rights, with moral rights-based specifications such as the limitation of confiscation and pledges to the proceeds of the exploitation, and only after the author has assigned her economic rights (Arts.111-112 l.aut.).[99] The same mix of copyright propertization and exceptionalism emerges in Arts.113-114 l.aut., on the expropriation of authors' rights in the public interest.

Along the same lines, several Italian court decisions have used property rules to compensate legislative gaps, particularly *vis-à-vis* new technologies. Examples range from the definition of the relationship between photograms and soundtracks as servitude,[100] or between single components and the entire work as that between accessories and principal good,[101] to the reference to union and confusion to establish the ownership of each contributor (Art.939 c.c.),[102] and to the rule on the compensation due to co-owners for innovations and amelioration in a case

[96] L.C.Ubertazzi,M.Ammendola, *Il diritto d'autore* (Torino:UTET,1993),p.40.

[97] With debates as to the possibility of independent exercise of economic rights, as in France. See, eg, CA Milano,13 March 1973,AIDA 1973,315;Trib.Milano,2 July 2004,AIDA 2005,1039.

[98] Reported by Ubertazzi, Commentario,p.350.

[99] P.Greco,P.Vercellone, *I diritti sulle opere dell'ingegno* (Torino:UTET,1974), pp.334-338

[100] Cass. 12 August 1953, Dir.aut. 1953,510.

[101] CA Roma, 23 May 1947, Foro it.,1947,I,782.

[102] Ibid.

on the use of part of an opera performance in a cinematographic work.[103] Encyclopedias or treaties have been treated as universalities of movables (Art.816 c.c.),[104] ceasing to publish a periodical as abandonment in order to excuse infringement,[105] and conflicts between successors in title have been tackled by applying either the rule on conflicts of acquisition of movables (Art.1155 c.c.),[106] or the rule dictated in case of transfer of the right to use (Art.1380 c.c.),[107] although it was resolutely denied that authors' rights could be acquired through adverse possession, occupation, or any other way not provided by law.[108] More recently, courts have asked for evidence of an uninterrupted chain of transfers of exploitation rights in cases of requests of declaratory judgment and injunction against infringement,[109] or for a *rei vindicatio* under Art.948 c.c.[110]

Among EU Member States, Germany is the country where the civil code and copyright statute show the most resolute rejection of copyright propertization. The reasons for such aversion are deeply rooted in the rigid tangible property notion enshrined in the BGB, the lessons of the Historical School of Jurisprudence, and the concomitant predominance of the personality theory in shaping the modern *Urheberrecht*.[111] The German *Bundesgerichtshof* rarely uses the term

[103] Pret.Roma, ord. 8 February 1954, Foro it.,1954,I,707.

[104] Eg Cass.15 June 1951, Foro it.,1952,I,1569.

[105] Eg Cass.22 July 1953, Dir.aut.,1953,506.

[106] CA Roma,14 October 1986, AIDA 1987,139; CA Milano,22 December 1965,Riv.dir.ind.,1965,II,278.

[107] CA Torino, 23 June 1960, AIDA 1960,523.

[108] Recently Cass.29 December 2011, n.20082.

[109] Cass.5 March 2010, n.5359, in Foro it.,2011,VI,I,1875.

[110] Trib. Roma,23 February 2007,unpublished.

[111] See G.Schricker,U.Loewenheim (eds), *Uhreberrecht: Kommentar* (5th ed,Munich:Beck),pp.32-4.

"intellectual property", usually only doing so when referring to EU or international sources,[112] or in a rhetorical, a-technical fashion, with no real conceptual implications.[113] More generally, despite the self-sufficient nature of the 1965 copyright statute, whose level of details avoid the need to resort to the civil code in several areas, issues such as the fate of copyright in the matrimonial property regime, the enforceability of pecuniary claims on authors' rights and the possibility to subject them to pledge or expropriation remain partially unregulated, posing the question of which discipline to apply by analogy as the closest to the institutions. Overcoming the strong doctrinal criticism towards the assimilation of property and copyright, courts have admitted the residual application of the BGB provisions on co-ownership to exploitation rights,[114] within the limits allowed by the personality aspects of the right,[115] and adapted to copyright principles.[116]

b. Constitutional property

Much less aversion to copyright propertization characterizes constitutional law, predominantly due to the common extension of the subject matter of national constitutional property clauses to cover also intangible goods, reinforced by the case law of the ECtHR and the CJEU. The

[112] See recently ZR 185/03,20 July 2006,para 21, ZR 29/05,12 July 2005,11; ZR 114/04,15 February 2007.

[113] As in BGH, 18 May 1955,*Tonband/Grunding-Reporter,* to extend the general definition of author's right to any use made possible by new technologies. Schricker-Loewenheim, *Uhreberrecht*,pp.1385-6.

[114] Explicitly OLG Hamburg,OLGZ 207,7; OLG Frankfurt,11 U 26/05.

[115] OLG Hamburg GRUR-RR 2002,249; OLG Nuernberg ZUM 1999,656, but see Schricker-Loewenheim, Uhreberrecht, p.302.

[116] As in LG Muenchen I ZUM 1999, 333(336).

country leading by example is Germany,[117] where the German Constitutional Court has extended the property clause (Art.14 GG) to cover a broad range on intangible assets, with the aim of emancipating the constitutional property notion from the BGB model and thus enable the implementation of the *Sozialstaat* plans on various new forms of wealth.[118] Due to its close connection with individual dignity, self-development and participation in the social and cultural life of the community, copyright has been subject to this constitutional propertization since 1971, with remarkable implications.

The first and most paradigmatic decision, *Schulbuchprivileg* (1971),[119] stemmed from the constitutional complaint against the legislative introduction of an exception allowing the reprint of excerpts of protected works in anthologies for educational or religious purposes, which rightholders challenged as an uncompensated violation of their property rights under Art.14 GG. Not only did the Court circumvent the monist theory and limit the check to the economic aspects of the right, specifying the need to consider "the special nature and character of such property right",[120] but it also ruled that "in defining the content of copyright in line with Art.14 GG, [the legislator] should formulate provisions that guarantee the compatibility of the exploitation of the work with [its] nature and social relevance", since he "is not only obliged to protect the interests of the individual, but also to limit her rights to the extent necessary to

[117] See H.P.Götting, „Der Begriff des geistiges Eigentums" (2006) 5 GRUR 353,p.357, and F.Fechner, *Geistiges Eigentum und Verfassung* (Heidelberg:Mohr Siebeck,1999), p.56.

[118] The leading case is still *Nassaukiesungsbeschluss*, 58 BVerfGE 300 (1981). See D.P.Kommers,R.A.Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany* (3rd ed.,Durham:Duke University Press,2012), p.259.

[119] *Schulbuchprivileg,*31 BVerfGE 229 (1971), para 28, translated by Kommers-Miller, Constitutional Jurisprudence,p.232.

[120] Id.,p.241.

pursue the public good" – here the access of new generations to cultural materials, and the cultural and intellectual progress of the community.[121] The social function of property was also the argument used in *Bibliotheksgroschen* to declare the constitutional legitimacy of an exception that allowed the non-commercial use in schools of copies of protected works after the stipulation of the first license,[122] and in *Kirkenmusik* to justify the unauthorized performance of a protected musical piece at a non-profit event.[123] More recently, in *Germania 3*,[124] the *Bundesverfassungsgericht*, called to rule on the legitimacy of a narrow interpretation of the quotation exception, stated that not every exploitation of copyright is constitutionally guaranteed.[125] Since "the more the work fulfils its social role, the more it may serve as the origin of another artistic endeavour", this social function allows a limitation of authors' rights to protect the artistic freedom of others, particularly when the work quoted has a high social relevance and contributes to the contemporary cultural and intellectual *milieu*.[126] With similar arguments, *Metall auf Metall*[127] reversed two *Bundesgerichtshof* decisions censoring the unauthorized use on a loop of a two-second rhythm sequence of a song in another piece,[128] for they were judged as an excessive impairment of the claimant's artistic freedom and the public goal of community cultural development.[129]

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[121] Id.,pp.247-48.

[122] *Biblioteksgroschenentscheidung*,31 BVerfGE 248 (1971).

[123] *Kirkenmusik*,49 BVerfGE 382 (1978).

[124] 1 BvR 825/98 (2000).

[125] Id.,para 19.

[126] Id.,para 23 [my translation].

[127] 1 BvR 1585/13 (2016).

[128] BHG,GRUR 2013,614.

[129] *Metall auf Metall*,para 47.

While the German constitutional case law on the social function of copyright as property right is the most paradigmatic example of the positive effect a technical propertization may have on the copyright balance, the hazy framework set by the Italian Constitutional Court (ICC) proves the negative effects that the lack of systematic precision has on the evolution of the discipline. The ICC precedents, in fact, show no attempt to qualify authors' rights, prefer market-based arguments, and avoid as far as possible addressing any question which would require a definition of the nature of the rights and its implications. One of the most eloquent examples, judgment no.38/73, rejected the unconstitutionality claim without answering its two key inquiries, which asked whether the copyright act was consistent with the social function of property enshrined in Art.42 Cost., and whether the legislator struck a proportionate balance between Arts.42 and 21 Cost. on freedom of expression.[130] Only a handful of precedents contain systematic indications, the most illustrative one still being judgment no. 108/1995 on the constitutional legitimacy of the rental right.[131]

The claim was rejected on several significant grounds. The Court underlined that the legislator gave priority to authors' rights over the interest of users and other market players, in order to reward artistic creations and encourage their production in the general interest of cultural development.[132] For the first time, it explicitly defined copyright as "intellectual property", guaranteed under the property clause (Art.42 Cost.) and Art.35 Cost., which protects labour in any form,[133] and proceeded to the assessment of the legislative balance between opposing

[130] ICC,12 April 1973,no.38.

[131] ICC,6 April 1996,no.108.

[132] Id.,para 9.

[133] Id.,para 10. Similar arguments can be found in several other decisions (eg ICC 26 June 1973,no.110;13 April 1972,no.65;17 April 1968,no.25)

constitutional interests and goals. Unfortunately, the brevity of the reasoning led to the omission of important considerations. The copyright incentive to the production of creative works was apodictically linked to the promotion of the full development of individuals (Art.3 Cost.) and of culture (Art.9 Cost.), with no consequence drawn from the proprietary classification of authors' rights, and especially from the implications of the social function clause (Art.42(2) Cost.). [134]

The weak systematic precision caused more harm than good, with a return of contradictory statements and the rejection or absorption of claims grounded on Art.42 Cost. in favour of a classification under Art.41 Cost.[135] for "the particular features of the category of immaterial goods […] advise against its mechanical insertion in the schemes of public and private property".[136] More recently, the Court rejected as inadmissible an application advancing the argument that copyright has to be balanced with other fundamental rights, in light of its social function as property.[137] While the arguments advanced prove the growing sensitivity of civil courts towards copyright balance and the implication of copyright propertization, the ICC's silence stands as an obstacle to the evolution of the national case law towards more systematic consistency, in stark contrast with the German experience.

French decisions are much more recent, due to the lack of an *ex post* constitutional review of the legislation until 2008, and the late debut of the *Déclaration* as a cogent bill of rights.[138] In the first decision, concerning trademarks and the constitutionality of the restriction of advertisements of tobacco products, the *Conseil Constitutionnel* confirmed the protection of IP

[134] Ibid.

[135] ICC,8 March 2006,no.110.

[136] ICC,9 March 1978,no.20.

[137] ICC,21 October 2015,no.247.

[138] Only from French Constitutional Court (FCC),16 July 1971,no.71-44 DC.

as property (Art.17 *Declaration*), but also its potential limitation – again as property – in the general interest, here the protection of public health.[139] Copyright came under the spotlight only in 2006, but with opposite results, with the *Conseil* equating to expropriation the obligation imposed on rightholders to provide information on the technological measures of protection applied to their work when needed for interoperability purposes. [140] The constitutional property guarantee was read extensively, as encompassing the rightholder's power to prevent any private copying of her work, while limitations in the case of conflicting public interest were not even mentioned. However, to calm the doctrinal concerns about the negative effects of the constitutional propertization of copyright on its internal balance,[141] three recent decisions offered a different interpretation, showing a balanced proportionality assessment, the consideration of conflicting constitutional rights and goals, and a rejection of the myth of absolute property still affecting part of the French jurisprudence.

In *HADOPI* (2009), the *Conseil* repeated its 2006 holdings, but highlighted the *spécificité* of copyright, stating that although the protection of IP is an "objective of general interest", it is still not enough to legitimate the delegation to an administrative authority of the power to sanction copyright infringements with the termination of an internet connection, which, in light of its impact on the users' freedom of expression, is a measure whose necessity and proportionality should be assessed by the judiciary.[142] Similarly, in *Soulier-Doke* (2013), the *Conseil* judged as

[139] FCC,8 January 1991,no.90-283 DC, para 7. Similarly FCC,15 January 1992,no.91-303-DC,paras 8-11.

[140] FCC,27 July 2006,no.2006-540 DC.

[141] See V.L.Bénabou, "Patatras! A propos de la décision du Conseil constitutionnel du 27 juillet 2006" (2006) 20 Propr.intell. 240;M.Vivant, "Et donc la propriété littéraire et artistique est une propriété…" (2007) 23 Propr.intell. 193.

[142] FCC,10 June 2009,no.2009-580 DC,paras 13-17.

constitutional the law setting up a non-voluntary collective management scheme for the digitization of out-of-commerce books, justifying the intervention as in pursuance of the general interest in the preservation of and access to national cultural heritage. The *Conseil* also held the measure proportionate, for it did not prejudice other forms of exploitation, limited its application to out-of-commerce works, and provided a set of procedural guarantees and the possibility to withdraw from the scheme at will.[143] Again in 2013, the same principle was used to uphold the judicial declaration of non-retroactivity of an amendment of Art.1 of the 1793 copyright decree, originally assuming the contextual transfer of the ownership of the material support and the right of reproduction of a work of art.[144] Matisse and Picasso's heirs claimed that their property rights were illegitimately damaged by this reading, but the *Conseil* rejected the argument, holding the limitation proportionate, since it left rightholders free to contract otherwise, while pursuing the social goal of providing legal certainty and facilitating the market for works of art.[145]

With circumscribed exceptions, the national propertization of copyright has never prevented the balanced development of the discipline nor engendered distortive effects. In line with the historical findings, the analysis of selected contemporary national systems proves the consistent use, by legislators and courts, of property principles and rules, with the aim and positive effect of covering unregulated issues and gaps caused by technological evolution. Even more significantly, the constitutional propertization of authors' rights does not trigger the attribution of absolute guarantees for rightholders, but channels within copyright law the notion of social

[143] FCC,28 February 2014,no.2013-370 QPC. The scheme was still declared contrary to EU law in *Marc Soulier and Sara Doke v Premier ministre and Ministre de la Culture et de la Communication* (C-301/15) EU:C:2016:878.

[144] FCC,21 November 2014,no.2014-430 QPC.

[145] Id.,paras 4-7.

function and limitations in the general interest, providing more transparent and reliable criteria for the proportionality assessment required when balancing copyright with conflicting rights and goals.

These evidences substantiate the assumption that the ultimate reason for the distortions attributed to copyright propertization lies, in fact, in its superficial consideration and negligent management. National experiences demonstrate that whereas the use of a property rhetoric may trigger dangerous short-circuits, the use of property as a systematic framework may represent a useful paradigm to guide the reordering of the discipline. While this is true for every system, it assumes key relevance in the case of fragmented, unsystematic models, such as EU copyright law.

4. Connecting the dots

Against this background, following the same path traced by national copyright systems to conduct a systematic, technically grounded propertization of EU copyright appears to be the most reasonable solution to tackle most of the inconsistencies, uncertainties and distortions affecting the field. This exercise requires, however, the prior definition of the frame of reference.

Property remains one of the private law institutions least touched by EU law, due to the limitations set by Art.345 TEU.[146] Parallel to this, national property systems are characterized by complex nets of interrelated rules, most of them mandatory, which make their comparison a challenging endeavor. However, due to the same Roman law roots or the later circulation of legal solutions, contemporary property scholars have been able to identify basic principles that

[146] Broadly B.Akermans,E.Ramaekers, "Article 345 TFEU (ex Article 295 EC), Its Meanings and Interpretations"' (2010) 16(3) ELJ 292.

may be understood as the common core of European property law, channeling some of them in the DCFR.[147] It is reasonable to believe that the CJEU will draw inspiration from this background if requested to attribute autonomous meaning to a property concept used in a directive, or to cover gaps and interpret general rules through the lenses of property law. For obvious reasons, these are the property principles and concepts that the four-dimensional experiment of systemization of EU copyright briefly exemplified in this paper will build upon.

On the contrary, and particularly after the Lisbon Treaty entered into force, the construction of the EU constitutional property model has several multi-level sources to refer to, centered around Art.17 CFREU, and involving Art.1 P1 ECHR[148] and the Member States' common constitutional traditions. For the purposes of this paper, the next pages will attempt to sketch the main traits of this new framework.

a. An EU constitutional property framework for EU copyright law

Despite some divergences, national constitutional property doctrines share several common traits, which can be summarized around basic pillars. Property is generally subject to a varying degree of protection depending on the nature of the interests underlying it, with stronger preference given to goods closer to the owner's personality, dignity and personal needs.[149] Limitations to uses, subject to compensation, are distinguished from expropriations, requiring

[147] Inter alia S.Van Erp, "From 'Classical' to Modern European Property Law?", in *Essays in Honour of Konstantinos D Kerameus* (Bruxelles:Bruylant,2009),p.1517, and C.Von Bar et al (eds), *Principles, Definitions and Model Rules of European Private Law – Draft Common Frame of Reference, Outline Edition* (Munich:Sellier,2009),p.257.

[148] Praesidium, Explanations,p.23.

[149] As in 89 BVerfGE 1 (1993).

indemnification, on the basis of the intensity of the interference.[150] Both are justified if legitimate, proportionate and grounded on the general/public interest. In several national constitutions, property is a right internally limited by its social function/obligation – a notion that is either labelled as such, as in Germany, Italy and Spain,[151] or finds functional correspondence in other concepts, such as that of the French "objectives of general interest" and "objectives of constitutional value".[152] These personalist and solidarity-inspired traits are a direct consequence of the profound involvement of property in the goals of modern welfare states. Their implications are particularly visible in Germany, where *Eigentum* is considered a fundamental right because of its close connection with the protection of personal liberty and self-development, and its protection does not aim at the maximization of individual wealth, but at offering the owner the means to participate in community life and in the construction of the welfare state.[153] The link between the personalist conception and *Sozialstaat* goals is drawn by Art.14(2)GG, which states that property "obliges" and should serve the common good – a statement which implies its functionalization, and the inclusion of solidarity duties within its structure.[154]

The ECHR and CFREU's property provisions are largely similar. They both recognize and guarantee the owner's right to enjoy her possession, admit expropriation in the public interest,

[150] Eg, in France, Cass.30 May 1972,no.71-70206,Bull.civ.,III,no.335, and recently FCC,20 January 2011,no.2010-87 QPC.

[151] Art.14(2)GG, Art.42(2) Cost. (IT), Art.33(2) Cost. (ESP). See A.J.Van Der Walt, *Constitutional Property Clauses: a Comparative Analysis* (Juta 1999),pp.139-140.

[152] See G.Drago, 'La conciliation entre principes constitutionnels' (1991) Rec.Dalloz 265.

[153] 24 BVerfgGE 367 (1968),389.

[154] G.Alexander, "Property as a Fundamental Constitutional Right? The German Example" (2003) 88 Cornell LR 733,p.745.

and distinguish it from the regulation of the use of property. Both provisions are vague enough to leave to their respective courts ample margin to shape the two property models.

In the ECtHR's case law,[155] deference towards state socio-economic policies[156] characterizes the assessment of proportionality, which is never tested for strict necessity, as with other rights, but on the basis of criteria of equality and justice.[157] Only highly disproportionate measures are sanctioned as exceeding the state margin of appreciation, with an evaluation based on the owner's economic loss.[158] Similarly, the definition of general/public interest, overlapping the notion of social function, is mostly value-neutral, colored with economic nuances and not giving any weight to the social relevance of the good.[159] When the public interest appears weaker, the control on legality becomes more pervasive, with neutral procedural checks prevailing over the assessment of the social function of the measure.[160] Save for side examples the assessment is generally based on a neutral evaluation of the economic impact of the contested provision,[161] making the ECtHR's property a bundle of economic utilities, which can be sacrificed only by legitimate, reasonable and proportionate measures, and upon the payment of full, market-value compensation.

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

[156] Explicitly *Gasus Dosier-Und Fordertechnik GmbH v. Netherlands*,(1995) 20 EHRR 403.

[157] *Sporrong*,para 69.

[158] Exemplarily in *James v. United Kingdom*, (1986) 8 EHRR 123.

[159] Id.,para 40. Further case law in W.Schabas, *The European Convention on Human Rights: a Commentary* (Oxford:OUP,2015), po.975-7.

[160] Ibidem.

[161] With a weaker protection of commercial property (as in *Gasus*) compared to dwellings involving the right to housing (V*enditelli v. Italy*,(1995) 19 EHRR 464), and a consideration for personality-based argument (*Chassagnou v. France,*(2000) 29 EHRR 615).

Much of these traits are rooted in the Court's specific competence – protecting human rights against state violations – largely differing from national constitutional courts, whose cases allow a more holistic consideration of the goals set in national constitutions. The wide margin of appreciation and focus on legitimacy and economic impact represent an acknowledgment of this difference.[162] Yet, the narrow scope of the analysis is ill-suited to define the content, structure and functions of property (which is not, in fact, a task envisioned for the Court) – a circumstance that makes the ECtHR's and national models largely complementary, and only limited mutual antagonists.

On the contrary, the reference to Member States' common constitutional traditions and indirect EU intervention on national property law have made it possible for the CJEU to build an EU constitutional property model that includes references to the content of and limits to the right, based on the shared notion of social function as the ultimate ground for state intervention.[163] From *Wachauf* onwards, this stable *acquis communautaire* justified, beyond the borders set by Art.345 TEU, EU interventions limiting national property laws, if proportionate, not impairing the essence of property rights, and in pursuance of the Community's objectives of general interest.[164] In the almost three decades that followed, the principle returned remarkably often.[165] Yet, the nature of the Treaties' objectives has often made the Court substantiate the concept of

[162] As in T.Allen *Property and the Human Rights Act 1998* (Oxford:Hart Publishing,2005),pp.145-155.

[163]Paradigmatically *Nold v. Commission* (C-4/73) [1974] ECR 491,and *Hauer v. Land Rheinland-Pfalz* (C-44/79) [1979] ECR 3727, esp.paras 9,14,18-20.

[164]*Hubert Wachauf v. Germany* (C-5/88) [1989] ECR I-2609.

[165] *Commission v. Portugal* (C-367/98) [2002] ECR I-4731;*Commission v. France* (C-483/99) [2002] ECR I-4781;*Commission v. Belgium* (C-503/99) [2002] ECR I-4809;*Van den Bergh Foods Ltd. v. Commission* (T-65/98) [2003] ECR II-4653;*Germany v. Council* (C-280/93) [1993] ECR I-3667. More recently *Association Kokopelli v Graines Baumaux SAS* (C-59/11) EU:C:2012:447.

social function in the establishment and preservation of the internal market, and the development of European industries and the defense of competition,[166] with more sporadic references to the protection of fundamental rights,[167] of the environment[168] or of consumers.[169]

Against this fragmented framework, the construction of an EU constitutional property model may come at the price of highly generic formulations. However, the Lisbon Treaty and the CFREU indicates a potential convergence path. The joint reading of Art.6 TEU, reinforcing the role of common constitutional traditions as general principles of EU law, and Art.52(4) of the CFREU, which requires the use of common constitutional traditions to interpret EU fundamental rights stemming from them, leads to the integration of EU norms with shared national principles and doctrines.[170] Although the Praesidium's explanations specify that the meaning and scope of Art.17 CFREU "are the same as those of the right guaranteed by the ECHR", property is a "fundamental right common to all national constitutions", which demands the use of Member States' common constitutional traditions as a source to construe the EU property system, as the CJEU has indeed long been doing. To this end, the notion of social function – or its functional equivalents – can represent an optimal convergence platform,

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[166] Ibid.See also *Regione autonoma Friuli-Venezia Giulia (ERSA) v. Ministero delle Politiche Agricole e Forestal*i (C-347/03) [2005] ECR I-3785;*Unitymark Ltd, North Sea Fishermen's Organisation v. Department for Environment, Food and Rural Affairs* (C-535/03) [2006] ECR-I 2689.

[167] *Alliance for Natural Health et al. v. Secretary of State for Health and National Assembly for Wales* (C-154-155/04) [2005] ECR I-6451.

[168] *Commission v United Kingdom* (C-530/11) EU:C:2014:67,para 70.

[169] *Société Neptune Distribution v Ministre de l'Economie et des Finances* (C-157/14) EU:C:2015:823,paras 66-68.

[170] See P.Craig-G.De Burca, *EU Law.Texts, cases and materials* (Oxford:OUP 2015),pp.398-400, and related bibliography.

particularly in light of Art.3(3) TEU and its explicit reference to a "highly competitive social market economy", which requires bringing the internal market closer to welfare state models.

Compared to the CJEU's market-oriented approach, the national notion of social function/utility/obligation carries a much stronger meaning. In its most developed forms, it implies a duty of mutual solidarity towards other community members, which adds an obligatory element within the structure of the right, varying according to the social relevance of the object. Property performs a social function also towards its owner, either by protecting interests linked to her dignity and personality, or by providing the means she needs to self-develop and participate in community life. A convergence between the two systems would integrate the CJEU's notion with more overarching criteria and potentiate the value-oriented approach that already distinguishes the CJEU's case law from the ECtHR's precedents. Apart from its commonly accepted vertical application, where social function acts as a benchmark to assess the legitimacy and proportionality of current and future laws and their consistence with constitutional goals and values, the merger of the CJEU's models with national models would facilitate the horizontal application of the clause, for two synergic reasons. First, the CJEU's teleological method of interpretation also uses the functions of the right to solve interpretative knots.[171] Second, the horizontal effect of primary law has been part of the genetic traits of EU law since its beginning,[172] while the CJEU has progressively admitted the direct application of

[171] See Favale-Kretschmer-Torremans,Copyright Jurisprudence,pp.77-79; Leistner, Europe's copyright case law,p.599.

[172] Among the first analyses see H.Rasmussen, "Between Activism and Self-Restraint: a Judicial Policy for the European Court" (1988) 13 E.L.Rev. 28.

fundamental rights provisions in private controversies,[173] and copyright is not exempt, as confirmed by *Promusicae* in 2008.[174]

b. Four examples of the positive effects of a systematic propertization of EU copyright

Following national examples and the qualification proposed by Art.17(2) CFREU and Recital 9 InfoSoc, EU private and constitutional property rules and doctrines could constitute the systematic framework necessary to achieve greater legal certainty and consistency in EU copyright law, and a more stable copyright balance. The conciseness of this contribution allows proposing only a snapshot of this experiment of systematization,[175] focused on four "victims" of the harmonization pitfalls and linked to four elements of property law: (i) ownership (subject); (ii) works (object); (iii) economic rights (content); (iv) exceptions, fair balance, the three-step test and abuse of right (structure). However, this is already enough to showcase the importance of taking EU copyright propertization seriously, and its potential positive outcomes.

Property rules do not have an overarching impact on the definition of the **subjects** of copyright, characterized by subject-specific rules of acquisition. However, issues of authorship/ownership have been rarely considered by EU law, leaving several gaps which are destined to create interpretative problems. A glaring example is the issue of joint authorship under the Database and Software Directives, mentioned but not regulated in detail. Should the CJEU decide that the missing reference to national laws requires its harmonizing intervention, the common core of

[173] See D.Leczukiewicz, "Horizontal Application of the Charter of Fundamental Rights" (2013) 38 E.L.Rev. 479,and related bibliography on the heated debate surrounding the matter.

[174] Para 68.

[175] For a broader analysis, see Sganga, Propertizing European Copyright, Chapter 6, pp. 233 ff.

Member States' rules on co-ownership could provide systematic guidance and ensure predictable results. Similarly, property rules could become essential if the definition of the initial attribution of ownership turn out to be necessary for the application of EU copyright provisions, as might happen, e.g., in the case of fair remuneration. Should the CJEU decide to proceed as with the notion of originality, the proprietary framework could support the extension of the authorship provisions of the Software and Databases Directives, both for their consistency with the principles of property acquisition and for their similarity to the common core of Member States' regulation in the field. The same can be said for the question related to rights management in the case of co-authorship.

The positive effects of a technical propertization are much more visible on the side of the **object.** Constitutional property doctrines may support the vertical (legislative) and horizontal (judicial) attribution of a higher degree of protection to works close to the author's dignity, personality and self-realization, while more solidarity duties – and therefore more flexible exceptions and narrower rights – are imposed on low-creativity works protected to secure investments, such as technical and informational works particularly prone to excessive monopolies, with a new balance between authors and industrial rightholders.

The property framework may have highly positive effects on the definition of the **content** of exclusive rights. If copyright is qualified as property, the configuration of its rights should respect the *numerus clausus* principle, since their *erga omnes* effects of the rights demand that it is made possible for third parties to know the boundaries of the entitlements which may be enforced against them. The principle excludes a contractual definition of the rights, but also a definition of their scope based on subjective criteria, such as the notion of new public in the case of Art.3(1) InfoSoc. In addition, the vertical application of the social function doctrine would require the EU legislator to specify the goals pursued by copyright law, making sure that

they are "socially" justified and tested against the general interest. Any creation of new rights, protection of new uses, restriction of exceptions or term extension would need to be consistent with them.[176] Both at a legislative (vertical) and judicial (horizontal) level, this would ensure predictability and consistency, excluding aprioristic broad interpretations based on Recital 9 InfoSoc, and limiting – particularly in the case of a clash with other fundamental rights or the public interest – the protection to what is necessary for the right to perform its essential function, and therefore for the author to obtain "appropriate" remuneration, and for industrial rightholders to secure a "fair" return on their investment.[177] The non-idiosyncratic social, economic and cultural functions of the rights[178] would also call for an objective definition of their content based on what is required for them to reach the necessary incentivizing level. At the same time, they would constitute an internal limit, and not an external constraint, to copyright, so much that rightholders' conducts hindering their achievement would automatically fall outside the scope of the rights, eliminating the need to recur to exceptions.[179]

The constitutional propertization of copyright may have a significant impact on its **structure**, and particularly on the interpretation of exceptions, the notion of fair balance and the control of

[176] Similarly A.Peukert, "The Fundamental Right to (Intellectual) Property and the Discretion of the Legislature", in C.Geiger (ed),R*esearch Handbook on Human Rights and Intellectual Property* (Cheltenham/Northampton:Edward Elgar,2015),p.142.

[177] E.g. in InfoSoc, Recital 11;IPRED,Recital 2;OWD,Recital 5.

[178] Such as the achievement of the widest possible dissemination of works (IPRED,Recital 2), access to knowledge and culture (OWD,Recital 20;Marrakesh Directive Proposal,Recital 1) or the promotion of cultural identity and diversity (InfoSoc,Recitals 12-14;CMO, Recital 3;OWD, Recitals 18-23.

[179] For a more detailed descriptions of the effects of this interpretation on single economic rights, see Sganga, Propertizing European Copyright, pp. 245 ff.

copyright misuses.[180] Vertically, the doctrine of social function would require the legislator to provide a specific derogation every time this is needed to protect a conflicting fundamental right, as already ruled in *Deckmyn*. Horizontally, it would impose a flexible reading of limitations, with an extension of their scope or their application by analogy, when needed for the fulfillment of the socio-cultural goals of copyright, or the protection of other fundamental rights. Both horizontally and vertically, the doctrine would offer clear guidelines for the proportionality test on which the CJEU bases its fair balance, by considering not a generic exclusive right, but its core, as identified on the basis of its function and the social relevance of the right/interest conflicting with it. In the application of the three-step test, the notion of "normal exploitation" would have its purely market-based meaning tempered by the consideration of the prismatic goals of EU copyright law, and its "normality" defined not against any potential market for the work, but only the commercial uses needed for the right to perform its essential social functions. The legitimacy of the rightholder's interest, as the second prong of the test, would also be measured as to its alignment with the social goals of the right, both in absolute terms and with regard to its specific exercise.

Last, the horizontal application of the social function clause could back the development of a new doctrine of copyright misuse, directed to tackle rightholders' dysfunctional conducts not addressed by EU copyright law, despite their incompatibility with the overall goals of the discipline. The property framework would channel in the national experiences on abuse of property rights, and use social function as a benchmark to define a conduct as abusive or dysfunctional, based on the presence of three requirements, which are the constraint of the

[180] On which, broadly, C.Sganga-S.Scalzini,"From abuse of right to copyright misuse: a new doctrine for EU copyright law" (2017) 48(4) IIC 405.

qualified interest of a counter-interested party, its disproportionate nature, and the lack of an objective justification for the conduct based on the pursuance of any of the social functions of copyright.

5. **Conclusions**

The propertization of copyright has been viewed as the cause of most of the distortions afflicting contemporary copyright law. In spite of that, and of the problems created by the hybrid, patchworked and unsystematic nature of EU copyright and its harmonization, EU scholars have largely neglected the matter, and never really engaged in a systematic reconstruction of the discipline. Trying to fill this gap, and against the majoritarian doctrine, this paper started from the assumption that the parade of horribles usually attributed to copyright propertization is rather to be linked to a mismanaged property rhetoric, while the technical use of property as a systematic framework may help achieve greater consistency and predictability in legislative and judicial developments, and reach a more stable and reliable copyright balance. To substantiate its claim, this study assessed the instances and consequences of propertization in EU copyright law, and compared the negative impact of its a-technical property "logic" to the positive results achieved through the application of property rules and constitutional property doctrines in national copyright matters. Following the national paths, the article offered examples of how the use of EU private and constitutional property laws as systematic framework for EU copyright law could offer effective solutions to some of most relevant harmonization pitfalls and long-criticized tilt in the copyright balance.