DISTRIBUTIVE JUSTICE IN EU COPYRIGHT LAW: A FUNCTION-BASED ASSESSMENT FOR A SUSTAINABLE HARMONIZATION

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A dissertation submitted to

Central European University Department of Legal Studies

in fulfillment of the requirements for the degree of

Doctor of Juridical Science (S.J.D.) in International Business Law

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November 2019

I hereby declare that this dissertation is an original work and I am the sole author. It contains no materials accepted by any other institution for any other degree and no material previously published, unless otherwise acknowledged in the form of bibliographical reference.

I confirm that earlier versions of parts of this work have flown into the following articles:

Giulia Priora, 'Copyright law and the promotion of scientific networks: some reflections on the rules on co-authorship in the EU', Queen Mary Journal of Intellectual Property (2019) 9(2) 217-232;

Giulia Priora, 'The principle of appropriate and proportionate remuneration in the CDSM Directive: A reason for hope?', forthcoming in European Intellectual Property Review;

Giulia Priora, 'Catching sight of a glimmer of light: The emerging distributive rationale in the reform of EU copyright law', currently under peer-review.

s/Giulia Priora

For Emil, Carlos and Bianca

Abstract

Among the main causes of the crisis faced by EU copyright law in the digital era is a progressive detachment of the regulation from its own functions. Remarkable divergences emerge from the evolving legislation, case law and scholarship when it comes to identify the purpose of copyright in the EU. The dissertation takes up the challenge of paving the way towards a tighter connection between the legislation and its stated objectives, with the aim of tracing an analytical trajectory towards a sustainable harmonization.

The study builds on a historical, textual and content analysis of the law, unveiling the multi-functional nature of EU copyright law. The identified functions show a predominant economic nature, which leads to embrace the economic analysis to further inquire into the underlying, implicit objectives. The resulting picture displays a consolidated intent of the EU legislator to avoid copyright overprotection and underprotection, both deemed inefficient and socially undesirable scenarios. Within the limits imposed by this twofold warning, EU copyright law seeks a constant calibration of its own functions, essentially aiming at a fair distribution of copyright-generated income and information in society.

In this vein, the adoption of a distributive analytical framework is suggested to be an effective move towards a function-based assessment of EU copyright law. Focusing on fair remuneration, co-authorship and teaching exception, the framework proves effective in highlighting convergences and divergences between the promised legislative objectives and the expected outcomes of the economic analysis, opening a window towards further positive as well as normative analysis of the current state and future developments in the EU copyright scene.

Acknowledgements

After much typing, my hands may know the keyboard very well, yet the act of putting thoughts in writing can still be loaded with vivid emotions. I am very glad and honored to have the chance to express my gratitude to those who have been part of my doctoral journey. I am particularly thankful

to Prof. Caterina Sganga and Prof. Thomas Eger for their unwavering support, inspiring comments on each and every chapter of this dissertation and the time they have generously dedicated to our exchanges of ideas,

to the Central European University, the Columbia Law School and the Institute of Law and Economics at the University of Hamburg for giving me the opportunity to conduct research in genuinely interdisciplinary and international environments,

to the Managing Committee of the European COST Action 16121, the organizers and participants of the ATRIP, BILETA, SLSA and Queen Mary Postgraduate conferences for enabling me to collect valuable feedback on my work,

to the universities of Münster, Yangon and the CEU Center for Media, Data and Society for the teaching (and, at the same time, learning) opportunities,

to the Butler Library, the Arthur W. Diamond Law Library, the CEU Library, the SJD lab and the city of Budapest,

to my friends and colleagues, who have provided inestimable support and substantially enriched the journey,

to my family, *a cui, nonostante i chilometri di distanza, mi continuo a sentire ogni giorno più vicina che mai*, and to Berihun, who fills my heart with joy.

Table of contents

List of Tables

List of Abbreviations

AG	Advocate General
CDSM	Copyright in the Digital Single Market (Directive)
CFREU	Charter of the Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
CRM	Collective Rights Management (Directive)
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
InfoSoc	Information Society (Directive)
IP	Intellectual property
ISP	Internet Service Provider
p.m.a.	*post mortem auctoris*
SatCab	Satellite and Cable (Directive)
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TRIPs	Trade-Related Aspects of Intellectual Property Rights (Agreement)
UCC	Universal Convention of Copyright
WCT	WIPO Copyright Treaty
WIPO	World Intellectual Property Organization
WPPT	WIPO Performers and Phonograms Producers Treaty

Introduction

> *Sometimes, in schools of architecture, students are assigned the task of designing a hospital or a school as a practical exercise (…) Before starting the constructions, they calculate how the walls need to be curved and where the lights need to be placed in order to obtain a 'functional' result, fitting the purpose of the building. No architect would venture to build a theater without studying acoustics and visibility problems in advance. I believe that a similarly accurate study has never been carried out before building a court room.*[1]

The functional analysis cannot be said to be the most popular approach in the study of law. Having acquired high relevance in biology, psychology, sociology and anthropology,[2] the functional logic distinguishes itself from the nomological ways to study reality, which focus on the connections between events and their causes.[3] The peculiarity of the functional approach lies, in fact, in the study of the *goals* determining the course of a certain event or institution.[4] Even though the law can be deemed purposive by definition,[5] its teleological interpretation is a residual category, which is never mandatory, often left in the background, if not completely ignored, especially if the literal reading of the provisions leads to satisfactory and unambiguous results. This most likely has to do, on the one side, with the weaknesses of

[1] Piero Calamandrei, *Elogio Dei Giudici Scritto Da Un Avvocato* (Ponte alle Grazie 1999) 328 (translation by the author).

[2] Carl G Hempel, 'The Logic of Functional Analysis' in Michael Martin and Lee C McIntyre (eds), *Readings in the Philosophy of Social Science* (MIT Press 1994) 349, 355–357; Harold Kincaid, 'Assessing Functional Explanations in the Social Sciences' in Michael Martin and Lee C McIntyre (eds), *Readings in the Philosophy of Social Science* (MIT Press 1994) 415.

[3] Hempel (n 2) 349–353.

[4] *ibid* 353; Alex Rosenberg, 'Functionalism' in Lee C McIntyre and Alex Rosenberg (eds), *The Routledge Companion to Philosophy of Social Science* (Routledge 2017) 147 ('We often explain something's character or even its very existence by citing the function it serves. The functions something serves are one or more of its effects, or the effects of its presence and behavior.').

[5] Among the most renown formulations in this sense, see Rudolf von Jhering, *Der Zweck Im Recht* (Breitkopf & Härtel 1893); but also more recent studies of the nature and role of the law in the modern society. See, for instance, Mireille Hildebrandt, *Smart Technologies and the End(s) of Law. Smart Technologies and the End(s) of Law* (Edward Elgar 2015) 143–146, 154 ('Since the law aims to be instrumental for achieving policy objectives, because this instrumentality is one of the critical ends of the law, we need to pay keen attention to the types of purposes legal norms can serve.').

the functional approach in reaching 'objectively testable' explanatory conclusions[6] and, on the other side, on a varying sensitivity across the legal systems towards broader, more contextual interpretations of the law.

Nevertheless, the study of the objectives and functions of the law is worth renewed and serious consideration. Both these terms – objectives and functions – refer to the social *needs*[7] addressed by the law and, *in primis*, by the legislator as a result of the political process. Even more than in biology and other natural sciences,[8] the potential of the functional approach to the law manifests itself in a straight-forward manner. By defining law as a human artifact, a means to achieve defined goals,[9] the functional analysis focuses on the promised objectives of the legislation and highlights the need for consistent criteria to determine its 'proper functioning'.[10] This two-tiered investigation can significantly help understanding what specific legal institutions are conceived for and how they are expected to operate in society.[11]

[6] A problem of low empirical testability, which is in contrast with the requirements the social sciences expect any methodology to meet. See Hempel (n 2) 353–354; Jon Elster, 'Functional Explanation: In Social Science' in Michael Martin and Lee C McIntyre (eds), *Readings in the Philosophy of Social Science* (MIT Press 1994); Kincaid (n 2) 415–416; Felix S Cohen, 'The Problems of a Functional Jurisprudence' (1937) 5 Modern Law Review 5.

[7] Hildebrandt (n 5) 144 ('The ends of law [...] are thus co-determined by the needs of the society it serves and co-constitutes.'); Robert K Merton, *Social Theory and Social Structure* (Simon and Schuster 1968) 52; Bronislaw Malinowski, *A Scientific Theory of Culture and Other Essays* (Routledge 1944) 159 ('Function means [...] always the satisfaction of a need.').

[8] See examples provided by Hempel (e.g. the vital force, the heartbeat) in Hempel (n 2) 352–355, highlighting how the functional criteria in these regards are often left implicit or unspecified.

[9] An idea, the one of 'law as a tool', which unveils the connections of the functional analysis with several philosophies of law, from the legal realism to the sociological law theories, up to the instrumentalist approach, applied, among others, to the intellectual property field by Peter Drahos, *A Philosophy of Intellectual Property* (Australian National University Press 2016) 251 ff.

[10] See Hempel (n 2) 355, 365; the exercise of connecting the objectives of the law to the criteria for its assessment is not popular, yet neither unprecedented in the literature, see Hildebrandt (n 5) 143 ('[...] I will discuss the ends of law from a legal perspective to clarify how the law is meant to operate. This should at some point help to answer the question on whether the law is functioning well or not [...]').

[11] See Merton (n 7) 50 illustrating the application of the functional analysis to selected social institutions, organizations, structures and devices.

In this vein, an overarching question tackled by the functional analysis is: what does it *mean* that the law is 'working' effectively? Any articulated reply presupposes critical reflections[12] and an up-to-date contextualization of the law.[13] The functional approach to this question leads to an accurate analysis of the 'manifest' and 'latent' objectives of a particular legal institution[14] and to unveil information about the law itself and its impact.[15] Besides representing the needs of the society, in fact, functions and objectives of the law also point at the *effects* that it strives to cause.[16] This other side of the coin unveils a consequence-sensitive nature of the functional method, which turns the identified goals into a benchmark for the assessment of laws.[17]

[12] Cohen, 'The Problems of a Functional Jurisprudence' (n 6) 5–6 ('The most significant advances in intellectual history are characterised by the focusing of critical attention upon facts and issues which were formerly considered unimportant, indecent, or self-evident. [...] [T]he role of functionalism in legal science [...] as an insistence on certain questions that until recently have been generally ignored in legal studies. Specifically [...]: How do rules of law work? [...] What are the social mechanisms and institutions that make certain rules of law effective and leave others dead letters?').

[13] An evocative expression is used by Vivant stating that copyright law, if detached from its social ecosystem, would be 'like Robinson Crusoe without Friday'. Michel Vivant, 'Intellectual Property Rights and Their Functions: Determining Their Legitimate "Enclosure"' in Gustavo Ghidini, Hanns Ullrich and Peter Drahos (eds), *Kritika: Essays on Intellectual Property*, vol 2 (Edward Elgar 2017) 62.

[14] Taking inspiration from Merton's classification, Merton (n 7) 51, manifest functions being defined as both intended and recognized functions, while latent functions being those neither intended nor recognized. The distinction between expressed and implicit functions of EU copyright law suggested in this study slightly differs, the former overlapping with Merton's definition of manifest functions and the latter being defined as intended and not recognized functions. See also Rosenberg (n 4) 147 ('[I]dentifying "deeper" functions or wider functional categories is essential to the development of explanatory theories in the social sciences. [...] The manifest functions of a social institution are those that it was, as it were, intentionally designed to accomplish and/or that it is recognized by its participants as accomplishing. Latent functions are those it serves unwittingly, without the recognition of its participants.'); See also Drahos (n 9) 253 ('Institutions rarely serve one end. [...] Ends are conditioned by means and the other way around.').

[15] Hempel (n 2) 357 ('Functional analysis is widely considered as achieving an explanation of the "items" whose functions it studies.').

[16] In this light, studying the functions of the law is often associated with the observation of the "law in action". See Rosenberg (n 4) 147 ('The functions something serves are one or more of its effects, or the effects of its presence and behavior.'); Hildebrandt (n 5) 143–144 ('The concept of a function is a sociological notion that refers to the operations of the law within a societal structure, allowing an observer to check how the law actually works, irrespective of how people intend it to work or believe it to work.'); Cohen, 'The Problems of a Functional Jurisprudence' (n 6) 6–8 who interprets the functional analysis as the inquiry of the 'human significance of the law'.

[17] See Monika Hinteregger, 'Civil Liability and the Challenges of Climate Change: A Functional Analysis' (2017) 2017 Journal of European Tort Law 238; Apostolos Chronopoulos, 'Determining the Scope of Trademark Rights by Recourse to Value Judgements Related to the Effectiveness of Competition - The Demise of the

Copyright law and European Union (EU) copyright law, in particular, are exemplary cases of legal institutions, for which the functional analysis can prove very fruitful, if not of vital importance. Copyright is, in fact, undergoing a severe crisis.[18] During the last three decades, copyright laws have faced remarkable challenges at international, supranational and national level. Claims raised by copyright holders, seeking enhanced protection against the threats of the digital environment, have proven hard to tame, thus culminating in extensions in duration and scope of their exclusive rights, which do not always lead to desirable results.[19] At the same pace, even though more stealthily, the objectives of copyright have proliferated, the EU copyright legal framework being a glaring showcase of this development. Highly problematic is the fact that the expansion of EU copyright functions in the digital era does not follow an ordered pattern. Although, at first blush, some objectives may seem to dominate, the relationship between the several purposes recognized to copyright in the EU legislation remains unclear.

Trademark-Use Requirement and the Functional Analysis of Trademark Law' (2011) 42 International Review of Intellectual Property and Competition Law 535; Paul H Robinson, 'A Functional Analysis of Criminal Law' (1994) 88 Northwestern University Law Review 854; Robert J Glennon and John E Nowak, 'A Functional Analysis of the Fourteenth Amendment "State Action" Requirement' [1976] The Supreme Court Review 221.

[18] The term 'crisis' well captures the various connotations of profound structural problems faced by the discipline in the digital era, from the detachment of legal and social norms to the normative gap and deficiencies in the lawmaking. See, *inter alia*, Primavera De Filippi and Katarzyna Gracz, 'Resolving the Crisis of Copyright Law in the Digital Environment: Reforming the "Copy-Right" into a "Reuse-Right"', *Proceedings of the 7th International Conference on the Interaction of Knowledge Rights, Data Protection and Communication* (2013) <https://ssrn.com/abstract=2318016>; Ana Ramalho, *The Competence of the European Union in Copyright Lawmaking* (Springer 2016); Benjamin Farrand, *Networks of Power in Digital Copyright Law and Policy: Political Salience, Expertise and the Legislative Process* (Routledge 2014).

[19] Among the least desirable and more problematic outcomes of the copyright expansion are the constraints in the exercise of copyright exceptions, the rise of monopolization schemes over facts and information and, more generally, what Ghidini calls 'the progressive establishment of a net imbalance in favour of the means over the end'. See, *inter alia*, Gustavo Ghidini, *Rethinking Intellectual Property: Balancing Conflicts of Interest in the Constitutional Paradigm* (Edward Elgar Publishing 2018) 159; Thomas Dreier, 'Limitations: The Centerpiece of Copyright in Distress. An Introduction' (2010) 50 Journal of Intellectual Property, Information Technology and E-Commerce Law 50; Séverine Dusollier, 'Electrifying the Fence: The Legal Protection of Technological Measures for Protecting Copyright' (1999) 6 European Intellectual Property Review 285.

The risk is that, facilitated by the long-standing and to some extent 'path-dependent' reliance on copyright in Europe, the evolving legislation may lose track of its own functions, causing a progressive detachment between the stated objectives and the real outcomes of EU copyright rules. Such a disconnection between purposes and results would not only most likely favor the stakeholders enjoying strongest power of influence over the legislative process, but also jeopardize the same sustainability of the EU copyright system. The term 'sustainability' generally relates to the capability of a system to hold together in a cohesive way for long time.[20] The on-going process of copyright harmonization undertaken by the EU legislator is meant to be sustainable, in the sense that it intends to achieve a coherent body of rules acting in unison and improving the legal responses to determined needs of the society, among which the need for creative content, technological innovation, cultural preservation. It follows that the sustainability of the EU copyright system can be measured against the consistency between its pursued objectives and the outcomes of its application.

The threat of an unbridled and unsustainable evolution of EU copyright rules is reflected in the call emerging in the scholarship for a reconnection of the law with its own functions.[21] It

[20] Bengoextea illustrates the crucial role of coherence in solving conflicts of reasons for the purpose of preserving the legal system. Joxerramon Bengoetxea, Neil MacCormick and Leonor Moral Soriano, 'Integration and Integrity in the Legal Reasoning of the European Court of Justice' in Grainne De Burca and Joseph HH Weiler (eds), *The European Court of Justice* (Oxford University Press 2001) 64–68 ('Coherence is understood as making connections within a legal theory and between legal theory and moral and political theory, in order to appraise correctly the weight or importance of colliding reasons.'); Hildebrandt (n 5) 144 ("The ends of law must be seen from the perspective of the legal order as what holds together, in a very specific way, the people, things and institutions that form the polity.'); Hempel (n 2) 354 ('[...] to understand a behavior pattern or a sociocultural institution in terms of the role it plays in keeping the given system in proper working order and thus maintaining it as a going concern.').

[21] See, *inter alia*, Drahos' call for a 'strongly articulated conception of the public purpose and role of intellectual property', which, he argues, the legislative developments of the discipline should reflect. Drahos (n 9) 265–266; Bernt Hugenholtz and Martin Kretschmer, 'Reconstructing Rights: Project Synthesis and Recommendations' in Bernt Hugenholtz (ed), *Copyright Reconstructed. Rethinking Copyright's Economic Rights in a Time of Highly Dynamic Technological and Economic Change* (Wolters Kluwer 2018) 8 ('All authors agree that copyright's catalogue of exclusive economic rights should be reconstructed in light of copyright's [multiple] functions or rationales.'); Ronan Deazley, Martin Kretschmer and Lionel Bently, *Privilege and Property: Essays on the History of Copyright* (Open Book Publishers 2010) 13 ('A cross-jurisdictional study of the spread of the teleological story of copyright

may have been this feeling that prompted Advocate General (AG) Szpunar to attempt to restore some order asserting in one of his recent Opinions that '[c]opyright has two main objectives […] to protect the personal relationship between the author and his work […] [and] to enable authors to exploit their works economically and thus earn an income […].'[22] Yet, this statement, besides finding no validation in the related decision of the Court of Justice of the European Union (CJEU), remains highly controversial. The scholarship shows serious difficulties and substantial disagreements when it comes to identify the purpose(s) of copyright,[23] a legal institution nowadays mostly perceived as a 'moving target'.[24]

In the digital age more than ever before,[25] it becomes essential to provide unambiguous answers to the questions: what is EU copyright law conceived for? How do EU copyright

during the nineteenth century – from the dark beginnings of privileges to the full recognition of author's rights – is yet to be written.').

[22] AG Opinion in Case C-469/17 *Funke Medien NRW GmbH v Federal Republic of Germany* [2019] EU:C:2019:623 (*Funke Medien*), para 58.

[23] Ansgar Ohly, 'A Fairness-Based Approach to Economic Rights' in Bernt Hugenholtz (ed), *Copyright Reconstructed. Rethinking Copyright's Economic Rights in a Time of Highly Dynamic Technological and Economic Change*, vol 41 (Wolters Kluwer 2018) 109 ('[T]here is one considerable difficulty here: there is no agreement about what the proper function of copyright is.'); Stefan Bechtold, 'Deconstructing Copyright' in Bernt Hugenholtz (ed), *Copyright Reconstructed. Rethinking Copyright's Economic Rights in a Time of Highly Dynamic Technological and Economic Change*, vol 41 (Wolters Kluwer 2018) 76–77 ('[...] [C]opyright scholars and courts seem to agree much less on the ultimate goal of copyright protection.'). Martin Husovec, 'The Essence of Intellectual Property Rights Under Article 17(2) of the EU Charter' (2019) 20 German Law Journal 840, 842 ('Why do all IP rights exist? As simple as this question seems, it is actually very difficult to answer. Centuries of law-making have created a very fragmented landscape that cannot be explained with a single reason.'); Examples of diverging interpretations are, inter alia, Séverine Dusollier, 'Realigning Economic Rights with Exploitation of Works: The Control of Authors over the Circulation of Works in the Public Sphere' in Bernt Hugenholtz (ed), *Copyright Reconstructed. Rethinking Copyright's Economic Rights in a Time of Highly Dynamic Technological and Economic Change*, vol 41 (Kluwer Law International 2018) 164 ('[T]he ultimate objective of the control granted to copyright owners in the form of economic rights pertains to the exploitation of the work as an end, not to individual and specific acts of use that could constitute the many steps of a process.'); Gustavo Ghidini, 'Is IP Law a Lex Specialis? A Dual Test' in Graeme B Dinwoodie (ed), *Intellectual Property and General Legal Principles: Is IP a Lex Specialis?* (Edward Elgar 2015) 95 ('[I]n my view, said essential function [...] is simply and straightforwardly that of granting legal protection against the risk of losses from free-riding activities: more precisely, those free-riding activities capable [...] of frustrating the owners interest to recoup investment and obtain a fair compensation.').

[24] Evelyn Welch and Maria Mercedes Frabboni, 'Beyond Copyright. Law, Conflicts and the Quest for Practical Solutions' (2012) Report commissioned by the UK Arts and Humanities Research Council 18.

[25] In this regard, particularly insightful is Strowel's view on the impact of the digital environment to copyright: '[...] [W]e need, particularly in times of the harmonization of "copyright" within Europe, to ask new questions such as: what are the problems that will be created when the logic of a closed system is transplanted into an open one? [...] We need to focus attention not only on the detailed technicalities of copyright law, but upon the

rules meet their stated objectives? The functional analysis helps unravelling these crucial questions as follows. First, it identifies the expressed as well as implicit *functions* of EU copyright law. This carries the added value of facilitating the systematization of a vast and evolving body of rules, which urgently calls for such an analytical intervention.[26] Second, it paves the way towards a function-based assessment of the effectiveness of the harmonizing rules under the criterion of sustainability of the EU copyright system, thus shedding light on the convergences and divergences between the identified objectives and the *effects* of EU copyright rules.

Situated within the debate on the evolution and effectiveness of EU copyright law, this dissertation explores both these tiers of analysis and builds a new framework for assessing the evolving regulation. Starting with the study of the objectives of EU copyright law, the first three Chapters present a combined methodology. Chapter I adopts the historical analysis of law to analyze the original purposes of copyright in its first regulatory and statutory forms across Europe,[27] which laid the foundations for the modern national copyright laws the EU legislator aims to harmonize. Chapter II and Chapter III delve into the EU copyright legal framework, offering a comprehensive analysis of the objectives expressed, respectively, in the legislation and in its interpretation by the CJEU. The methodology used is the textual and

interpretative framework within the different European systems take on their meaning and gain their distinctive shapes.' Alain Strowel, '*Droit d'auteur* and Copyright: Between History and Nature' in Brad Sherman and Alain Strowel (eds), *Of Authors and Origins. Essays on copyright law* (Clarendon Press 1994).

[26] *Inter alia*, Caterina Sganga, *Propertizing European Copyright. History, Challenges and Opportunities* (Edward Elgar 2018) 142–146.

[27] The origins of copyright both in its Anglo-Saxon and Continental forms have been vastly explored in the literature, yet a specific focus on the purposive elements emerging from the sources has not been developed. See, inter alia, the seminal comparative work by Alain Strowel, *Droit d'auteur et Copyright. Divergences et Convergences* (Bruylant 1993); see also Jane C Ginsburg, 'Histoire de Deux Droits d'auteur: La Propriété Litteraire et Artistique Dans La France et l'Amerique Revolutionnaires' (1991) 147 Revue Internationale du Droit D'Auteur; Umberto Izzo, *Alle Origini Del Copyright e Del Diritto d'autore. Tecnologia, Interessi e Cambiamento Giuridico* (Carocci 2010); Peter Baldwin, *The Copyright Wars. Three Centuries of Trans-Atlantic Battle* (Princeton University Press 2014).

content analysis, which helps providing a faithful and accurate 'cartography' of the expressed EU copyright functions. In Chapter IV the study moves further by investigating the implicit objectives of EU copyright law and deploying, for this purpose, the economic analysis of law. This methodology, justified by the predominant economic and market-driven nature of the functions identified in the previous Chapters,[28] unearths a crucial element, that is a distributive rationale. Mostly unspoken in the legislation and unexplored in the literature, this rationale underlies the EU copyright system and exercises a significant radiating effect over the harmonization process, thus showing a key potential in decrypting the multi-functional approach to copyright. Picking the threads of the analysis, Chapter V explores this potential by turning the distributive rationale into a fully-fledged analytical framework, testing its capability to identify convergences and divergences between the declared objectives of EU copyright law and the effects of its application.

A few caveats should be borne in mind while reading the Chapters that follow. Throughout the dissertation the term 'copyright' is intended *latu senso*, thus including neighboring and *sui generis* rights. The research conducted was completed on 15 September 2019. The law is, therefore, stated as at this date and all websites referred to were last accessed on this day, unless otherwise indicated.

[28] Worth highlighting is the familiarity and compatibility of the economic and functional approaches to the study of law, a so-called functional school of law and economics having been developed in the 90s as a response to the shortcomings of the dominant Chicago and Yale economic schools, with the aim to 'bridge the gap between conflicting normative perspectives in law and economics, at least by bringing the debate onto the more solid ground of collective choice theory.' Francesco Parisi and Jonathan Klick, 'Functional Law and Economics: The Search for Value-Neutral Principles of Lawmaking' (2004) 79 Chicago-Kent Law Review 431, 436.

Chapter I - A historical analysis of the original purposes of copyright law in Europe

The inquiry into the functions of EU copyright law starts with the study of its pre-EU experiences, thus with the original reasons for which such institution has been conceived. The choice is dictated by two main reasons. First and foremost, EU copyright law arises neither *ex novo* nor in a self-standing manner, but rather deeply reliant on the substratum of national copyright legislations across the Union. Second, there is a tight interconnection between the functional analytical approach and the historic-genetic explanation of events and institutions:[29] any chronological overview of the evolution of copyright, to be meaningful, requires a criterion of relevance[30] and, *vice versa*, the functional analysis needs historical underpinning and contextualization not to lose track of the meanings and evolution of the functions it studies.

In this vein, this opening Chapter engages with the historical analysis of copyright law in Europe, focusing, in particular, on its justifications and purposes. The point may be raised that these two terms refer to slightly different meanings, the former indicating the philosophical ground of legitimation for copyright enforceability, while the latter identifying more in details the needs tackled by the legislation and, in turn, providing information on its addressees, scope and other core features.[31] Even though in the analysis of EU copyright law

[29] Hempel (n 2) 357.
[30] *ibid* 357–358.
[31] A divide, which is unveiled, for instance, between the lines of Dusollier, 'Realigning Economic Rights with Exploitation of Works' (n 23) 177 ('Many theories of copyright have been advanced over the years [...] but few are deployed to the extent they could serve as paradigms explaining the conditions and extent of copyright.'); an interesting perspective in this regard is developed by Strowel, who draws a distinction between nature and justification of copyright, emphasizing how the Continental European scholarship has majorly focused on the former and the Anglo-Saxon world on the latter. Strowel (n 25) 240–241.

in the following Chapters the attention will be primarily on the latter – i.e. the specific goals pursued by the EU legislator –, the historical analysis below takes into account both justificatory and purposive elements, as, due to the strong influence of the philosophical theories, they present themselves deeply intertwined in the first experiences of copyright regulation.

Starting from the origin of copyright in the form of printing privileges (Section 1.1), the analysis inquires historical circumstances and arguments that led to the original input for regulatory intervention on the creation and dissemination of intellectual works. Following the evolution of the regulation, the analysis focuses on the English (Section 1.2) and French developments (Section 1.3), as they show particular high historical relevance. Besides being the cradles of copyright's first statutory experiences, both national models of regulation have, indeed, significantly influenced the evolution of the other copyright systems in the Continent. The historical analysis concludes with a focus on the modern developments of copyright across Europe (Section 1.4), defining the two main traditions stemming from the English and French experiences, and shedding light on the convergences between them.

1.1. The ancestors of copyright: technological input and printing privileges

The origins of copyright are rooted in Europe, hence in its historical and social context. Attaching a more intimate dimension to it, Rose argues that copyright generates with the 'conception of ourselves', referring to the unique way in which every individual experiences

and re-presents the world.[32] Yet, it would be improper to describe the rise and evolution of this legal institution as a process led independently by single individuals. As the Chapter demonstrates, since the 16th century, the protagonists of the history of copyright have been groups holding specific common interests and reacting to the changing socio-cultural factors in the background.[33] The most relevant among these factors is the technological progress, which remarkably shaped the main features of copyright in its evolution.[34]

1.1.1. A reaction to the letterpress revolution

The birth of copyright dates back to the second half of the 15th century, in the aftermath of the invention of the letterpress printing and its diffusion in Europe.[35] There is no evidence of any previous regulation stemming from the political process and addressing the production and distribution of creative content.[36] Collective dimensions of learning, inclusive visions of

[32] Mark Rose, *Authors and Owners: The Invention of Copyright: The Invention of Copyright* (Harvard University Press 1993) 8.

[33] See Willem Grosheide, 'Transition from Guild Regulation to Modern Copyright Law. A View from the Low Countries' in Lionel Bently, Uma Suthersanen and Paul Torremans (eds), *Global Copyright. Three Hundred Years Since the Statute of Anne from 1709 to Cyberspace* (Edward Elgar 2010) 80–81 ("[T]he history of copyright law is also the history of the social organization and societal pressure of related and supporting groups in the successive periods of time until the establishment of the BC [Berne Convention] which may be qualified as the starting point of modern copyright law."); this statement is supported by the findings of historical, historiographical and comparative studies by Deazley, Kretschmer and Bently (n 21); Umberto Izzo, *Alle Origini Del Copyright e Del Diritto d'autore. Tecnologia, Interessi e Cambiamento Giuridico* (Carocci 2010); Strowel (n 27).

[34] The close link between copyright and technological advancement is inherently related to both the increasingly problematic aspects of distribution of content. See, in this regard, Ohly (n 23) 99; Leanne Wiseman and Brad Sherman, 'Facilitating Access to Information: Understanding the Role of Technology in Copyright Law' in Susy Frankel and Daniel Gervais (eds), *The Evolution and Equilibrium of Copyright in the Digital Age* (Cambridge University Press 2014); Thomas Eger and Marc Scheufen, 'The Past and the Future of Copyright Law: Technological Change and Beyond' in Jef De Mot, *Liber Amicorum Boudewijn Bouckaert* (Die Keure 2012).

[35] With Gutenberg, inventor of the letterpress technology, being granted what historians consider the first copyright privilege ever issued, in 1469 in Venice. See 'Johannes of Speyer's Printing Monopoly' (1469), available at Lionel Bently and Martin Kretschmer (eds), 'Primary Sources on Copyright (1450-1900)' <www.copyrighthistory.org>; see also Izzo (n 33) 13; Mark Rose, *Authors and Owners: The Invention of Copyright* (Harvard University Press 1993) 9–10.

[36] For a thorough analysis of the Ancient Greek, Roman and Chinese alternative practices to copyright, see Izzo (n 33) 11–15.

progress and spontaneous forms of appreciation towards knowledge seem to characterize the pre-copyright world. In China, where printing techniques developed since the first centuries AD, Taoism and Confucianism had a major influence in postponing to the 19th century the introduction of individual entitlements over creative works.[37] Roman law did not provide any property entitlement or other institution that can be ascribed to a primordial form of copyright was provided, as the intellectuals carried out their works out of prestige and received discretionary *honoraria* from wealthy patrons.[38] In the Middle Ages, monks in monasteries and cloisters secured the literary legacy of Europe manufacturing innumerable copies of books handwriting them, driven by their spiritual belief.[39] It is with the advent of the letterpress technology that the idea of copyright, as an individual exclusive entitlement authorizing the production of copies of a work, came into being, its first developments being inevitably linked to the literary sector.[40]

What triggered the regulatory intervention in this direction is something embedded in Gutenberg's invention and inherently related to the creation of profit and dissemination of knowledge in society. The revolutionary potential of the letterpress printing has been, indeed,

[37] Jennifer Wai-Shing Maguire, 'Progressive IP Reform in the Middle Kingdom: An Overview of the Past, Present and Future of Chinese Intellectual Property Law' (2012) 46 The International Lawyer 893; Izzo (n 33) 11–12.

[38] Haimo Schack, *Urheber- Und Urhebervertragsrecht* (Mohr Siebeck 2017) 50–51; Ugo Bartocci, *Aspetti Giuridici Dell'attività Letteraria in Roma Antica. Il Complesso Percorso Verso Il Riconoscimento Dei Diritti Degli Autori* (Giappichelli 2009); Izzo (n 33) 12 ('[...] It should be clarified [...] that no direct historical correlation exists between the legal institutions of late republican/imperial age and the body of rules, which the countries signatory of the Berne Convention of 1866 decided to adopt, thus promoting copyright to a global legal institution ante litteram.') (translation by the author).

[39] Baldwin (n 27) 54; Rose, *Authors and Owners* (n 35) 9.

[40] A focus, which has remained for long time primary focus of the analysis of the copyright paradigm and, in particular, its economic structure and implications. See, *inter alia*, Eger and Scheufen (n 34); Stephen Breyer, 'The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs' (1970) 84 Harvard Law Review 281; Arnold Plant, 'The Economic Aspects of Copyright in Books' (1934) 1 Economica 167.

to enable, for the first time, the mass production of text materials.[41] The exploitation of this potential fundamentally led to a twofold consequence: on the one side, a radical change in costs of production, and, on the other, a remarkable impact on the diffusion of information across society.[42] Both these effects jointly represented favorable conditions for the printing industry, which, with no surprise, in the 17th century experienced a quick and disruptive take-off in the European continent.[43] The rise of a new branch of industry and related markets, or, more precisely, the decentralized and profitable nature that the printing activity acquired with the machineries evolved from Gutenberg's prototype brought about the need for a regulatory response.[44]

In the Republic of Venice, in England, France and Germany, this response took the form of printing privileges (also called letter patents), which represent the embryonal ancestor of copyright entitlements.[45] Letter patents started being issued in Venice to authorize some printers to reproduce and sell a specific book or a category thereof for a limited number of

[41] Baldwin (n 27) 54 ('The invention of printing with moveable type in fifteenth-century Germany made writings easily reproducible for the first time. By reducing the physical toil of copying by hand, printing also allowed anyone—not just their legitimate owners—to reproduce printed materials.'); The 'mass' dimension of markets as well as the 'mass culture' in society prove to be pivotal not only in the origin, but also in further core developments of copyright, as illustrated by Mark Rose, 'The Public Sphere and the Emergence of Copyright: *Areopagitica*, the Stationers' Company and the Statute of Anne' in Ronan Deazley, Martin Kretschmer and Lionel Bently (eds), *Privilege and property: Essays on the history of copyright* (Open Book Publishers 2010).

[42] A structured analysis of the changes in benefits and burdens of copying caused by technological innovations, starting from printing, is developed by Harold Demsetz, 'Toward a Theory of Property Rights' (1967) 57 The American Economic Review 347; see also Eger and Scheufen (n 34); Izzo (n 33) 13.

[43] Rose, *Authors and Owners* (n 35) 13–14.

[44] See Baldwin (n 27) 54 ('[...] [W]hen the printing press created new markets for works, ownership became an issue.'); Paul Goldstein, *Copyright's Highway. From Gutenberg to the Celestial Jukebox* (Stanford University Press 2003) 21 ('Copyright was technology's child from the start. There was no need for copyright before the printing press. But as movable type brought literature within the reach of everyone, and as the preferences of a few royal, aristocratic, or simply wealthy patrons were supplanted by the accumulated demands of mass consumers, a legal mechanism was needed to connect consumers to authors and publishers commercially. Copyright was the answer.').

[45] Izzo (n 33) 16 ('The privilege to print and to sell books, granted by the sovereign for censorhip purposes, is to be considered the initial prerogative, from which the regulation of publishing activities stems and, hence, the historical embryo of the legal protection of the literary and artistic work.') (translation by the author); Deazley, Kretschmer and Bently (n 21) 3–4.

years,[46] and in the 16th and 17th centuries they spread across Europe.[47] Soon, printing privileges were joined by letters patents serving as authors' privileges, i.e. authorizations issued to writers allowing them to have their manuscripts published.[48]

1.1.2. Why privileges

Printers' and authors' privileges were officially issued by a central authority within its prerogatives, yet, lacked the general nature of the law, being granted *ad personam*. In this light, explicit references to the broader justification of such regulatory choice can hardly be found in these documents. Nevertheless, the historical contextualization of the printing privileges phenomenon reveals insightful information on the aims pursued by such entitlements. What Venice, England and Germany had in common in the 15th and 16th centuries was a solid centralized structure of civil power, represented by the monarchical form of government and mostly supported by the religious authority in the interest of defending the predominance of Christian faith across Europe.[49] During the 16th century, the integrity of this institutional centralization started to be threatened by religious and civil wars, which brought remarkable changes within and outside the territorial boundaries.[50]

[46] In the case of the first ever issued patent to Gutenberg, five years. See Paul Gendler, *The Roman Inquisition and The Venetian Press* (Princeton University Press 1977) 28.
[47] See, for instance, the Imperial Senate privilege to the Sodalitas Celtica issued in Nürnberg in 1501, the proof of royal printing privilege in 'The Articles of the Pope's Bulle' by Richard Pynson, printed in Westminster in 1518, Totell's Printing Patent for Common Law Books of 1553, all available at Bently and Kretschmer (n 35).
[48] Joanna Kostylo, 'From Gunpowder to Print: The Common Origins of Copyright and Patent' in Ronan Deazley, Martin Kretschmer and Lionel Bently (eds), *Privilege and property: Essays on the history of copyright* (Open Book Publishers 2010) 22–23.
[49] Laura Moscati, 'Un "Memorandum" Di John Locke Tra Censorship e Copyright' in Orazio Condorelli (ed), *'Panta rei'. Studi dedicati a Manlio Bellomo* (Il Cigno 2004) 128.
[50] Particularly worth mentioning are the defeat of Henry VI at the Hundred Years War, which caused significant losses in territories for the English Crown, the civil conflict known as War of the Roses still in England; the Turkish-Ottoman threat in Venice and the weakening of the central role of the Doge; the religious conflicts in

In this context, printing privileges arose within the intent to control the circulation of literary works in society to maintain order and minimize dissident or heretical voices.[51] The mechanism of censorship stemming from the privilege system turns particularly evident in some national developments. In England, for instance, the initial aim of the Crown was to attract the technological innovations and let printers with their machineries reach the island.[52] However, it did not take long before Henry VIII established a system of harsh restrictions upon the dissemination of books.[53]

In particular, two core features of the privilege systems across Europe unveil the purpose of establishing a censorship mechanism. First, complementary to the issuance of *ad personam* royal printing privileges was a general *prohibition* to print for everyone else, including non-privileged printers and even authors when the privilege was granted only to the printer.[54] Even though the duration of privileges was mostly – and arbitrarily – limited,[55] the strict

Germany, ended only with the Westphalian Peace of 1648. For a detailed analysis, see Michael Howard, *War in European History* (Oxford University Press 2009); see also Rose, *Authors and Owners* (n 35) 17–18.

[51] Exemplary of this intent are the cases of the Papal bull Exsurge Domine of 1520, by way of which Pope Leo X prohibited the printing and dissemination of Martin Luther's theses, and the French Censorship Act of 1551, both sources available at Bently and Kretschmer (n 35); Izzo (n 33) 16 ('The political and religious tensions triggered by the Lutheran thought in Europe and the crucial role that the press acquires in the dissemination of ideas set the ground for the rise of an opportunity of tacit institutional agreement between sovereigns and printers [...]') (translation by the author).

[52] See Rose, *Authors and Owners* (n 35) 21–22.

[53] Reference is made to the Treasons Act of 1534 and the Henrician Proclamation of 1538. See David Harvey, 'Law and the Regulation of Communications Technologies: The Printing Press and the Law 1475-1641' [2005] Law & History Journal 160, 170.

[54] Deazley, Kretschmer and Bently (n 21) 8 emphasizing on Diderot's wording in his comment to the French regulation on book trade of 1649 ('[...] [T]he magistrate verbally prohibited the guild from printing anything without letters of privilege stamped with the great seal. [...] he even extended his verbal order to old books, and the Council, ruling, as a consequence of this order, on privileges and their continuation by letters patent of 20 December 1649, prohibited the printing of any book without a royal privilege [...]').

[55] Not rarely coinciding with a life-long period of time. See Schack (n 38) 55.

requirement of holding a royal permission to reproduce and distribute books intended to prevent non-holders of such privilege from printing any book.[56]

Second, the privilege system and its successful development across Europe from the 15th century up to 18th century relied on consolidated feudal structures of enforcement. Indeed, once issued, privileges had to be effectively enforced across the territory and, at the same time, sustainable to the sovereign treasury. To fulfil these needs, the system of privileges heavily relied on corporative structures, which had been at play since the 13th century in the form of craft guilds.[57] In particular, printers, who held a *de facto* monopoly over the technology and know-how for the production of intellectual content, were primarily targeted.[58]

By this token, the London Stationers, printers' corporations in Venice, Paris and Basel became, at the same time, the main beneficiaries and enforcers of the printing privileges.[59] The delegation of enforcing power from the sovereign to the printers has a marked feudal connotation, which emerges not only from the hierarchical structure of the guilds themselves, but also from the mutual pact of loyalty between them and the ruler.[60] The founding basis of

[56] Along this line, even when the privilege was granted to the author, the purpose was not of rewarding or incentivizing his or her creativity, but rather of securing accountability over the published work. For a detailed analysis of author's privileges, see *ibid* 55–56.
[57] Grosheide (n 33) 81.
[58] A monopoly, which, as the following Sections will show, became ever harder to control. The English scenario, in particular, shows the emergence of an increasingly privatized and self-enforced model of administration of the privileges by the Stationers' Company. See Section 1.2.
[59] In England, in 1557 the Crown conferred full prerogatives of censorship and enforcement of exclusive patent rights to the Stationers' Company, a highly hierarchical corporation, based in London, which would long be in the limelight of English copyright history. See Ronan Deazley, 'Commentary on the Stationers'' Royal Charter 1557' (2008) available at 'Bently and Kretschmer (n 35).
[60] See Maurizio Borghi, 'A Venetian Experiment on Perpetual Copyright' in Ronan Deazley, Martin Kretschmer and Lionel Bently (eds), *Privilege and property: Essays on the history of copyright* (Open Book Publishers 2010) 144 highlighting how, until the 18th century, the category of printers was limited in numbers and composed of members notably belonging to the upper class.

this loyalty was the shared interests in economic profit and in the preservation of the *status quo*, The cultural and economic potential of the press was clear to both parties and the traditional secrecy kept by the guilds met the objective of the sovereign to tame the subversive potential of the technology. This occurred at the costs of the technological and industrial progress as well as of authors, who became ever more marginalized in the book trade.[61]

In this vein, it can be summarily stated that the system of *ad personam* printing privileges in force from the 15th up to the 18th century in Europe unveils a substantiated intent to control the dissemination of works in society and exercise an influence on the public opinion.[62] Such aim results particularly evident in the analysis of the historical context and the *modus operandi* of printing privileges, which granted the possibility to print and profit only to selected printers, with whom the central authority had a relationship of loyalty. Disturbances and cracks in this trust, along with the constant evolution of the technological means and supports to copying, will lead to a fundamental disruption in the history of copyright, marking the shift from the privilege system towards the modern copyright paradigm.

1.2. The rise of the English *bourgeoisie* and the Statute of Anne

Strong of their privileges and delegated powers, several printers' guilds across Europe became remarkably cohesive groups, fiercely standing for the interest of their members and defending their profitable monopolies.[63] Nevertheless, in the 17th century the printing industry

[61] Laurent Pfister, 'Author and Work in the French Print Privileges System: Some Milestones' in Ronan Deazley, Martin Kretschmer and Lionel Bently (eds), *Privilege and property: Essays on the history of copyright* (Open Book Publishers 2010) 122.
[62] On copyright privileges and public opinion, see the seminal article by William Haller, 'Before *Areopagitica*' (1927) 42 PMLA 875.
[63] Rose, *Authors and Owners* (n 35) 67 ff.; Strowel (n 25) 25–27.

underwent radical changes and the regulatory response to the growing printing industry did not remain unaltered for long. The consolidation of the power of the corporate guilds is well represented by the evolution of the London Stationers' Company. Its customs and practices started enjoying highest recognition by the English Crown, who did not hinder the emergence of an increasingly privatized and self-enforced model of administration of printing privileges.[64] In the meanwhile, the non-privileged middle class of the English society, the *bourgeoisie*, was rapidly growing in London cafés, willing to freely write and spread opinions and take active part in public life.[65]

This situation brought to a growing discontent in a twofold way. On the one side, printers who were not part of the London guild started pointing at the flaws of the privilege system and voicing arguments in favor of competition.[66] On the other side, the role and power of the Stationers' Company was becoming unacceptable to authors, who started manifesting distress towards the high profits gained by the printers and the limited share they received for their manuscripts.[67] Both these sides contrasting the Stationers' monopoly jointly contributed to heated debate – or, rather, a proper 'battle' – on copyright, which embeds elements of crucial importance from a functional perspective.

[64] See Ordinance for the Regulation of Printing of 1643. Only with the Printing Act of 1662, the control and enforcement of printing privileges stopped being internal to the same Company's bodies and shifted back to the competence of the King's Bench. Both sources are available at Bently and Kretschmer (n 35).

[65] Rose, 'The Public Sphere and the Emergence of Copyright: *Areopagitica*, the Stationers' Company and the Statute of Anne' (n 41).

[66] The crucial role played by provincial publishers and booksellers, in particular in Scotland, shows great similarity to other collisions between printers in the central capital and in the provinces in other European countries. See, in this regard, Baldwin (n 27) 55 ('Scottish reprint publishers dogged the London booksellers. In France the booksellers in the provinces, Lyon for example, fought their Parisian colleagues. Swiss publishers escaped both the French monarchy's censorship and its grants of privileges.').

[67] *ibid* ("Publishers and their authors fought too. Privileges were generally given to publishers, who usually paid authors for manuscripts. [...] During the late seventeenth century, authors and their heirs began to insist that renewal of publishers' privileges depended on their say-so."); Annette Kur and Thomas Dreier, *European Intellectual Property Law. Text, Cases and Materials* (Edward Elgar 2013) 241.

1.2.1. Competition and public interest

The authors' claims were based on two main arguments. The first was the disproportion of profits between Stationers and writers, caused by the monopolistic pricing of books by the former and the established system of lump sum payments received by the latter.[68] The second argument raised by the authors found in Milton's famous speech *Areopagitica*[69] not only an incisive labelling, but a proper manifesto. Its core lies in the so-called 'liberty of unlicensed printing', i.e. a strong rejection of the mechanisms of censorship established by the Stationers' Company. According to Milton, preventive censorship represented an act of dishonor 'to the author, to the book, to the privilege and dignity of learning.'[70]

The claims of the writers, championed by Milton in his speech, referred not only to the safeguard of their own individual interests, but also to the pursuit of a 'broader good', advocating for the protection of expression, knowledge and exchanges of ideas, 'good' pillars for the truth and the individual formation in the society.[71] Significant clarity and further articulation of the authors' viewpoints come from philosophy. Contemporary to these claims are philosophical theories, which will be milestones in the formation of the modern copyright paradigm. Among them, John Locke directly engaged with the debate on printing privileges with a Memorandum in 1694, advocating for the freedom to print the classics in defense of

[68] Among the most exemplary and renown cases is the contract between Milton and the printer Simmons regarding the poem "Paradise Lost", signed in 1667, through which Milton alienated to Simmons "All that Booke, Copy, or Manuscript (…) the full benefit, profit, and advantage thereof, [which] shall or may arise thereby" in exchange for four payments of £5. See David Masson, *The Life of John Milton: 1608-1639* (Macmillan 1894) 509–511.

[69] John Milton, '*Areopagitica*, with a Commentary by Sir Richard C Jebb and with Supplementary Material' <https://oll.libertyfund.org/titles/103>.

[70] *ibid*.

[71] Rose, 'The Public Sphere and the Emergence of Copyright: *Areopagitica*, the Stationers' Company and the Statute of Anne' (n 41) 76.

the public interest.[72] Before the Memorandum, in his renowned Second Treatise on Government of 1689, Locke had conceptualized private property as a natural, yet not limitless,[73] right acquired by way of labor.[74] Structured normative arguments arose also in favor of the enhancement of trade and economic development, as fundamental parts of the prosperity of a society.[75]

In addition to the distress of the authors, frustration grew also among provincial publishers.[76] As the first royal licenses were granted to book traders enabling them to operate outside London, the English privilege system began to shake. Numerous revolts against the expanding monopoly of the Stationers broke out, questioning their legitimacy.[77] The reaction of the English Parliament was, first, to lower the autonomy of the Company, and, subsequently, to dismantle the privilege system.[78] In short, competition has been the key element for the evolution of English copyright law from a privilege-based system into a new

[72] John Locke, 'Memorandum on the 1662 Act' (1693) available at Bently and Kretschmer (n 35).
[73] Putting particular emphasis on Locke's implicit reliance on the concept of positive commons is the interpretation by James Tully, *A Discourse on Property: John Locke and His Adversaries* (Cambridge University Press 1982); see also Drahos (n 9) 48 ff.
[74] The so-called theory of labor, or *theorie du travail-mérite*. See John Locke, *Two Treatises of Government* (Cambridge University Press, Peter Laslett 1824) 288–290; for a thorough analysis on the implications of the theory of labour in copyright, see Strowel (n 27) 175 ff.
[75] For a detailed overview of the most meaningful positions in favour of free competition and laissez faire policies, among which those expressed by Adam Smith, see Drahos (n 9) 141 ff.
[76] The dispute between the London Stationers and the provincial printers shows similar features with the subsequent Nachdruckdebatte in Germany. See Diethelm Klippel, 'Über Die Unzulässigkeit Des Büchernachdrucks Nach Dem Natürlichen Zwangsrecht. Der Diskurs Über Den Büchernachdruck Im Jahre 1784' in Tiziana J Chiusi, Thomas Gergen and Heike Jung (eds), *Das Recht uns seine historische Grundlagen: Festschrift für Elmar Walde zum 70. Geburtstag* (Duncker & Humblot 2008) 477–498; Ohly (n 23) 99; Baldwin (n 27) 55.
[77] The very first protests being led by John Wolfe in 1580. See Joseph Loewenstein, 'For a History of Literary Property: John Wolfe's Reformation' (1988) 18 English Literary Renaissance 389.
[78] The Parliament first abolished the Star Chamber, thus depriving the Stationers' Company of substantial part of its autonomy, and then fully took back the power to issue licenses and privileges. See the Star Chamber Decree of 1637, the Ordinance for the Regulation of Printing of 1643 and House of Commons' Reasons for objecting to the renewal of the Licensing Act (1695), all sources available at Bently and Kretschmer (n 35).

form of regulation. This gives a significantly commercial connotation to the origins of English copyright law as well as its modern developments, as it will be demonstrated in due course.[79]

The opening towards competition in the reproduction and distribution of literary works in England presupposed the recognition that the *de facto* monopoly held by the Stationers' Company stifled both technological progress and the markets, to the detriment of society. This argument first concretized in the Statute of Monopolies of 1624, which limited the duration of new patents to fourteen years (with the possibility of renewal for other fourteen) and capped the protection of existing patents to a maximum of twenty-one years.[80]

Despite this growing awareness, London Stationers carried on a strenuous fight to restore privileges as they were.[81] Ultimately, they settled for a political compromise resulting in the Statute of Anne, which is known as the very first copyright statute in Europe, adopted by the English Parliament on 5 April 1710.[82] The Statute symbolizes not only the turning point from the system of privileges into modern copyright, but also a moment of synthesis of the most influent arguments raised within the changing scenario of the printing industry. Its core

[79] Mark Rose, 'The Statute of Anne and Authors' Rights: *Pope v Curll* (1741)' in Lionel Bently, Uma Suthersanen and Paul Torremans (eds), *Global Copyright. Three Hundred Years Since the Statute of Anne from 1709 to Cyberspace* (Edward Elgar 2010) 70. See also Section 1.4.1.

[80] See Statute of Monopolies of 1624, available at Bently and Kretschmer (n 35); It should be specified that the Monopolies Act did not apply to printing privileges, thus not affecting directly the Stationers' powers. Nevertheless, despite representing a crucial moment of separation between the protection of copyrights and patents, the emphasis lies here in the evolving environment surrounding the systems of privileges and determining its end. See, in this light, also Lionel Bently, Uma Suthersanen and Paul Torremans (eds), *Global Copyright. Three Hundred Years Since the Statute of Anne from 1709 to Cyberspace* (Edward Elgar 2010) 109–110.

[81] A very interesting read of the Stationers' attempts to uphold their monopolistic position is offered by Plant, who emphasizes how the arguments raised are still relevant and fitting for today's copyright scenario. See Plant (n 40) 177 ("The stationers then pass to a statement of the case for copyright which would not discredit an 'economic adviser' to a modern publishers'' association. The first consideration is that books are luxuries, the demand for which is elastic, and therefore monopoly cannot harm the public […] The second consideration is that copyright monopoly would result in more and cheaper books […]")".

[82] An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, During the Times therein mentioned (1710) (Statute of Anne), available at Bently and Kretschmer (n 35).

features can be found in the affirmation of the right of the author to authorize the printing of copies from his or her manuscript and in the limited duration of such right. Rather glaring is the fact that the Statute borrowed the terms of protection from the Statute of Monopolies, providing for a renewable term of fourteen years for new books and a maximum of twenty-one years for books already in print.[83] It is interesting to note that the Statute did not regulate the effects of the expiration of these terms. With a wording that anticipates modern copyright developments, it could be stated that the Statute of Anne did not define a so-called public domain. This means that literary works, after a maximum of twenty-eight years during which the author held the exclusive right to print, were left in an undefined grey zone between the lapsed privileges and the intent to promote freedom of printing and disseminating knowledge.[84]

In more than one passage, the text of the Statute of Anne reveals meaningful insights concerning the underlying aims of copyright. First and foremost, the Statute represents a response to the raised need for better protection and acknowledgement of the author.[85] Such protection is intended also to serve as mechanism of encouragement of the literary creation.[86] In addition, the Statute gives voice to the arguments related to the 'thirst for knowledge' of

[83] Statute of Anne: "(…) [T]he sole right and liberty of printing such Book and Books for the term of One and twenty years to commence from the said tenth day of April and no longer (…) Provided always that after the expiration of the said term of fourteen years the sole right of printing or disposing of copies shall return to the Authors thereof if they are then living for another Term of fourteen years".

[84] Jane C Ginsburg, '"Une Chose Publique"? The Author's Domain and the Public Domain in Early British, French and US Copyright Law' (2006) 65 Cambridge Law Journal 636, 636 ('This does not mean that the broader concepts that the "public domain" today embraces did not exist in some form in the eighteenth century, but simply that no single locution conveniently and universally captured the concept of non-property in works of authorship.').

[85] Statute of Anne: "Whereas printers Booksellers and other persons have of late frequently taken the liberty of printing reprinting and publishing or causing to be printed reprinted and published Books and other writings without the consent of the authors or proprietors of such books and writings *to their very great detriment and too often to the Ruin of them and their families*. *For preventing therefore such practices for the future* (…)" (emphasis added).

[86] *ibid*: "(…) *for the encouragement of learned men to compose and write useful books*" (emphasis added).

the society by making the goal of encouragement of learning part of its title ('An Act for the Encouragement of Learning'). In this light, it is also worth noting the choice of the term '*useful* books',[87] which hints at the valorization of knowledge in the interest of the collectivity, as advocated by authors and provincial publishers during the turmoil prior to the Statute. As Cornish pointed out, these two purposive elements emphasized in the Statute of Anne – i.e. the protection of the writers to prevent their economic misery and encourage their work and the promotion of learning – respectively represent 'a private and a public objective', which predict a core juxtaposition, to which the modern copyright paradigm will be exposed.[88]

To a certain extent, the Statute of Anne can be deemed a successful statutory experience for copyright, as it attracted the attention of main actors from other creative sectors and inspired the drafting of new legislative acts.[89] Nevertheless, in the literary world, the emerging English *bourgeoisie* was not fully satisfied. Authors were still exchanging their manuscripts for low payments and the limited duration of copyright was often overlooked, especially in the decisions of the Court of Chancery.[90] Most importantly, the Statute did not appease the tensions between the London Stationers and provincial printers, especially the ones from Scotland, where the reprint industry was rapidly flourishing.[91] Fiercely opposing were, on the one side, the last attempt of the Stationers' Company to hold tight to their privileges, thus suggesting to interpret the Statute of Anne as supplementary to the traditional and perpetual

[87] *ibid*.
[88] William Cornish, 'The Statute of Anne 1709–10: Its Historical Setting' in Lionel Bently, Uma Suthersanen and Paul Torremans (eds), *Global Copyright. Three Hundred Years Since the Statute of Anne from 1709 to Cyberspace* (Edward Elgar 2010) 21-22. See Section 1.4.
[89] Among the earliest reactions, engravers claimed the same level of protection as book authors, which led to the 1735 Engravers' Copyright Act, opening for the first time the copyright regulation to a new sector of artistic expression. See An Act for the encouragement of the arts of designing, engraving, and etching historical and other prints, by vesting the properties thereof in the inventors and engravers, during the time therein mentioned (1735) (Engravers' Copyright Act), available at Bently and Kretschmer (n 35).
[90] For a thorough overview of the decisions, see Izzo (n 33) 120.
[91] Baldwin (n 27) 55–56.

right of property at common law, and, on the other side, the Scottish booksellers advocating for a strictly literal interpretation of the Statute. This clash led to so-called battle of the booksellers, which took place in the courts of common law and lasted over thirty years. The two opposing viewpoints culminated in the landmark decisions in the cases of *Millar v Taylor*[92] and *Donaldson v Becket*.[93]

1.2.2. The debate on the perpetuity and limits of copyright

Millar v Taylor is a King's Bench decision of 1769 stipulating the perpetual and common law nature of the right of copyright, despite the provisions on its limited duration enshrined in the Statute of Anne. It is particularly worth paying attention to the reasoning, as it unearths arguments essential to the understanding of the aims pursued by way of copyright.

Among the arguments in support of the decision, Lord Chief Justice Mansfield argued that it was a matter of principles of common law, hence of justice, that the author held rights on his or her work already before its publication, rights which allowed him or her to decide whether, when, how and by whom to have the book published.[94] The argument, patently oriented towards a natural law justification of copyright, presented a strong connection with the notion of natural right to the fruits of one's own labor, as theorized by Locke and supported also in the *Tonson v Collins* decision.[95] Justice Mansfield explained, indeed, that the common law right of property over the literary work applied to the compensation due to the author for his labor,

[92] *Millar v Taylor* [1769] 4 Burr 2303 (*Millar v Taylor*).
[93] *Donaldson v Becket* [1774] 17 Hansard 953 (*Donaldson v Becket*).
[94] *Millar v Taylor* 2399 ('[I]t is *just*, that an Author should reap the pecuniary Profits of his own Ingenuity and Labour […] It is *just*, that another should not use his name, without his consent. It is fit, that he should judge when to publish, or whether he will ever publish.') (emphasis added).
[95] *Tonson v Collins* [1761] 1 Black W 301 (*Tonson v Collins*).

the protection against the uses of his or her name without consent and the recognition of his or her full decisional power over the copies of the manuscript.[96]

On the dissenting side, Justice Yates voiced a strong opinion, according to which, the affirmation of a perpetual right to publish would have led to highly detrimental consequences to the public at large. He acknowledged the appropriate reward was due to the author, further arguing that such right found its limits in the provisions of the Statute of Anne on the duration of the protection:

> All property has its proper limit, extent, and bounds. Invention or labour (be they ever so great) cannot change the nature of things; or establish a right, where no private right can possibly exist.[97]

Highlighting the inconsistency with the stated purpose of the Statute of Anne to encourage the learning, Justice Yates warned against a step backward in the history of copyright, i.e. towards a regime of censorship and monopolistic pricing fully in the hands of booksellers, who, hence, would have been capable to restrict the printing and the access to books by the public.[98] Justice Yates' opinion entered the history books as a masterful example of foresightedness in copyright matters, yet back in 1769 before the King's Bench it remained the minority view.

It did not take long before the concurring and dissenting viewpoints radically changed. The second landmark decision, *Donaldson v Becket*, dated 1774, saw the House of Lords adopting a literal interpretation of the Statute of Anne, thus limiting the duration of copyright. The

[96] *Millar v Taylor* 2399.
[97] *Millar v Taylor* 2357.
[98] "(…) the injustice would lie on the side of the monopolist, who would thus exclude all the rest of mankind from enjoying their natural and social rights." *ibid* 2360, 2374-2476, 2387-2391.

fundamental issue at stake overlapped with *Millar v Taylor*, with renewed emphasis being put on the question as to whether authors' perpetual and exclusive rights to print and publish their works could be claimed also after the publication and, if so, whether their enforcement was subject to the Statute of Anne.

In deciding the case, the majority opinion strongly opposed the common law nature of copyright. Lord Camden championed the reasoning in this direction focusing on a factual element: the real financial benefits stemming from the perpetual common law copyright were flowing not into the pockets of the authors, but rather of their assignees, masters of the printing technology and greedy 'engrossers' of knowledge.[99] This, in Lord Camden's view, not only undermined copyright's justification of reward for the intellectual labor, but also caused damages to society, this view being supported by Lord Effingham's emphasis on the dangerous effect that an improper copyright regulation would lead to in terms of censorship and limitation of expression.[100]

The decision in *Donaldson v Becket* well serves the purpose of analytical inquire and interpretation, as neither the fundamental question on the nature of copyright found a clear-cut answer, nor a compromise between authors' rights and public benefits in terms of encouragement of learning was achieved. Worth noting is, however, that in the aftermath of the decision, the book markets experienced a boost and the public opinion had the impression of gaining a renovated, more flexible copyright, detached from its old-fashioned natural law dimension.[101]

[99] *Donaldson v Becket* 998-1001.
[100] *ibid* 1003.
[101] William St Clair, *The Reading Nation in the Romantic Period* (Cambridge University Press 2004) 109–110.

1.3. Towards a *droit d'auteur* in continental Europe

In the 17th and 18th century the *bourgeoisie* was emerging not only in England, but across Europe.[102] The rise of the middle class stimulated markets and, in particular, enhanced and diversified the demand for literary works.[103] A development of major influence to the literary world was the Enlightenment, a widespread and wide-ranging intellectual movement promoting rational and critical thinking, which provided thought-provoking arguments and heated the debates, among others, about the regulation of writing and printing.[104] In continental Europe, the influence of the Enlightenment pivoted on a set of defined concepts and values, which soon resulted to be nestled in the copyright discourse: among them, anthropocentrism, individualism, reason, morality.[105]

Until mid-18th century, privileges consolidated as the regulatory response to the printing technology and the emerging markets across continental Europe. In the Republic of Venice, in order to overcome the stagnation of the market, which was overflowing with reprinted books, the *Doge* declared the perpetual duration of privileges, even of the ones expressly limited in time.[106] On German territories, massive amounts of privileges were getting issued

[102] See James M Thompson, *European History, 1494 - 1789* (Harper 1969) 189–191.
[103] Clair (n 101) 19–20.
[104] Christophe Geiger, 'The Influence (Past and Present) of the Statute of Anne in France' in Lionel AF Bently, Uma Suthersanen and Paul Torremans (eds), *Global Copyright. Three Hundred Years Since the Statute of Anne from 1709 to Cyberspace* (Edward Elgar 2010) 124.
[105] Among the Enlightenment thinkers who took part to the copyright discourse are Kant, who in 1785 wrote an opinion "Von der Unrechtmäßigkeit des Büchernachdrucks (On the Illegality of Unauthorized Editions)", and Fichte with the "Beweis der Unrechtmäßigkeit des Büchernachdrucks (Proofs of the Illegality of Unauthorized Editions)" of 1793. These works significantly contributed in shaping the discourse on the relation between property and the intangible, in particular, by bringing the arguments closer to an author-centered copyright. A detailed analysis of these works is developed by Baldwin (n 27) 76–79.
[106] Borghi (n 60) 178 with particular reference to the Venetian Bill of 1790.

to boost the publishing industry, jeopardizing the customs of book trade with regards to reprinting of books and driving a wedge between North and South.[107]

Yet, similarly to what occurred in England, the sustainability of the privilege system was put under question and the case made for changing the regulation over literary works. Also in continental Europe, the institutional and public discourses on copyright lit up offering numerous relevant arguments for the scope of this analysis.[108] Besides the fact that it will be of great influence in the following centuries in the development of other national copyright legislations, France represents an exemplary scenario, in which the notion of intellectual property, and of copyright in particular, gained centrality and led to the birth of the so-called *droit d'auteur* tradition, whose underlying justification and purposes are worth a close analysis.

1.3.1. The detachment from the privilege system in pre-revolutionary France

The French privilege system presented a peculiar feature. The mechanism of control and censorship over the printed content established by the central authority relied on a slightly more fragmented delegation of power to local *Parlements*,[109] universities and the clergy for its enforcement.[110] Nevertheless, the capital-periphery dynamic which brought to the tensions between London Stationers and Scottish booksellers occurred between the Paris and the

[107] Schack (n 38) 57 with reference to the Saxony Statute of 1685, amended in 1773.
[108] Among the most exemplary cases of opposition against the privilege system, see the cases raised by French authors, e.g. Le Pelletier in 1700 claiming for the right to a profit out of his works for living, and Condorcet questioning the need for privileges at its very core. On both cases, see the analysis conducted by Pfister (n 61) 123–124.
[109] Despite the misleading terminology, Parlements were judiciary and administrative - not legislative - authorities, enforcing law on behalf of the King and, only in some restricted eventualities, playing a political role. See Julian Swann, 'Parlements and Provincial Estates' in William Doyle (ed), *The Oxford Handbook of the Ancien Régime* (Oxford University Press 2012).
[110] Izzo (n 33) 47, 69.

provinces. The Parisian printers, strong of their proximity to the royal power, intended to stretch their monopolies and lobbied at the court of Louis XIV to secure favorable regulations on royal letter patents.[111]

Starting from the end of the 17th century, provincial book traders confronted the Parisian competitors with growing fervor.[112] By the same token as beyond the English Channel, the privilege system started cracking also in France. In contrast with the developments in England, the French King promptly embraced a skeptical behavior towards the printers' guild in Paris and started restricting their powers.[113]

Among the main arguments raised by the provincial printers were the accusation of conflict of interests between the King and the privileged printers[114] and the claim for the freedom to print books whose privileges has expired or never established, an activity that was depicted as an undeniable need *ratione utilitatis publicae*.[115]

Supported by jurists and philosophers,[116] the stances of printers and booksellers from the periphery introduced an important focus on the social utility of printing and distributing

[111] See, *inter alia*, Arrêt et Reglement du Conseil Touchant les Privileges et continüations d'iceux, pour l'impression ou reimpression des Livres tant anciens que nouveaux en faveur des Marchands Libraires et Imprimeurs des Villes de Paris of 1665; Statuts et reglements des imprimeurs et libraires de Paris of 1686, both available at Bently and Kretschmer (n 35).

[112] See 'Memorandum on the dispute which has arisen between the booksellers of Paris and those of Lyon, regarding the privileges and extensions of these which the King grants for the printing of books' (1690s) (Memorandum 1690); Pierre-Jacques Blondel, 'Memorandum on the abuses practised by the booksellers and printers of Paris' (1725-1726), both available at *ibid*.

[113] Exemplary wording in the Preamble of *Arrêt du Conseil Portant Réglement sur le Fait de la Librairie et Impremerie* of 1725: '*Le roi étant informé qu'encore que par les réglements cidevant faits sur le fait de la librarie et impremerie* (…) cependent la negligence de plusiers libraires et imprimeurs, et l'avarice de quelques-uns, ont donné lieu à differénts abus, *qui ont excite les plaintes du public, et portent un préjudice considerable au commerce des livres* (…)', available at *ibid* (emphasis added).

[114] Printing privileges being deemed to be issued not only by but also in the ultimate favor of the King: "(…) *biensfaits dont le Roy se sert pour honnorer et recompenser le merite de ses sujets qui les obtiennent.*" Memorandum 1690.

[115] *ibid*; see also Ginsburg, '"Une Chose Publique"? The Author's Domain and the Public Domain in Early British, French and US Copyright Law' (n 84).

[116] E.g. Gaultier and Condorcet. See respectively, Gaultier, 'Memorandum for consultation by the Booksellers and Printers from Lyon, Rouen, Toulouse, Marseille, and Nisme, concerning book trade privileges and their

books. The argument was based on the idea of a social contract between the author and the collectivity, the former seeking means for living and creating, the latter in need of accessing and learning from the literary works. The resulting *do ut des* conception of the literary world pivoted on the notions of remuneration of the author[117] and of social progress, to be pursued following the precepts of the Enlightenment.[118]

Opposing this rising narrative, Parisian printers and booksellers reacted to the turmoil generated by their provincial colleagues by placing the author at the center of the discourse. They mainly relied on a natural law approach,[119] which legitimized their power by way of the contractual relation between them and the authors.[120] The basis of such approach was the defense of the author's right to property over the intellectual creation, which was defined to be both perpetual and transferable.[121]

prolongations' (1776) (Gaultier Memorandum); Marquis de Condorcet, 'Fragments on the Freedom of the Press' (1776) (Condorcet Fragments), both available at Bently and Kretschmer (n 35); it is interesting to note that a critique of printing privileges, developed by Furetière, was already published in 1690. See Antoine Furetière, 'Privilege', *Dictionnaire Universel* (1690).

[117] See Gaultier Memorandum (n 117) ('(…) [*L*]*e Privilege ne peut être accordé équitablement qu'à titre de mérite réel, et il doit par conséquent en porter avec lui la récompense complete.*').

[118] See Condorcet Fragments (n 117) and Jean-Antoine-Nicolas de Caritat Marquis de Condorcet, *Outlines of an Historical View of the Progress of the Human Mind: Being a Posthumous Work of the Late Marquis de Condorcet* (J Johnson 1795).

[119] Baldwin (n 27) 73 ('The Continent and the Anglo-American world would later diverge. But in the eighteenth century the French and Germans also dealt with the author's natural rights to his literary property.').

[120] See Louis d'Hericourt, '*Mémoire de Louis d'Héricourt à Monseigneur le Garde des Sceaux*' (1725) translated by and available at Bently and Kretschmer (n 36) ('It is certain, according to the principles just established, that it is not by royal Privilege that Booksellers become the owners of the Works they print, but solely by their acquisition of the Manuscript, the property of which the author transfers to the Bookseller by means of the payment he receives in return […]').

[121] See Denis Diderot, '*Lettre historique et politique adressée à un magistrat sur le commerce de la librairie, son état ancien et actuel, ses réglements, ses privilèges, les permissions tacites, les censeurs, les colporteurs, le passage des ponts et autres objets relatifs à la police*' (1763) translated by and available at *ibid* ('(…) [T]he publisher was supplied with a title deed which still retained the name of 'privilege', which authorized him to publish the work he had obtained and which […] guaranteed to him the peaceful enjoyment of a possession, the perpetual ownership of which was transferred to him by a private agreement, signed by the author and by himself. ').

The choice of this line of argument by the Parisian publishers proved not to be supported by the authors themselves.[122] Left at the periphery of the book trade, unsatisfied by the assignment contracts they were forced to sign with the printers, as their colleagues in England, French authors were frustrated and started to call the royal Courts into question. They started claiming remunerations for living, maintaining the family and continuing creating content and the judges, in accordance with the stringent approach of the King, granted them the protection they were seeking.[123]

Such developments dramatically weakened the privilege system while significantly empowering authors. The privilege system came to an official end with the *Arrêts reglementaires* of 1777 and 1778,[124] when the Royal Council directly intervened changing the regulation of privileges. The *Arrêts* represent a step towards the formation of the modern paradigm of *droit d'auteur* and, in this sense, can be considered anticipatory of some of its features.

The author was granted for the first time the perpetual right to print and sell the work,[125] regardless of any privilege issued in favor of others. This implied a turn towards a natural law conception of perpetual protection[126] and, moreover, a fundamental distinction between the author and publisher, which was missing, for instance, in the Statute of Anne. The activities carried out by these two different copyright actors were acknowledged to substantially differ

[122] In this light, Izzo describes the role of the author at the time as a 'borrowed' interest holder ('*L'autore un personaggio in prestito*'). See Izzo (n 33) 93 ff.
[123] E.g. *Arrêt du Conseil d'Estat du Roy, en faveur du Sieur de Crébillon, Auteur de la tragédie de Catilina, Qui juge que les productions de l'Esprit ne sont point au rang des Effets Saisissables* (1749); *Jugement rendu par M. de Sartine, Chevalier, Conseiller d'Etat, Lieutenant Général de Police de la Ville, Prévôté et Vicomté de Paris, Commissaire du Conseil en cette partie, Entre le Sieur Luneau de Boisjermain, Et les Syndic & Adjoints de la Librairie & Imprimerie* (1770), both available at Bently and Kretschmer (n 36).
[124] *Arrêt du Conseil d'Etat du Roi, Portant Règlement sur la durée des Priviléges en Librairie du 30 août 1777* (*Arrêt* of 1777); *Arrêt du Conseil d'Etat du Roi portant réglement sur les privilèges en librairie et les contrefaçons du 30 juillet 1778* (*Arrêt* of 1778).
[125] Art.5 *Arrêt* of 1777 ("(…) *vendre chez lui* (…)").
[126] Baldwin (n 27) 74.

and, hence, to be worth different protection:[127] on the one hand, the printer's right to publish was limited in time and subjugated to the author's consent; on the other hand, the author enjoyed of much broader protection, being granted the perpetual right to dispose of his or her work.[128] In other words, the right introduced with the *Arrêts* was a perpetual right of the *author*, not the assignee. It was a perpetual copyright, which, if transferred, turned into a limited entitlement.[129]

This dualism is reflected also in the Preamble to the *Arrêt* of 1777, which enshrines an element of highest relevance from a strictly functional perspective. The Preamble, indeed, asserts the objectives underlying the possibility to transfer the right, these being the purpose of remuneration of the author for his or her work (*récompenser son travail*) and the recoupment of the investment of the publisher (*remboursement de ses avances et l'indemnité de ses frais*).[130] This twofold conception and purpose of copyright in late-18th century France sheds light on the further evolution of the discipline, hinting at a perspective ever more centered on the subject of protection.

1.3.2. Personal and limited: the outcomes of the French Revolution

Although the *Arrêts* addressed the possibility to transfer the rights of the author using the word 'privilege', they represented a first radical turning point towards a new regulatory model. A

[127] Preamble, *Arrêt* of 1777 ("(…) *Sa Majesté a reconnu (…) Que l'Auteur a fans doute un droit plus assuré à une grace plus etendue, tandis que le Libraire ne peut se plaindre, si la faveur qu'il obtient est proportionée au montant de ses avances et à la importance de son entrerprise* (…)").
[128] *ibid*.
[129] Baldwin (n 27) 74 ('Bowing to natural rights of property, authors were given perpetual and inheritable ownership of their writings—but only if they themselves published their works. If—as was common—authors sold them to publishers, then they received only limited rights. The author's rights were thus either perpetual or assignable but not both.').
[130] Preamble, *Arrêt* of 1777.

further push in this direction occurred at the outbreak of the French Revolution in 1789, which marked the ultimate end of printing privileges and the complete detachment of copyright regulation from the will of the King and the bureaucratic apparatus of the *Ancien Régime*.[131]

The Revolution generated not only a momentum of highest historical significance, but also specific input for the consolidation of the *droit d'auteur* paradigm. The fruits of the Revolution, i.e. the Declaration of the Rights of the Man and the Citizen and the related French Constitutions of 1791 and 1793[132] provided, indeed, arguments that traced a twofold direction in the evolution of copyright. If, on the one hand, the right to property was declared 'natural, unalienable and sacred',[133] on the other, great emphasis was put, through the principle of liberty,[134] on the freedom of expression, detached from the will of the King.[135] From a copyright perspective, the core question arising was, therefore, whether property applied also to intellectual works. If so, then among the outcomes of the Revolution was to expect a strengthening of the natural law justification of a perpetual copyright to author. Otherwise, as the related debates also emphasized, utmost importance had to be given to the limits that the constitutional charters set to the declared rights.[136]

[131] Izzo (n 33) 82.
[132] Respectively, *Déclaration des droits de l'homme et du citoyen* (1789) (Declaration of the Rights of the Man and the Citizen); *Constitution française du 3 septembre 1791* (French Constitution of 1791); *Constitution de l'an I du 24 juin 1793* (French Constitution of 1793).
[133] French Constitution of 1791, I.1.
[134] *ibid* I.3.
[135] French Constitution of 1791, XI; Art.11 French Constitution of 1793: "*La libre communication des pensées et des opinions est un des droits les plus précieux de l'Homme : tout Citoyen peut donc parler, écrire, imprimer librement, sauf à répondre de l'abus de cette liberté, dans les cas déterminés par la Loi.*".
[136] E.g. French Constitution of 1791, IV; Art.6 French Constitution of 1793.

Heated debates in this regard eventually found a regulatory response in two legislative decrees of 1791 and 1793, the former addressing the public performance of theatre scripts[137] and the latter covering all creative sectors.[138] *Rapporteur* of the first Decree of 1791 was Le Chapelier, whose report is key to the understanding of the conception of copyright expressed by the law. What may appear at first blush very surprising is that, although Le Chapelier emphasized the natural and personal nature of the author's rights in his foreword to the legislative text,[139] the Decree stipulated the limited duration of the author's rights.[140]

Le Chapelier's explanation, which is still very topical nowadays, is crucial to decrypt this apparent clash of views. He illustrated the exceptionality of the rights granted to authors: the property entitlements granted over the fruits of one's own labor faces the peculiarity of the intangible dimension, thus the fact that, once shared, the work becomes public and acquires social utility.[141] For this reason, the need for an exclusive right to be acquired by the author at the moment of creation of the work, which was limited in time and transferable, was justified under the coexisting needs to let the author enjoy the fruit of his or her labor[142] and to protect the public.[143]

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[137] *Décret sur la pétition des auteurs dramatiques, lors de la séance du 13 janvier 1791* (Decree of 1791), known as the moment of "Liberty of Theaters". See Victoria Johnson, *Backstage at the Revolution: How the Royal Paris Opera Survived the End of the Old Regime* (University of Chicago Press 2008) 74.

[138] *Décret de la Convention Nationale du dix-neuf juillet 1793 relatif aux droits de propriété des Auteurs d'écrits en tout genre, des Compositeurs de musique, des Peintres et des Dessinateurs* (Decree of 1793).

[139] Defining intellectual property "la plus sacrée" of all properties. See Report of Le Chapelier attached to the Decree of 1791, available at Bently and Kretschmer (n 36). See also Ghidini, 'Is IP Law a Lex Specialis? A Dual Test' (n 23) 92.

[140] See Art.5 Decree of 1791 (five years *post mortem auctoris*).

[141] According to Ginsburg, Le Chapelier centered his report on the idea of public domain, rather then on the author, thus unveiling a utilitarian approach underlying the Revolutionary Decrees. See Ginsburg, '"Une Chose Publique"? The Author's Domain and the Public Domain in Early British, French and US Copyright Law' (n 84) 655–659; Ginsburg, 'Histoire de Deux Droits d'auteur: La Propriété Litteraire et Artistique Dans La France et l'Amerique Revolutionnaires' (n 27) 130; see also Strowel (n 27) 130.

[142] Report of Le Chapelier (n 140) ("[…] *comme il est extremement juste que les hommes qui cultivent le domaine de la pensée tirent quelque fruit de leur travail* […]").

[143] *ibid* ("*Voilà ce qui s'opère en Angleterre pour les auteurs et le public, per des actes qui l'on nomme tutélaire* (…)").

Following up and extending the scope of the regulation to all sectors of intellectual endeavor, the Decree of 1793 provided any author with the exclusive right 'to sell, authorize for sale and distribute their works in the territory of the Republic, and to transfer that property in full or in part',[144] for the duration of ten years *post mortem auctoris* (*p.m.a.*).[145] Once again, the report introducing the Decree, written by *rapporteur* Lakanal, offers valuable insights on the legislative text. Lakanal revived the focus on the author, bringing the attention on the importance to protect 'intellectual genius' to its peak. What will be labeled the Romantic envisioning of the author[146] led to arguments in defense of rewarding those individuals in society, who dedicated their life to the intellectual work and the production of knowledge, as well as their families:

> *Le génie a-t-il ordonné, dans le silence, un ouvrage qui recule les bornes des connaissances humaines: des pirates littéraires s'en emparent aussi tôt, et l'auteur ne marche à l'immortalité qu'à travers les horreurs de la misère. Eh! ses enfants!* (…) *Par quelle fatalité faudrait-il que l'homme de génie, qui consacre ses veilles à l'instruction de ses concitoyens, n'eût à se promettre qu'une gloire stérile, et ne pût revendiquer le tribut légitime d'un si noble travail*. [147]

Lakanal's report shows a strong inclination towards the natural law approach to copyright justification and the purposive element emerging with most vigor is the reward to the author, as grateful acknowledgement for his or her contribution. Nevertheless, the public dimension of such intellectual contributions is not fully ignored.[148] The enhancing of the *connaissances*

[144] Art.1 Decree of 1793.
[145] Artt.1, 2 Decree of 1793.
[146] Strowel (n 25) 93–97.
[147] Report of Lakanal accompanying the Decree of 1793, available at Bently and Kretschmer (n 35).
[148] *ibid* ("*L'impression peut d'autant moins faire des productions d'un écrivain une propriété publique, dans le sens où les corsaires littéraires l'entendent, que l'exercice utile de la propriété de l'auteur ne pouvant se faire que par ce moyen, il s'ensuivrait qu'il ne pourrait en user, sans la perdre à l'instant même*.").

humaines was explicitly recognized as what ultimately made the author such honorable member of the society, under the belief that 'the freedom to form an enlightened public opinion was both a pillar of the new constitutional structure and a natural right.'[149] In this vein, it can be stated that the conception shared by the developments in France and England, as well as generally across Europe, presented a mixed nature, focusing on both the needs of the individual author and of society as a whole.[150]

1.4. The consolidation of modern paradigms of copyright protection

Referring to 'modern copyright' may be rather misleading. The point in history from where this term finds legitimate use has been identified in various events, e.g. the aftermath of the Statute of Anne,[151] the post-revolutionary Decrees in France,[152] or, rather, the first wave of copyright internationalization in the late 19th century.[153] All these possible historical underpinnings signal that what defines the modern scenario of copyright law in Europe is the consolidation, at national level, of two well-defined copyright traditions, i.e. the Anglo-Saxon (to become Anglo-American) copyright tradition and the French (to become continental) *droit d'auteur* tradition. These two traditions play an important role not only in the understanding

[149] Gunnar Petri, 'Transition from Guild Regulation to Modern Copyright Law' in Lionel Bently, Uma Suthersanen and Paul Torremans (eds), *Global Copyright. Three Hundred Years Since the Statute of Anne from 1709 to Cyberspace* (Edward Elgar 2010) 112.
[150] Baldwin (n 27) 82 ("Britain, America, France, and Germany thus started from a common premise: works were a form of property to which authors had an inherent claim. But, to protect the public domain, neither authors nor disseminators owned works for more than a limited time.").
[151] The definition of modern copyright being associated with the idea of "right of the author". See Lyman Ray Patterson, *Copyright in Historical Perspective* (Vanderbilt University Press 1968) 5.
[152] Geiger, 'The Influence (Past and Present) of the Statute of Anne in France' (n 104) 124.
[153] Strowel (n 27) 44.

of national dynamics of copyright law, but also in the analysis of the harmonization process, which started at the end of the 20th century at EU level.[154]

During the 19th and 20th centuries, national experiences of statutory regulation and codification of copyright rules flourished, pursuing the common aim to avoid discretionary administration of the rights and ameliorate the response to the technological progress.[155] By this token, the story of modern copyright traced the path towards ever more refined responses of the nature of copyright and, in particular, its regulation of creative markets.[156] The main feature, which the Anglo-Saxon and the continental copyright traditions will prove to have in common, hence strongly characterizing the modern European copyright paradigm, is, indeed, a strong economic connotation.[157] Modern copyright deals primarily with private economic interests, in particular of authors and publishers,[158] the public benefits and burdens of the law entering in the focus at a later stage.[159]

[154] See Chapter 2.
[155] Petri (n 149) 113.
[156] Baldwin (n 27) 83–96.
[157] Dusollier, 'Realigning Economic Rights with Exploitation of Works' (n 23) 163–165 ('In the early days of copyright, economic rights were defined to encompass what counted then as ways of exploiting a creation. The bundle of economic rights granted by copyright reflected the many means by which a work used to be exploited.'); Daniel Gervais, *(Re)Structuring Copyright. A Comprehensive Path to International Copyright Reform* (Edward Elgar 2017) 25 ('Copyright adapted and was able successfully to regulate new markets made possible by these new technologies because it was created by professionals who were willing and able to live with a certain degree of complexity as part of their compliance efforts.'); Izzo (n 33) 18 ('[...] Since the emergence of its need, the legal regulation of the intangible, here analyzed in the forms of the Anglo-American copyright and the French and then Continental author's right paradigm, has been constantly shaped after the intent to protect consolidating [and, to a remarkable extent, already consolidated] economic interests.') (translation by the author).
[158] Baldwin (n 27) 126.
[159] Ginsburg, '"Une Chose Publique"? The Author's Domain and the Public Domain in Early British, French and US Copyright Law' (n 84) 637–638.

1.4.1. Copyright and pragmatism

One of the main factors influencing the evolution of English modern copyright law is the remarkable export of literary works, especially to Ireland and the United States.[160] The Statute of Anne started showing weaknesses in the forms of an increasing room for legal uncertainty stemming from its application[161] and the need for its adaptation to the evolving technological and commercial context.[162] As a result, from the 19th century, copyright protection started enlarging its scope in terms of addressees, entitlements and duration.[163]

Alongside with this expansion, the arguments enshrined in the reforming legislations and judicial petitions, showed a peculiar, increasingly pragmatic approach. Exemplary cases are, among others, the Copyright Act of 1842 granting protection over compositions of work to the publisher, 'as if he were the actual author' of the work,[164] or the reasoning in the *University of Cambridge v Bryer* case,[165] where it was argued that the Statute of Anne, and more precisely its deposit requirements, were designed 'to make learning easy of access'.[166] Worth highlighting is the dual impact that the pragmatic take on copyright implied. On the one hand, it strengthened the focus on the protection of the author's economic interests.[167] On the other

[160] E.g. the Copyright Act of 1801 extending Statute of Anne to Ireland and the Anglo-French Copyright Treaty of 1851, both available at Bently and Kretschmer (n 35); see also Cornish (n 88) 249.
[161] See, *inter alia*, the decision of the King's Bench in 1798 in the case Beckford v Hood, where protection was granted to authors, despite the fact that they had failed to comply with the registration requirements set in the Statute, the reasoning being based on common law rights, available at Bently and Kretschmer (n 35).
[162] A treatise on the inadequacy of the Statute *vis-à-vis* the evolving printing technologies was compiled by Robert Maugham, *A Treatise on the Laws of Literary Property …* (Longman 1828).
[163] E.g. Dramatic Literary Property Act of 1833; International Copyright Act of 1844; Fine Arts Copyright Acts of 1861 and 1862, all available at Bently and Kretschmer (n 35).
[164] Copyright Law Amendment Act of 1842, XVIII, available at *ibid*.
[165] The case pivots on the formal requirement of deposit of eleven copies at the Stationers' Hall library, as stipulated in the Copyright Act of 1808. *University of Cambridge v Bryer* [1812] 16 East's Reports 317 (*University of Cambridge v Bryer*).
[166] *University of Cambridge* v *Bryer* 333.
[167] See Maugham (n 162) 26–27.

hand, it supported the enduring sensibility towards the public need for knowledge, the 'encouragement of learning' posited already in the Statute of Anne and recalled in the title of several subsequent Acts.[168]

Pragmatic views were raised also in the English Parliament, where between the 1830s and the 1840s the debate on copyright gathered momentum. The debate pivoted on the duration of copyright protection and was triggered by the proposal of Sir Thomas Talfourd, judge at the Common Bench, to extend the copyright term from twenty-eight years or the life of the author (*ex* Copyright Act of 1814 in force at the time) to sixty years *p.m.a.* Talfourd's proposal met substantial opposition, not only in the Parliament, but also in the public opinion, as petitions show.[169] The critics of the proposal unanimously voiced a call for a more reasonable quantification of the protection of authors, in defense of the public interest.[170] In this occasion, the opposing views on copyright generated fundamental reflections and numerous references to the question of the purpose of the protection:

> What was it the hon. and learned Sergeant [Talfourd] wanted to establish by that law? What was it he expected to do? Did he think thereby to benefit the cause of literature, to serve the community at large, or confer any advantage upon the authors generally?[171]

The embracing of a goal-oriented perspective prompted the recourse to empirical evidence to achieve an appropriate assessment of the advantages and disadvantages of a strong copyright protection. The eloquence of Sir Thomas Babington Macaulay stood out in this attempt.

[168] E.g. A Bill for the Further Encouragement of Learning, London of 1801; Bill to amend Acts for the Encouragement of Learning of 1814, both available at Bently and Kretschmer (n 35).
[169] Since the first proposal in 1837, around 500 petitions were submitted, as reported by Catherine Seville, *Literary Copyright Reform in Early Victorian England: The Framing of the 1842 Copyright Act* (Cambridge University Press 1999) 33.
[170] Parliamentary Debates on the Copyright Bill (1840), available at Bently and Kretschmer (n 35) 1250 ("[The reform] […] should not look to the interests of individuals, but to that of society at large.").
[171] *ibid*.

According to him, an extension of the copyright duration would have left untouched the advantages of the authors, but enhanced the disadvantages for the public.[172] He observed that the expansion of the protection would have not incentivized authors to produce better or more content; on the contrary, it would have caused higher prices for books, thus representing a major disadvantage for the public, without bringing any additional advantage for authors.[173]

The conception of copyright portrayed by Macaulay well embodies the utilitarian character of the Anglo-Saxon copyright tradition, copyright being deemed a means to liberally remunerate authors with consumers' money, encouraging them to carry on the production of valuable books and artistic works.[174] In this vein, rather low importance was given to the protection of heirs, as the connection between them and the justificatory aim to incentivize creation was too thin.[175]

The conception of copyright as a 'necessary evil'[176] brought to the claim for a more balanced extension of copyright and, in general, to the idea of a balanced copyright protection,[177] acknowledging the need for a reform of the law to achieve a 'greater encouragement to the production of literary works',[178] but also the public interest. This balance took a legislative shape in the Copyright Act of 1842, a compromising and pragmatic solution which will last

[172] Parliamentary Debates on the Copyright Bill (1841), available at Bently and Kretschmer (n 35) 346.
[173] *ibid* 349-350.
[174] Macaulay famously described copyright as a 'tax on readers for the purpose of giving a bounty to writers'. See *ibid* 350.
[175] See Macaulay highlighting even the risk of suppression of the works by the heirs, due to the lost connection between them and the original author after many generations. *ibid* 349, 354-355.
[176] 'For the sake of the good we must submit to the evil; but the evil ought not to last a day longer than is necessary for the purpose of securing the good. (…) The principle of copyright is this. It is a tax on readers for the purpose of giving a bounty to writers. The tax is an exceedingly bad one; it is a tax on one of the most innocent and most salutary of human pleasures; and never let us forget that a tax on innocent pleasures is a premium on vicious pleasures.' *ibid* 348.
[177] '(…) the interests of authors and the interest of the public were both to be considered, and properly and duly weighed' *ibid* 135.
[178] See Preambles to the Copyright Bill 1840 and the Copyright Bill 1841.

until the Copyright Act of 1911, providing for a strengthened statutory protection of authors lasting seven years *p.m.a.* or forty-two years in total, whichever longer.[179]

The subsequent legislative interventions kept the pragmatic approach and the idea of balance embedded in the expressed conception of copyright. From the debates on the protection of the author's reputation[180] up to the Copyright Commission in the late 1870s[181] and the two main reforms in 1911 and 1956, English modern copyright law results strongly characterized by a focus on the economic interests, as a viable synthesis and, at the same time, solution of the dilemma between the opposing views on copyright.[182]

1.4.2. Personality, family, moral rights and society

The two legislative decrees of 1791 and 1793 constitute the original core of the *droit d'auteur* tradition born in France and influencing copyright systems across Europe and beyond. The French copyright system will stand upon these decrees until the first half of the 20th century, when they got subjected to modest amendments and, in 1957, to a profound reform.[183] As

[179] See Copyright Amendment Act of 1842. See also the commentary by Seville (n 169).
[180] Debates over the drafting of the Fine Art Copyright Act of 1862 majorly focused on the preservation of the perpetual recognition of the paternity of the author over a painting, drawing or photograph, as an independent element from the limited economic monopoly granted by way of copyright law. See Parliamentary Debates on the Fine Art Copyright Act (1862) available at Bently and Kretschmer (n 35); As Deazley points out, this is likely to correlate to the International Exhibition held in London in the same year, during which numerous artists would have shared and drawn inspiration from each other's works, thus generating a risk of piracy and a concrete disincentive for valuable creators to participate in absence of protection. See Ronald Deazley, 'Commentary on Fine Arts Copyright Act 1862' (2008) available at *ibid*.
[181] Report of the Royal Commission on Copyright (1878) ix, C.2036, available at Bently and Kretschmer (n 35) ('[…] [W]e entertain no doubt that the interest of authors and of the public alike requires that some specific protection should be afforded by legislation to owners of copyright.').
[182] See Copinger in the first version of his landmark treatise in 1870: "The claim of authors resulting from the principles of natural right involves the perpetual duration of the property. But in order that such property should be of value, it is necessary that society should interfere actively for its protection (...) the fundamental principle on which is based the protection afforded to authors from piracies (…) [is] the injury or damage caused to them by the depreciation in the value of their original works." Walter Arthur Copinger, *The Law of Copyright, in Works of Literature and Art* (Stevens & Haynes 1870) 55–56, 102 (emphasis added).
[183] *Loi nr.57-298 du 11 mars 1957 sur la propriété littéraire et artistique*.

seen, liberty, equality and property placed themselves at the center of the revolutionary and post-revolutionary discourse on copyright, thus leading to a system of entitlements of natural, personal and exclusive nature, yet of limited duration.[184]

With the exception of Napoleon's attempt to re-establish a centralized system of direct control and censorship over the printing of books,[185] the underlying political intent was to enhance the stability and prosperity of the cultural industries.[186] This inevitably urged a re-discussion of the copyright system and welcomed proposals of reform of the Decrees. In 1825 the *Commission de la Propriété Litteraire* was established for this purpose. The debates within the Commission primarily focused on the duration of copyright protection and offered at times broader elements for discussion. The Commission, whose members belonged to the upper class, ultimately sided with the *hommes de lettres*, defending the need for protection of the independent intellectual work.

Two notions lie at the core of this evolution of the modern conception of copyright in France. First, the idea of a 'contract' between the author and the public.[187] Most presumably inspired by the theory of social contract rooted in the Enlightenment,[188] this new expression in the copyright discourse refers to the acknowledged clash between private and public interests.[189] Second, the notion of reward, which leads to a few meaningful observations.

[184] Decree of 1793; see Section 1.3.2.
[185] Décret Impérial contenant Réglement sur l'Imprimerie et la Librairie (1810) available at Bently and Kretschmer (n 35). The attempt was strongly criticized and failed due to the lack of minimum guarantees. See 'Minutes of the 1825-1826 Commission' (1826) 31, available at *ibid*.
[186] Charles Lahure, *Histoire Populaire Contemporaine de La France* (L Hachette 1865) 196 ff.
[187] 'Minutes of the 1825-1826 Commission' (1826) 39, available at Bently and Kretschmer (n 35) ("It is a solemn contract between society and the authors, whose conditions should be regulated; the advantages granted to one should not prejudice the rights of the other.").
[188] Rousseu being its leading exponent, Jean-Jacques Rousseau, *Du Contrat Social, Ou Principes Du Droit Politique* (M-M Rey 1762).
[189] *ibid* ("(…) [I]t becomes necessary to put forward the two opposing principles: the reward due to immortal geniuses and the indefeasible right of the public to the enjoyment of works of genius. (…)").

The focus on the due reward to the author conveys the economic dimension embraced by the conception of copyright not only in England, but also in France. The idea was, indeed, primarily associated with the revenues collected from the exploitation of the work and with the problem of disproportionate share between authors and publishers. In this vein, the focus on rewards fundamentally included the protection of heirs, i.e. wives and children of authors,[190] a family component that stemmed from a Napoleonic legacy.[191] Evidence of the authors' distress concerning their economic status can be found in the letter written in 1834 by Honoré de Balzac, exhorting French authors to form coalitions against the 'barbarous laws' drafter after the Revolution,[192] which provided insufficient protection against the unauthorized uses of the works within and beyond national borders.[193]A fundamental question arose on the legitimacy of the profits gained by third parties – e.g. owners of public places where works were used, foreign publishers, unauthorized translators[194] –, which could harm the economic interests of the author. The idea of 'social reward' well conveys this concern, once again referring to both the private and public dimensions of the copyright regulation.[195]

[190] 'Minutes of the 1825-1826 Commission' (1826) 33-34. See also 'Rapport de M. de Sainte-Beuve au Sénat sur la loi relative aux droits des héritiers et ayants cause des auteurs' (1866) available at Bently and Kretschmer (n 35) ('*Sans doute l'oevre de la pensée est la plus personelle de toutes; mais, tandis que le mari était occupé à ses compositions, la femme se dévouait aux soins du ménage, à l'éducation des enfants: chacun d'eux a donc mis à la masse commune sa part*.').
[191] The *Code Napolèon* introducing family law as one of its pillars as well as setting the basis for an interpretation of the civil law oriented towards the protection of family values. See *Code civil des Français* (1804).
[192] Honoré de Balzac, 'Pro Aris et Focis. Lettre adressée aux écrivains du XIXe siècle' (1834) 63, available at Bently and Kretschmer (n 35).
[193] 'Regardless of whether it is a palace or a shack, a cathedral or a thatched cottage, the work belongs to us. (…) But if instead we are dealing with a written page, with an idea, then justice no longer seems to know what legal action means (…) Let us therefore talk about capital, let us talk money! Let us materialize, let us quantify thought in an age which prides itself on being the age of positive ideas! A writer cannot attain anything without tremendous studies, which constitute a stock of time or money, for time is worth money: it generates it. His knowledge is thus a thing before it is an expression, his drama is a costly experience before it is a public emotion. His creations are a treasure, the greatest of them all.' *ibid* 72.
[194] de Balzac (n 164) arguing against theatres' profits out of plays on novels' stories.
[195] *ibid* 39 ("Now it remains to clarify this idea of social reward that we have already indicated and that, for lack of the principle of absolute property in the person of the author, if it must be renounced, should become the basis

In 1841 the work of the *Commission de la Propriété Litteraire* reached the French Parliament in the form of a proposal of reform of copyright law, presented by Lamartine.[196] Speaking on behalf of his colleagues, he posed the question of the purpose of copyright in society[197] and asserted that 'remunerating work, perpetuating the family, increasing public wealth' were the objectives of property.[198] Building the connection to the literary and artistic sectors, he further explained that the revolution caused by the printing press inevitably called for a regulation that, in light of these principles, could distribute the created content 'morally and equitably'.[199]

The three main purposes of the French modern copyright rationale found clear-cut definition and consolidated in the following developments of the French copyright legislation. The protection of wives, children and heirs, essential pillar to the 'foundation of the family and, through the family, foundation of all permanent society',[200] will remain present in the regulations of 1844 and 1854.[201]

The need to reconcile the objectives of remuneration and protection of the public interest found a twofold response. On the author's side, the moral rights doctrine emerged in the jurisprudence and consolidated as an essential mark of the *droit d'auteur* copyright tradition.

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of the system that it seems appropriate to sanction by the new law. We must apply ourselves to seeking the means of rendering the perpetuity of this reward inseparable from the existence, however prolonged it might be, of the works that it should remain attached to.")

[196] 'Report of Lamartine and Parliamentary Debates from March and April 1841 on literary property legislation' (1841) translated by and available at Bently and Kretschmer (n 35).

[197] *ibid* 634 ('(…) Is this useful? It would suffice to answer that it is just; for the foremost utility for a society is justice. But those who ask whether it is useful to remunerate in the future the work of intelligence have never thought back to the nature and to the results of this work.').

[198] *ibid*.

[199] *ibid*. Interestingly and supporting the thesis of interference between the two systems, the same adjectives can be found in Blackstone's formulation, according to which "the literary compositions being the produce of the author's own labour and abilities, [the author] has a *moral and equitable* right to the profits they produce", as reported by Yates in *Millar v Taylor* 2359 (emphasis added).

[200] Art.3 of the Bill proposed by the Commission; see also Baldwin (n 27) 95–96.

[201] Loi relative au Droit de propriété des Veuves et des Enfants des Auteurs d'ouvrages dramatiques (1844); Loi sur le Droit de propriété garanti aux Veuves et aux Enfants des Auteurs, des Compositeurs et des Artistes (1854), both available at Bently and Kretschmer (n 35).

Rooted in the principle of natural justice and in the Romantic vision of the author,[202] the protection of moral rights highlights the subjective element stemming from the personalistic conception of copyright, which aims to protect the connection between the creation and the author, whose personality is embedded in the work, rather than the labor activity.[203]

On the opposite side, the protection of the public did not completely succumb. Landmark case law decisions and the scholarship carved out room for significant reasoning about the limits of copyright protection in favor of public utility.[204] Attention was especially paid to an accurate assessment of the damages caused to the author, who embodied the *fulcrum* of the copyright justification and, therefore, needed to be taken into highest consideration.[205] Awareness was growing of the fact that the technological and commercial advancements could bring huge lucrative opportunities but, at the same time, cause tremendous loss for authors, thus meaning that 'what the law was able to do, and what it did, was to restrict the natural liberty of third parties *as much as it was necessary* to allow the author to draw a reasonable profit from his work.'[206] The focus on the effects of the *droit d'auteur* on the public

[202] From the case law it emerges glaringly how the authors were recognized as unconfutable masters of their works, the purpose of protecting the intellectual endeavor ("la pensée") and the inestimable value of their erudite intelligence often prevailing in an undisputed manner. See, i*nter alia*, *Rosa v Girardin* [1845] Cour d'Appel de Rouen, Dalloz 1846.2.212; *Delprat v Charpentier* [1867] Cour de Cassation, Dalloz 1867.1.369, available at *ibid*.
[203] 'Report of Lamartine' (n 168) 365 ('When we sell a painting or a statue, we only sell a material object, but we do not sell thought personified in the canvas or in the marble, above all we do not sell the right to denature it, to degrade it, to debase it by imperfect imitations or by ignoble reproductions. This would be to sell the right to profane or to calumniate our talent (…)'); see also Baldwin (n 27) 87 ff.
[204] E.g. *Havas, Bullier et al v Gounouilhou* [1861] Court of Cassation, Dalloz 1862.1.137, available at Bently and Kretschmer (n 36) setting an important exception to the application of the Decree of 1793 for telegraphic cable-messages reporting news, excluding them from copyright protection ('(...) *[N]e peuvent être considérées comme des œuvres de l'ésprit et placées sous la garanties de la loi du 19 juillet 1793*.'). See also André Morillot, 'De la personnalité du droit de publication qui appartient à un auteur vivant' (1872) available at *ibid*; Eugène Pouillet, Georges Maillard and Charles Claro, *Traité Théorique et Pratique de La Propriété Littéraire et Artistique et Du Droit de Représentation* (Marchal et Billard 1908) 63–64.
[205] See, *inter alia*, Morillot reasoning about imitations being the engine of the society and causing no direct damage to the author. ('The truth is that the reproduction of a work by others may cause the author indirect pecuniary damage, by causing him to miss out on a chance to make a profit, or by allowing him to realise only a smaller profit than he had hoped.') *ibid* 20.
[206] *ibid* 133 (emphasis added).

reflected also in the legislative developments, the 1852 French International Copyright Act protecting foreign authors within the French territory in order to encourage 'the sciences, the letters and the arts' and heated debates pivoting on the controversial nature of copyright in occasion of the reform of the French system in 1957.[207]

1.5. Conclusion

From the historical analysis of the first developments of copyright regulation in Europe, important elements have emerged regarding its original role and purposes. At the outset, the study of the ancestor of copyright, i.e. the system of printing privileges, has unveiled the intent to establish a centralized mechanism of control over the profits and, above all, the content disseminated in society. This regulatory scheme majorly favored the corporate guilds of printers, on which the sovereign relied to enforce the privileges and maintain central power through a feudalistic *modus operandi*. Discontent, especially among authors and provincial publishers, brought to the cracking of the privilege system. This development, besides leading to the first statutory experiences of copyright regulation, has proved to be of particular significance from a functional perspective.

The evolution of copyright in England has shown how the turning point – from the system of royal privileges established by the Stationers' Charter of 1557 to the Statute of Anne of 1710 up to the *Donaldson v Beckett* decision in 1774 – introduced two main lines of arguments: first, the interest of individual authors in receiving an appropriate share of the profits stemming from their works and not die in misery; and second, the importance of learning and the

[207] For a thorough analysis of the reform, see Baldwin (n 27) 204 ff.

benefits of competition for the society. This brought English copyright to develop both towards a natural law justification of copyright[208] and, at the same time, towards a focus on its limits. Behind the core (and lively debated) importance attributed to the limited duration of copyright lies the fundamental juxtaposition between, on the one side, the natural right of enjoying the fruits of one's own labor and, on the other, the objective of promotion of learning and cultural flourishment.

The French experience is equally insightful and shows remarkable similarities in the pattern of development of the copyright discourse. Also in France, two main stances opposed each other: on one side, the defense of the author's natural rights over the intangible work, on the other, the rising awareness of the negative effects that such entitlement would have caused to society. What characterizes the French experience is the peculiarity of its author-centered approach, which inevitably led towards favoring natural law arguments, but did not fully ignore utilitarian aspects related to the circulation of knowledge in society, thus resulting, so as in England, into a regime of entitlements limited in time.

In this light, the English and French experiences, which will majorly influence the evolution of modern copyright legislations across Europe, show two main convergences. First, a disruptive transition from the system of privileges towards the modern conception of copyright, which is characterized by the recognition of the censorial control over created content as a limit to the well-being of the society.[209] The intent underlying both the Anglo-

[208] *ibid* 55 ('Both booksellers and authors began claiming that their rights to works derived not from royal favor, but from nature itself.').
[209] Ghidini, 'Is IP Law a Lex Specialis? A Dual Test' (n 23) 92 ('[A] newly instituted regime of individual rights of freedom of expression - of course including authorship and publishing - stemming from the repeal of administrative censorship and corporations and guilds constraints on free initiative, and the consequent transformation of "privileges" into "equal rights". [...] In short: the very expression "IP" was conceived as functional to, and coherent with, the new perspective of citizens fundamental freedoms of both economic initiative and expression, inaugurated by the "dual revolution" that crowned the Age of the Enlightenment.').

Saxon and continental initial ideas of, respectively, copyright and *droit d'auteur* was to establish a regulatory response to the printing technology, which was a more inclusive entitlement.

Second, a fundamental interplay of objectives accompanying the evolution of both copyright systems. Parliamentary debates, legislative documents, judicial hearings and scholars' contributions show an entangled, and often involute, net of rationales and purposive arguments related to why and how copyright should be enforced. This configuration allows for the consolidation as well as for the lively discussion on the dominance of one or the other objective of copyright law.[210] Examples of this interplay are numerous. Among them, the role played by the notion of labor in copyright justification presents varying connotations, from the backward-looking[211] and justice-oriented perspective of Locke's theory to a forward-looking[212] utilitarian view on incentivizing and maximizing the production. The same purpose of remuneration translates into several specific and slightly different aims, from the reward the society owes to intellectuals, to the proportionate share of profits between the author and the publisher, up to the protection of the economic well-being of authors and their family members. The interest of the public is perhaps the most interesting element of the analysis. Although the notion has been introduced at very early stage in the history of copyright by the rising European middle class and has played a crucial role in limiting the copyright entitlements in both the Anglo-Saxon and continental systems, it never settled in a fixed

[210] See, in support of this thesis, also Strowel (n 27) 109–110, 177.
[211] *ibid* 235–238.
[212] *ibid*; see also Mark A Lemley, '*Ex Ante versus Ex Post* Justifications for Intellectual Property' (2004) 71 The University of Chicago Law Review 129.

terminology or consolidated archetype, fluctuating from the encouragement of learning to the freedom of thought and expression.

As the following Chapters will demonstrate, the co-existence and the interplay of various copyright purposes and the push towards a compromising, balanced regulatory response will be of major relevance to the recent developments of the modern copyright systems and, in particular, of their harmonization at EU level.

Chapter 2 - The expressed functions of EU copyright law

Any study on copyright in Europe can hardly depart from taking stock of the emergence of the European Union (EU) copyright dimension. With the birth and increasing impact of EU law on national legal systems, copyright has, in fact, not been exempted from profound changes. This Chapter offers a functional perspective on the rise and evolution of EU copyright law from 1988 until 2019, retracing both legislative acts and related explanatory documents.

As will be illustrated, the EU copyright legal framework presents more than one function and the analysis aims to unveil and systematically order all objectives expressed in the legislation. The importance of such an investigation, which has been so far overseen in the scholarship,[213] finds confirmation in two overarching features of EU copyright law. First, the EU legislator has embarked in the copyright harmonization process with a particularly pragmatic view on the issues which needed to be tackled.[214] Second, the relevance of the numerous teleological references in the interpretation of EU copyright rules by the Court of Justice of the European Union (CJEU) should not be underestimated.

In this vein, this Chapter offers a brief overview on the way EU copyright law has developed (Section 2.1) and its contextualization within the objectives and general principles of EU law (Section 2.2). It then illustrates the main features of its expressed goals (Section 2.3) and

[213] An exception being represented by the thorough analysis conducted by Ramalho (n 18) 25–55.
[214] Exemplary is the case of the first Green Paper on Copyright and the Challenges of Technology of 1988, which identified four main concerns in the creation of a Community market, its competitiveness at global scale, the solution to unfair exploitation of copyrighted content by users outside the EU and the promotion of technological progress. Commission of the European Communities, 'Copyright and the Challenges of Technology – Copyright Issues Requiring Immediate Action' (Green Paper) (Green Paper 1988) [1988] 172 final, paras 1.1.1.-1.1.3.

operates a classification, which enables to analyze more in details the functions of copyright harmonization (Section 2.4) and functions of copyright protection (Section 2.5). The following Chapter will complement the analysis looking at the copyright case law of the CJEU.[215]

2.1. A short history of EU copyright legislation

Since the 19th century, two major trends have been pushing national copyright laws in Europe to come closer together. The first is the internationalization of copyright, epitomized by the Berne Convention of 1886.[216] The idea of setting international minimum standards of copyright protection to facilitate the international trade of creative works and better protect the copyright holders[217] further concretized in the Universal Convention of Copyright, the Rome Convention, the TRIPs Agreement, the WIPO Internet Treaties and the Marrakesh

[215] See Chapter 3.

[216] Berne Convention for the Protection of Literary and Artistic Works 1886 (as last amended in 1979). Insightful analyses on the internationalization of copyright are offered by Sam Ricketson and Jane C Ginsburg, 'The Berne Convention: Historical and Institutional Aspects' in Daniel Gervais (ed), *International Intellectual Property: A Handbook of Contemporary Research* (Edward Elgar 2015) 3–36; Graeme B Dinwoodie, 'A New Copyright Order: Why National Courts Should Create Global Norms' (2000) 149 University of Pennsylvania Law Review 469, 477–483; Strowel (n 27) 44 ff.

[217] Interesting to note is the transversal focus on the protection of the copyright holder across all international copyright treaties, with the sole exception of the Marrakesh Treaty, which aims to protect the interests of blind and visually-impaired users. See Margaret Ann Wilkinson, 'International Copyright: Marrakesh and the Future of Users' Rights Exceptions' in Mark Perry, *Global Governance of Intellectual Property in the 21st Century. Reflecting Policy Through Change* (Springer 2016) 107 ff.

Treaty.[218] None of the conventions provides a supranational entitlement, copyright remaining tightly bound to its territorial nature.[219]

International copyright law does not extensively engage with the justification and purposes of copyright. Few references are made to the goal of approximation of the law as an end in itself[220] and to the aim of encouraging the production of creative content in favor of the public interest.[221] Nevertheless, even in this latter more significant case, the task to further elaborate this purpose remains of national legislators.[222]

The second trend bringing national copyright systems closer to each other is the regional Europeanization of copyright.[223] Officially initiated in 1991 with the first Directive,[224] the EU legislator has undertaken a remarkable process of harmonization of copyright rules, which has generated, to date, eleven Directives, three Regulations, over six Communications and

[218] Respectively, Universal Convention of Copyright 1952 (as last amended in 1971) (UCC); Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations 1961 (Rome Convention); Agreement on Trade-Related Aspects of Intellectual Property Rights 1994 (TRIPs Agreement); WIPO Copyright Treaty 1996 (WCT); WIPO Performances and Phonogram Treaty 1996 (WPPT); Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled 2013 (Marrakesh Treaty).

[219] Paul Goldstein and Bernt Hugenholtz, *International Copyright: Principles, Law, and Practice* (Oxford University Press 2019) 9–10, 85 ff. ('[...] [I]nternational copyright today resembles a "patchwork" of independent national laws, each with its own rules on subject matter, ownership of rights, and scope, and each exacting certain requirements of foreign works as a condition of protection.').

[220] Valerio De Sanctis and Mario Fabiani, 'Les Cents Ans de La Convention de Berne: L'évolution Du Droit Dans Le Domaine Du Droit d'auteur Résultant de l'interaction Entre La Convention et Les Législations Nationales' (1986) 99 Le Droit d'Auteur. Revue mensuelle de l'Organisation Mondiale de la Propriéte Intellectuelle 117 (citing Enrico Rosmini: '[...] *pour jeter les bases d'une Union entre eux dans le but de réaliser une protection des droits des auteurs avec des dispositions uniformes et réciproques*.').

[221] See Preambles to the UCC, WCT and WPPT.

[222] It is yet worth noting the use of the notion of balance in the international copyright context, as highlighted by Graeme Dinwoodie, 'The WIPO Copyright Treaty: A Transition to the Future of International Copyright Lawmaking' (2007) 57 Case Western Reserve Law Review 754–758.

[223] Ansgar Ohly and Justine Pila (eds), *The Europeanization of Intellectual Property Law: Towards a European Legal Methodology* (Oxford University Press 2013).

[224] Council Directive 91/250/EEC on the legal protection of computer programs (Computer Programs Directive of 1991) [1991] OJ L122/42.

four Green Papers.[225] The two phenomena, i.e. the internationalization and Europeanization of copyright, go hand in hand, the former being a major input for the latter. Nonetheless, the EU legislator has embarked to a wider project, promoting not only the harmonization but also the modernization of numerous copyright aspects and giving shape to proper European standards of regulation.[226] Although one may expect an EU copyright codification to be arising from the natural course of action, this step does not seem to be approaching in the near future.[227]

The legal instrument characterizing and being predominantly used in the copyright harmonization process is the Directive, a source of EU secondary law that is binding upon all Member States in its objectives, but leaves national legislators free to decide on forms and methods of implementation.[228] The effectiveness of the harmonization by Directive has been questioned under two main lines of argument. It has been pointed out how the vagueness and broad discretion left to Member States in the phase of implementation is likely (and actually

[225] For an overview of the relevant legislative acts, see European Union, 'The European copyright legislation' (2019) <https://ec.europa.eu/digital-single-market/en/eu-copyright-legislation>.

[226] Bernt Hugenholtz, 'Is Harmonization a Good Thing? The Case of the Copyright *Acquis*' in Ansgar Ohly and Justine Pila (eds), *The Europeanization of Intellectual Property Law: Towards a European Legal Methodology* (Oxford University Press 2013) 65.

[227] The idea of EU copyright code was discussed only in the European Commission, 'A Single Market for Intellectual Property Rights. Boosting creativity and innovation to provide economic growth, high quality jobs and first class products and services in Europe' (Communication) [2011] 287 final, while in the scholarship it meets a strong support. See, *inter alia*, the Wittem Group; Bernt Hugenholtz et al., 'The Recasting of Copyright & Related Rights for the Knowledge Economy', Report to the European Commission (DG Internal Market) (November 2006); *ibid* 71–73.

[228] Consolidated version of the Treaty on the Functioning of the European Union (TFEU) [2012] OJ C326, art 288. See Paul P Craig and Gráinne De Búrca, *The Evolution of EU Law* (Oxford University Press 2011) 165 See also the comment by AG Trstenjak in the opinion in Case C 467/08 Padawan SL v Sociedad General de Autores y Editores de España (Padawan) [2010] EU:C:2010:620, para 83, where he offers an interesting observation on the obligation of each Member State to produce a particular result: 'The concept of "*Ziel*" (objective) in the German version of the third paragraph of Article 249 EC is also understood in the German language jurisprudence in the sense of an "*Ergebnis*" (result) prescribed by the directive. This opinion is supported by the wording in other language versions (*"résultat", "result", "resultado", "risultato", "resultaat"*). The Member States must consequently provide for a legal position desired by the directive (…) For that reason, the French concept of "*obligation de résultat*" has established itself in the jurisprudence.' (emphasis added).

does) to generate legal uncertainty.[229] In addition and strictly related to this, the heavy reliance on Directives has been interpreted as the manifestation of an excessively cautious and sectorial approach by the EU legislator, deemed the real cause of the regulatory fragmentation.[230] This has been portrayed as one of the central weaknesses of the EU copyright legal framework, but also understood as a problem hard to be fixed, as it originates in the limited legislative competence of the EU.[231]

[229] Hugenholtz, 'Is Harmonization a Good Thing? The Case of the Copyright *Acquis*' (n 226) 65–67 ('Clearly, the instrument of a harmonization directive is ill-suited to respond quickly to the challenges of a constantly evolving, dynamic information market [...] A related problem is the "ratcheting-up" effect that a harmonization directive inevitably has on national levels of protection, even in the rare case that a directive is later repealed. [...] Harmonization by directive creates additional layers of legal rules that require interpretation first at the national level of the local courts, and eventually by the CJEU. This extra legislative layer is the cause of legal uncertainty.'). Evidence of legal uncertainty is provided by the rising number of references for preliminary ruling reaching the CJEU in copyright matters. See in this regard Chapter 3 Section 3.1.

[230] Jonathan Griffiths, 'Taking Power Tools to the *Acquis*. The Court of Justice, the Charter of Fundamental Rights and European Union Copyright Law' in Christophe Geiger, Craig Allen Nard and Xavier Seuba, *Intellectual Property and the Judiciary* (Edward Elgar 2018) 132; Bernd Justin Jütte, *Reconstructing European Copyright Law for the Digital Single Market: Between Old Paradigms and Digital Challenges* (Nomos 2017) 17–18; Reto Hilty and Valentina Moscon, 'Modernisation of the EU Copyright Rules. Position Statement of the Max Planck Institute for Innovation and Competition' (2017) Max Planck Institute for Innovation and Competition Research Paper 9(3); Thomas Margoni, 'The Harmonisation of EU Copyright Law: The Originality Standard' in Mark Perry (ed), *Global Governance of Intellectual Property in the 21st Century. Reflecting Policy Through Change* (Springer 2016) 85; Christophe Geiger, 'Introduction' in Christophe Geiger (ed), *Constructing European Intellectual Property: Achievements and New Perspectives* (Edward Elgar 2013) xxi; Mireille van Eechoud and others (eds), *Harmonizing European Copyright Law: The Challenges of Better Lawmaking* (Kluwer Law International 2009).

[231] Irini Stamatoudi and Paul Torremans, *EU Copyright Law: A Commentary* (Edward Elgar 2014) 446 ('The cautious approach [...] has also been justified by reasons of competence. Yet, the fragmented landscape of limitations across Europe fails to offer legal certainty, even though, especially in the context of the online environment, certainty regarding allowed uses is crucial.'); Christophe Geiger, 'The Construction of Intellectual Property in the European Union: Searching for Coherence' in Christophe Geiger (ed), *Constructing European Intellectual Property: Achievements and New Perspectives* (Edward Elgar 2013) 6 ('[I]t is appropriate to remember that the EU institutional framework did certainly not facilitate the emergence of coherence in the developments of a European intellectual property law. [...] The European Union has one jurisdiction *ratione materiae*: its intervention must be based on a provision of the Treaty that authorizes it to act.'); Michel Walter and Silke von Lewinski, *European Copyright Law: A Commentary* (Oxford University Press 2010) 11.5.9.

2.1.1. The distribution of legislative competences and the internal market

At the core of the distribution of legislative competences between the EU and its Member States lie three main principles.[232] The principle of conferral stipulates that the EU can undertake legislative action only insofar the founding Treaties explicitly confers to it power to do so and within the limits set by the objectives expressed in the Treaties.[233] The principles of subsidiarity establishes that whenever no explicit competence is attributed to the EU (hence, in subject matters for which Member States are competent), the EU can intervene only under circumstances of necessity, i.e. when the action of the national legislator does not prove satisfactory and the EU can contribute with an added value to the regulation.[234] Lastly, the principle of proportionality looks at the scenario of shared competence between the EU and the Member States, once again tying the hands of the EU legislator, legitimized to operate only to the extent it is needed to pursue the objectives set in the Treaties.[235]

These three principles intend to safeguard the national sovereignty and significantly constrain the EU legislative initiative. Within this picture, it is meaningful to note that since the birth of the European Community and the EU law dimension, for many decades the EU legislator has not been entrusted with an explicit competence to legislate over copyright matters. With the entry into force of the Treaty of Rome, Member States retained, in fact, the competence to legislate over industrial and commercial property.[236]

[232] Consolidated version of the Treaty on European Union (TEU) [2012] OJ C326, art 5.
[233] TEU art 5(2).
[234] TEU art 5(3).
[235] *ibid*.
[236] Treaty establishing the European Economic Community (EEC Treaty) [1958] artt 36.

It did not take long for the EU to recognize that the exercise of these national entitlements could jeopardize cross-border exchanges and fragment the internal market.[237] The CJEU tried to solve the conundrum of territorial rights in a single market by emphasizing the so-called existence-exercise dichotomy.[238] The Court stated that, even though Member States were competent for granting and regulating national entitlements of industrial and intellectual property, the exercise of such rights should not violate the objectives set out in the EEC Treaty.[239] In other words, national laws could exist and be enforced within the national territory, but no rule could be valid if its exercise was in breach of the principle of freedom of movement of goods, for instance enabling the right holder who marketed his or her work in one country to object to its sale in another Member State.[240] Following this reasoning, the European Court of Justice set the spotlight on the freedom of movement in the internal market, ruling that the possibility of derogation from it had to be interpreted restrictively, allowing only for those national rights that constituted the 'specific subject matter' of copyright.[241] No definition of this notion was provided by the Court or the EU legislator, thus

[237] Kur and Dreier (n 67) 243 ('[Q]uite like in patent and in trade mark law, the first conflict that had to be solved under the EEC Treaty was the dichotomy between the territoriality of national copyright and the principle of freedom of movement of goods [...] The issue was whether or not the author or right-holder of a copyrighted work can invoke his national copyright law in one of the EU Member States in order to prevent copyrighted works that were legally put onto the market in another Member State from being re-imported or freely circulating within the EU.').

[238] Justine Pila, 'Intellectual Property as a Case Study in Europeanization: Methodological Themes and Context' in Justine Pila and Ohly Ansgar, *The Europeanization of Intellectual Property Law: Towards a European Legal Methodology* (Oxford University Press 2013) 10; David T Keeling, *Intellectual Property Rights in EU Law: Free Movement and Competition Law*, vol 1 (Oxford University Press 2003).

[239] Case 78/70 *Deutsche Grammophon GmbH v Metro-SB-Grossmarkte GmbH &Co KG* (*Deutsche Grammophon*) [1971] ECR 487, paras 5, 11.

[240] *ibid*; Joined Cases C-55/80 and C-57/80 *Musik-Vertrieb Membran and K-Tel International v GEMA (Musik Vertrieb)* [1981] ECR 147; see also Kur and Dreier (n 67) 244 ('Technically speaking, in order to have the principle of free movement of goods prevail the ECJ develop ed the concept of Community-wide exhaustion of the national distribution rights.').

[241] Deutsche Grammophon para 11; see also Pila (n 238) 10–11.

making it highly dubious and fully in the hands of the Court to determine which rights might have been covered.[242]

The focus on the protection of the internal market can be detected also from the EU legislative developments. The first main revision of the Treaty of Rome, the Single European Act of 1986,[243] enabled the Council to approximate national laws 'which have as their object the establishment and functioning of the internal market'.[244] The Treaty of Nice added to the internal market also the common commercial policy as a main objective of the Union, thus conferring to the EU (*rectius* European Community) legislator the competence to enter international commercial agreements.[245] This competence was limited to conventions whose provisions fell under an explicit legislative competence attributed to the Community legislator.[246] Interestingly, despite the fact that the Community legislator was still entrusted with no competence over copyright matters, the Treaty of Nice further stipulated that 'agreements relating to trade in cultural and audiovisual services, educational services, and social and human health services, shall fall within the *shared competence* of the Community and its Member States',[247] thus anticipating a major development in EU copyright law.

[242] *ibid* 11; van Eechoud and others (n 230) 4 ('The laws of Member States pass the specific subject-matter test fairly easily because the Court seems to regard any -potential- form of exploitation of copyright works as falling within the specific subject matter.').
[243] Single European Act [1987] OJ L169.
[244] *ibid* art 18 (IP and copyright laws find no explicit mentioning in the Act, yet neither are they excluded from its scope: '[…]Paragraph 1 shall not apply to fiscal provisions, to those relating to the free movement of persons nor to those relating to the rights and interests of employed persons'). See also Commission of the European Communities, 'Completing the Internal Market' (White Paper) [1985] 310.
[245] Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts *(Treaty of Nice)* [2001] OJ C80, art 2(8).
[246] *ibid* ('An agreement may not be concluded by the Council if it includes provisions which would go beyond the Community's internal powers, in particular by leading to harmonisation of the laws or regulations of the Member States in an area for which this Treaty rules out such harmonisation.').
[247] *ibid* (emphasis added).

2.1.2. The Treaty of Lisbon

The Treaty of Lisbon of 2009[248] represents a momentous development for EU copyright law for two main reasons. First and foremost, the Treaty of Lisbon confers, for the first time, explicit competence to the EU to regulate intellectual property (IP) related matters. This competence is twofold. On the one side, the Treaty attributes to the EU legislator the power to establish Union-wide IP rights in addition to or replacement of national regulations.[249] On the other side, it stipulates a shared competence between EU and Member States to harmonize national laws for the purpose of establishing the internal market.[250]

To date, the EU legislator has not embraced the path towards an EU unitary copyright system.[251] The choice has been to rely on the shared competence[252] and initiate a long-standing process of harmonization to bring national copyright rules closer to each other, without replacing them.[253] The result is a hybrid system of copyright rules, partially harmonized[254]

[248] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (Treaty of Lisbon) [2009] OJ C306.
[249] TFEU art 118.
[250] TFEU artt 4(2)(a), 26, 114.
[251] On the opportunity of a EU-wide copyright code in the digital age, see, *inter alia*, Bernt Hugenholtz, 'The Dynamics of Harmonization of Copyright at the European Level' in Christophe Geiger (ed), *Constructing European Intellectual Property. Achievements and New Perspectives* (Edward Elgar 2013) 289–291.
[252] As pointed out by Ramalho, the shared competence triggers the principle of subsidiarity, according to which the EU has to prove to be in a better position than the Member States to achieve the objectives set in the Treaties, thus demonstrating the benefits of a given EU law intervention and ensuring that Member States' regulatory space is respected. See Ramalho (n 18) 109.
[253] Caterina Sganga, 'Towards a More Socially Oriented EU Copyright Law: A Soft Paradigm Shift after Lisbon?' in Delia Ferri and Fulvio Cortese (eds), *The EU Social Market Economy and the Law. Theoretical Perspectives and Practical Challenges for the EU* (Routledge 2019) 2.
[254] Excluded from the scope of harmonization are, for instance, moral rights and the adaptation right. See Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society (InfoSoc Directive) [2001] OJ L167, recital 19; Directive 96/9/EC on the legal protection of databases (Database Directive) [1996] OJ L77/20, recital 28.

and, to the extent of their harmonization, moving towards a consolidation of the EU internal market.[255]

The second main reason why the Treaty of Lisbon is of highest relevance to the evolution of EU copyright law lies in the recognition of EU primary law *status* to the Charter of Fundamental Rights of the European Union (CFREU).[256] According to the principle of constitutional legality, EU primary law binds both the making of secondary laws and their interpretation.[257] This does not mean that the introduction of the CFREU into primary law basis of EU legislation is intended to expand the EU competences.[258] The role played by the Charter becomes, as for the Treaties, of policy guidance and solid safeguard of the fundamental rights enshrined in it. In this light, it is important to note that Article 17(2) CFREU stipulates the protection of IP as a fundamental right,[259] although a *de facto* the recognition of this right was not unprecedented in the EU copyright legislation and case law.[260] Not less relevant are other fundamental rights set out in the CFREU – among others, the freedom of expression and information,[261] the right to conduct a business,[262] the right to

[255] See European Commission, Green Paper 1988 (n 214) para 1.5.10 ('After the entry into force of the Single European Act, Art.100A EEC has become available for measures aimed at the establishment of an internal market. (...) Accordingly, where differences in the copyright laws of the Member States affect the functioning of the internal market to the point that legislative action is required, the Community is now able to rely on this new possibility to remove the obstacles and distortions in question.').
[256] TEU art 6(1).
[257] Christoph Möllers, 'Pouvoir Constituant – Constitution – Constitutionalisation' in Armin von Bogdandy and Jürgen Bast, *Principles of European Constitutional Law* (Hart Publishing 2010) 169 ff.; Ramalho (n 18) 19–20.
[258] TEU art 6(2); CFREU art 51(2). This explanatory statement is reiterated multiple times in the Declarations concerning provisions of the Treaty, signaling the related concerns of the Member States at the negotiation table of the Treaty. See, in this regard, Paul Craig, 'The Treaty of Lisbon, Process, Architecture and Substance' (2008) 33 European Law Review 137, 162.
[259] CFREU art 17(2): 'Intellectual property shall be protected.'.
[260] See Sganga, *Propertizing European Copyright* (n 26) 113 ("[T]he effects of the new IP clause could be noticed even before 2007, as in Recital 9 InfoSoc and Recital 23 IPRED, and in a CJEU decision of 2006, where the Court justified as proportionate the restriction on the freedom to receive information 'in the light of the need to protect intellectual property') with reference to Case C-479/04 Laserdisken ApS v Kulturministeriet (Laserdisken) [2006] EU:C:2006:549.
[261] CFREU art 11.
[262] CFREU art 16.

personal and family life[263] –, which will acquire a growing relevance in the interpretation of EU copyright rules, as the analysis in Chapter 3 will show.[264]

A closer look at the Treaty of Lisbon allows to notice an additional focus, which takes the shape of a merely supporting competence of the EU, i.e. the promotion of culture.[265] The presence of this element among the objectives set in the Treaty should not be a surprise. Already in the Treaty of Nice, the promotion of culture was mentioned, intended as promotion of the education, cultural diversity of the Member States and common cultural heritage of the Union.[266] Even though not directly impacting over the process of harmonization, the introduction of this competence calls for the EU legislator to supplement Member States' actions while respecting their cultural diversity,[267] i.e. promoting the 'flowering of cultures' and 'tak[ing] cultural aspects into account' in its legislative and judicial actions.[268]

2.1.3. Vertical and horizontal harmonization

A good way to classify the vast body of EU copyright rules is by their harmonizing effect. The first approach of the EU legislator has been of vertical harmonization, thus meaning characterized by targeted harmonizing interventions on specific problems. In the second half of the 20th century, the technological progress pushed towards an expansion and innovation

[263] CFREU art 7, 8.
[264] See Chapter 3 Sections 3.1, 3.5.
[265] TFEU artt 6(c), 167.
[266] TEU as amended in 2002, artt 3, 151.
[267] *ibid*.
[268] *ibid* art 167(4). See Geiger, 'The Construction of Intellectual Property in the European Union: Searching for Coherence' (n 231).

of the creative industries, the software, recorded music and movie industries being glaring examples of the booming effect of the emerging computer technologies.[269] This generated pressing problems of legal uncertainty, especially with regards to the territoriality of copyright entitlements and the rising phenomenon of cross-border uses of protected content.[270]

The intent to provide an EU coordinated legal response to these issues translated into a first generation of Directives,[271] which single out and address specific problems. By this token, the Computer Programs Directive[272] and the Database Directive[273] tackle the economic imbalance between the high investments required to create, respectively, computer programs and databases, and the facility of copying them.[274] Similarly, the Rental Directive[275] aims to protect the investments behind the production of creative content *vis-à-vis* the widespread phenomenon of rental use. With the audio-visual industry experiencing a remarkable market expansion through cable TVs and satellites, the SatCab Directive[276] has been enacted to regulate and facilitate the cross-border transmission of content.[277] Lastly, the Resale Directive[278] does not address a technology-related issue, but rather stems from the need to

[269] Hugenholtz, 'The Dynamics of Harmonization of Copyright at the European Level' (n 251).
[270] European Commission, Green Paper 1988 (n 214); European Commission, 'Copyright and Related Rights in the Information Society' (Green Paper) (Green Paper 1995) [1995] 382 final; European Commission, 'Copyright in the Knowledge Economy' (Green Paper) (Green Paper 2008) [2008] 466 final, 4. See also van Eechoud and others (n 230) 5–6.
[271] Bernt Hugenholtz, 'Copyright in Europe: Twenty Years Ago, Today and What the Future Holds' (2013) 23 Fordham Intellectual Property, Media and Entertainment Law Journal 506 ff., 506–507.
[272] Computer Programs Directive of 1991, as consolidated in Directive 2009/24/EC on the legal protection of computer programs (Computer Programs Directive) [2009] OJ L111.
[273] Directive 96/9/EC on the legal protection of databases (Database Directive) [1996] OJ L77. See, in particular, *ibid* recitals 9, 11, 12.
[274] Computer Programs Directive recitals 2,3.
[275] Directive 2006/115/EC on rental right and lending right and on certain rights related to copyright in the field of intellectual property (Rental Directive) [2006] OJ L376.
[276] Council Directive 93/83/EEC on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (SatCab Directive) [1993] OJ L248.
[277] *ibid* recitals 2, 9.
[278] Directive 2001/84/EC on the resale right for the benefit of the author of an original work of art (Resale Directive) [2001] OJ L272.

better remunerate the authors of original artworks in an increasingly profitable reality of art auction sales.[279]

Stemming from the policy guidance and propositions of the Green Paper on Copyright and Related Rights in the Information Society,[280] the EU legislator has developed a more comprehensive approach by implementing a so-called horizontal harmonization. The second generation of Directives representing this different take attempt to close the divides between national copyright systems tackling the core features of copyright protection, with a transversal effect crossing all possible relevant sectors and scenarios.[281] The compliance with international copyright law obligations has been a main driver, leading to the harmonization of the duration of copyright entitlements (Term Directives),[282] the protection of anti-copying devices and rights management systems (InfoSoc Directive)[283] and copyright exceptions and limitations in favor of people with print disabilities (Marrakesh Regulation and Marrakesh Directive).[284]

[279] *ibid* recital 3.
[280] European Commission, Green Paper 1995 (n 270).
[281] To better grasp the idea behind horizontal harmonization, one may think of what an EU copyright code would include in its articles. See, in this perspective, the Wittem Project, reported by Thomas Dreier, 'The Wittem Project of a European Copyright Code' in Christophe Geiger (ed), *Constructing European Intellectual Property. Achievements and New Perspectives* (Edward Elgar 2013).
[282] Council Directive 93/98/EEC harmonizing the term of protection of copyright and certain related rights (Term Directive of 1993) [1993] OJ L290/9, replaced by Directive 2006/116/EC on the term of protection of copyright and certain related rights (Term Directive of 2006) [2006] OJ L372/12, as last amended by Directive 2011/77/EU amending Directive 2006/116/EC on the term of protection of copyright and certain related rights (Term Directive of 2011) [2011] OJ L265/1.
[283] Directive 2001/29/EC on the harmonization of certain aspects of copyright and related rights in the information society (InfoSoc Directive) [2001] OJ L167.
[284] Regulation 2017/1563 on the cross-border exchange between the Union and third countries of accessible format copies of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled (Marrakesh Regulation) [2017] OJ L242/1; Directive 2017/1564 on certain permitted uses of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print disabled and amending Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society (Marrakesh Directive) [2017] OJ L242/6.

The example *par excellence* of horizontal harmonization is the InfoSoc Directive.[285] To date, it represents the most encompassing piece of EU copyright legislation, as it fundamentally harmonizes the scope of copyright protection, identifying its core in the rights to reproduction, communication to the public and distribution.[286] In addition, in its Article 5 the InfoSoc Directive provides a close list of exceptions and limitations, from which the Member States can choose, yet without exceeding it.[287] Several criticisms have been levelled against this provision. The scholarship has warned against the risk of highly different behaviors by national legislators and, in turn, of regulatory fragmentation across the Union,[288] which may jeopardize the legitimate interests of the addressees of copyright exceptions. Moreover, the choice of locking the possible exceptions and limitations into a close list signals a lack of flexibility of the harmonization towards future technological developments and new uses of protected works.[289]

The growing focus of the EU legislator on the rise and potential of digital technologies[290] has led to both vertical and horizontal efforts to further expand the harmonization: while the

[285] InfoSoc Directive.
[286] *ibid* artt 2, 3, 4.
[287] *ibid* art 5.
[288] van Eechoud and others (n 230); Lucie Guibault and others, 'Study on the Implementation and Effect in Member States' Laws of the Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society' (IViR Institute for Information Law 2007) Study commissioned by the European Commission Internal Market Directorate General MARKT/2005/07/D; Bernt Hugenholtz, 'Why the Copyright Directive Is Unimportant, and Possibly Invalid' (2000) 22 European Intellectual Property Review 501.
[289] Guido Westkamp, 'Copyright Reform and Necessary Flexibilities' (2014) 45 International Review of Intellectual Property and Competition Law 497; Gustavo Ghidini, 'Exclusion and Access in Copyright Law: The Unbalanced Features of the InfoSoc Directive' in Graeme Dinwoodie (ed), *Methods and Perspectives in Intellectual Property* (Edward Elgar 2013); Reto Hilty, 'Five Lessons about Copryight in the Information Society: Reaction of the Scientific Community to Over-Protection and What Policy Makers Should Learn' (2005) 53 Journal of the Copyright Society USA 103; Lucie Guibault, 'Le Tir Manqué de La Directive Européenne Sur Le Droit d'auteur Dans La Société de l'information' (2003) 15 Cahiers de Propriété Intellectuelle 537.
[290] In the aftermath of the Treaty of Lisbon, an ambitious policy plan has been launched under the then consolidated name of Digital Single Market Strategy. See European Commission, 'Creative Content in a European Digital Single Market: Challenges for the Future. A Reflection Document of DG INFSO and DG MARKT' (Report) [2009].

Orphan Works Directive[291] deals with the specific issue of digitization of content by public libraries and other cultural heritage institutions,[292] the Directive on Copyright in the Digital Single Market (CDSM)[293] represents the second most representative piece of horizontal harmonization after the InfoSoc Directive. Due to its ambitious scope and the delicate task of reconciling the conflicting interests of growing digital businesses and Internet users, the CDSM Directive was adopted in a haze of heated debates.[294] Nevertheless, worth acknowledging at this stage of the analysis is the strategy of a *mixed* harmonization of copyright rules, which conceals both targeted interventions and a large vision of modernization of copyright for the digital age.[295]

2.2. Fitting the bigger picture: copyright and EU law objectives

It should not be overlooked that EU copyright law is but a piece of a bigger jigsaw puzzle, which sees in the formation of a supranational body of law the way towards peace, protection of fundamental rights and market freedoms.[296] Since the early stages of this political project, agreement among Member States has been essentially sought over common *objectives*, rather than pre-set substantive rules.[297] Over the decades the *acquis communautaire* has grown both in

[291] Directive 2012/28/EU on certain permitted uses of orphan works (Orphan Works Directive) [2012] OJ L299.
[292] *ibid* recitals 3, 4, 9.
[293] Directive EU 2019/790 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (CDSM Directive) [2019] OJ L130.
[294] See Lionel Bently et al, 'Strengthening the Position of Press Publishers and Authors and Performers in the Copyright Directive' (2017) Study commissioned by the JURI Committee of the European Parliament, PE 596.810, 17 ("[T]here is nearly universal criticism of the proposal, with particularly critical interventions from academics based not only in Spain, France, Finland and the UK, but also the country where the right originated, Germany.").
[295] Jütte (n 230) 116–117.
[296] See Franz Wieacker and Edgar Bodenheimer, 'Foundations of European Legal Culture' (1990) 38 The American Journal of Comparative Law 1.
[297] Pierre Pescatore, *The Law of Integration. Emergence of a New Phenomenon in International Relations, Based on the Experience of the European Communities* (AW Sijthoff 1974) 19 ("The Treaties establishing the European

size and complexity and expressed references to the objectives pursued by way of EU law have marked both the founding Treaties and secondary law regulation.

2.2.1. The expansion of EU law objectives

In the dawn of the European project, Pierre Pescatore conducted a remarkable analysis of the objectives of EU law, classifying them in three categories based on the criterion of immediacy.[298] He called 'immediate objectives' those aiming at the establishment of a commercial customs union, based on the principles of free movement of goods and non-discrimination.[299] 'Intermediate objectives' were those intending to expand the commercial union into an economic one, thus stretching the scope of free movement and non-discrimination to all aspects of the production and exchange of goods.[300] Lastly, 'distant objectives' related to the formation of a political union, a final stage whose form and features remained yet to be defined.[301] In his analysis, Pescatore identified a fundamental problem in the elusiveness of intermediate and distant objectives, which caused (and presumably would have continued generating) vagueness and inefficiencies in the EU legislative process.[302] He highlighted how, while the immediate purpose of forming a commercial union was

Communities, especially the Treaty establishing the Economic Community, laid down objectives rather than formulated substantive rules.").

[298] *ibid* 19 ff.

[299] In light of Article 9 of the EEC Treaty. *ibid* 20.

[300] *ibid* 20–21.

[301] *ibid* 23.

[302] *ibid.*

adequately defined, the Treaties showed a lack of cohesion in setting the objectives that the EU economic and political policies should pursue.[303]

Pescatore's arguments show a particularly prescient view on the evolution of EU primary law. The initial idea of a partial integration[304] limited to the formation of a commercial union, in fact, soon moved towards a broader project of common economic and political policies.[305] Despite the failed attempt of establishing an EU Constitution,[306] an expansion of objectives of EU law can be detected in both the Treaties.[307] The Treaty of Lisbon, in particular, has moved important steps towards the formation of a political union, introducing the notion of 'social market economy'[308] and listing among the Union's goals the promotion of peace, European values and the well-being of the citizens, a sustainable development, the promotion

[303] "(…) the Treaty of Rome does not express any comprehensive idea regarding the objective of the economic union. Whilst in the conception of the Common Market the customs union forms a focal point towards which a coherent complex of precisely defined objectives and a well-defined complex of powers converge, such indications are lacking in the Treaty of Rome insofar as economic union is concerned." Pescatore (n 297) 22.
[304] Pierre Pescatore, 'La Cour en tant que juridiction fédérale et constitutionnelle', Dix ans de jurisprudence de la Cour de justice des Communautés européennes (Carl Heymans Verlag 1965). See also Oliver De Schutter, 'The Balance Between Economic and Social Objectives in the European Treaties' (2006) 5 Revue française des affaires sociales 119.
[305] The Treaty of Rome of 1957 creates the European Economic Community for the purpose of providing for closer economic ties between Member States and establishing a single customs union; the Single European Act of 1986 advances the creation of the internal market; the Treaty of Maastricht of 1992 prepares for the monetary union, and the Treaty of Lisbon of 2007 reaffirms the EU internal market as a pillar objective of the Union. See in this regard Pila (n 238) 10 See Loic Azoulai, 'The Court of Justice and the Social Market Economy: The Emergence of an Ideal and the Conditions for Its Realization' (2008) 45 Common Market Law Review 1335, 1340. An interesting example of this evolution is Art.235 of the EEC Treaty, which allocated legislative competence to the Council for undertaking necessary action to preserve a functioning internal market. The provision consolidated its wording with the Maastricht Treaty (Art.308 EC Treaty), but changed it with the Treaty of Lisbon: Art.352 TFEU omits the limitation to the sole purpose of assisting the functioning of the Common Market, thus opening up to further possible objectives arising from the Treaties ('If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties.').
[306] Treaty Establishing a Constitution for Europe 2004, unratified.
[307] TEU art 3; see also Treaty on European Union 1992, article B ('The Union shall set itself the following objectives: to promote economic and social progress which is balanced and sustainable, in particular through the creation of an area without internal frontiers, through the strengthening of economic and social cohesion and through the establishment of economic and monetary union […] to strengthen the protection of the rights and interests of the nationals of its Member States through the introduction of a citizenship of the Union.').
[308] TEU art 3(3). See Loic Azoulai, 'The Court of JUstice and the Social Market Economy: The Emergence of an Ideal and the Conditions for Its Realization' (2008) 45 Common Market Law Review 1335, 1337.

of scientific and technological progress, the enhancement of social cohesion and the respect of cultural diversity.[309]

Nevertheless, the relation and boundaries between the economic and political objectives of EU law remain vague.[310] The Treaty of Lisbon, in fact, does not confer competence to the EU to harmonize social matters, but rather a mere function of support and coordination of national social policies.[311] As seen, also the recognition of the CFREU as primary law does not to intend to expand the competences of the EU legislator. The social values enshrined in the Charter shall enter the EU legal framework by permeating EU secondary law and its interpretation, thus moving the attention towards the CJEU.

In the aftermath of the Treaty of Lisbon, high expectations have been placed upon the Court's activity in the hope that its interpretation may disentangle the knot of the economic and social objectives of EU law.[312] The pre-Lisbon approach followed by the Court was based on a theory of complementarity of the economic and social goals of the Union,[313] according to which

> […] the Community has not only an economic but also a social purpose, the rights under the provisions of the EC Treaty on the free movement of

[309] *ibid* art 3. See also Ramalho (n 18) 91.
[310] See Bruno de Witte, 'A Competence to Protect: The Pursuit of Nonmarket Aims through Internal Market Legislation' in Philip Syrpis (ed), *The Judiciary, the Legislature and the EU Internal Market* (Cambridge University Press 2012) 24 ff.
[311] Azoulai (n 308) 1337.
[312] Worth recalling is the AG opinion in Case C-515/08 *Criminal proceedings against Víctor Manuel dos Santos Palhota and Others* [2010] EU:C:2010:589, para 53, where it is affirmed: 'To the extent that the new primary law framework provides for a mandatory high level of social protection, it authorises the Member States, for the purpose of safeguarding a certain level of social protection, to restrict a freedom, and to do so without European Union law's regarding it as something exceptional and, therefore, as warranting a strict interpretation. That view, which is founded on the new provisions of the Treaties cited above, is expressed in practical terms by applying the principle of proportionality.'
[313] Azoulai (n 308) 1336.

> goods, persons, services and capital must be balanced against the objectives pursued by social policy […].[314]

Such an approach has not shown signs of strengthening over the years.[315] On the contrary, the CJEU has been wary of referring to the social market economy and of tracing the way through the difficult combination of economic and social goals.[316] With specific regards to IP and copyright in particular, the recent development towards a so-called constitutionalization of IP rights operated by the CJEU is not without problems:[317] the CFREU-inspired interpretation of the Court is not constant and, when provided, fails to build consistent trends, the references to fundamental rights being scattered across the case law in a highly case-by-case reasoning.[318] In this light, it can be anticipated – as will be illustrated in details in the following Chapter – that the juxtaposition of private economic and public social interests remains to date a highly controversial task for the Court.[319]

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[314] Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* (*Viking*) [2007] EU:C:2007:772, para 79. See also Case 43-75 *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena* (*Defrenne*) [1976] EU:C:1976:56, para 10 (referring to the 'social objectives of the Community, which is not merely an economic union, but is at the same time intended, by common action, to ensure social progress'); Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* (*Laval*) [2007] EU:C:2007:809, para 105.

[315] In Azoulai's words '(…) the practical problem which [the CJEU] has to solve is that of the technical methods for realizing this ideal. It has to explain clearly what separates the law of a Community based on the market – "a market Community" – from the law of a "social market economy".' Azoulai (n 308).

[316] Václav Šmejkal, 'CJEU and the Social Market Economy Goal of the EU' (Charles University of Prague Faculty of Law 2014).

[317] See Christine Godt, 'Intellectual Property and European Fundamental Rights' in Hans Micklitz (ed), *Constitutionalization of European Private Law* (Oxford University Press 2014).

[318] Sganga, 'Towards a More Socially Oriented EU Copyright Law: A Soft Paradigm Shift after Lisbon?' (n 253) 22 ("Identifying characterizing trends in the CJEU's copyright case law is a challenging task, due to the naturally patchworked nature of decisions that stem from national courts' referrals for preliminary ruling, the heterogeneous responses offered by the Court and its substantial variations of approaches depending on the subject-matter involved, with no real horizontal doctrines, and the similarly fragmented and heterogeneous nature of the EU legislative harmonization.").

[319] See Chapter 3 Section 3.5 for a detailed analysis on the CJEU interpretation of the notion of fair balance of rights. See also in this regard Caterina Sganga, 'A Decade of Fair Balance Doctrine, and How to Fix It: Copyright versus Fundamental Rights Before the CJEU from *Promusicae* to *Funke Medien, Pelham* and *Spiegel Online*' (2019) 11 European Intellectual Property Review; Jonathan Griffiths, 'European Union Copyright Law and the Charter of Fundamental Rights—Advocate General Szpunar's Opinions in (C-469/17) *Funke Medien*,

2.2.2. The evolving concept of internal market: the 'social' and the 'digital'

The study of the competences and objectives underlying EU law has unveiled the pivotal role played by the idea of EU internal market, which therefore requires a more detailed analysis. As seen previously, the establishment of an internal market represents the ground for legitimation of EU lawmaking[320] and, as such, the main pillar of the harmonization process in which the EU legislator has embarked. Yet, what does establishing and promoting the internal market really mean?

Article 26 TFEU provides the following definition:

> The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties.[321]

In a straight-forward manner, the legislator sets the core element of the EU internal market in the safeguard of the four freedoms of movement – of goods, of persons, of services and of capital –, to which a fifth one – i.e. the free movement of information and knowledge – has been added in the policy and doctrinal discourses.[322] Nevertheless, defining the objective of

(C-476/17) *Pelham GmbH* and (C-516/17) *Spiegel Online*' (2019) 20 ERA Forum 35; Jonathan Griffiths and Luke McDonagh, 'Fundamental Rights and European IP Law: The Case of Art.17(2) of the EU Charter' in Christophe Geiger (ed), *Constructing European Intellectual Property. Achievements and New Perspectives* (Edward Elgar 2013).

[320] TEU art 3.

[321] TFEU art 26(2).

[322] First introduced by the former EU Commissioner First introduced by the former EU Commissioner Janez Potočnik in 2007, the "fifth market freedom" consolidated in the explanatory documentation and scholarship. See European Commission, Green Paper 2008 (n 270) 3.

promoting the EU internal market merely as the goal to remove and prevent obstacles to the market freedoms, although formally correct, may result not to be fully exhaustive.

Two additional dimensions have entered the scene and influenced EU lawmaking: the social and the digital dimensions. The concept of social market economy introduced in the Treaty of Lisbon[323] attaches to the safeguard of the market freedoms an emphasis on social welfare, fair competition and anti-discrimination policies, solidarity principles.[324] Glaring evidence of the growing attention on the social dimension of the EU internal market can be found in the legislative and judicial developments regarding EU labor law[325] and EU consumer protection law.[326]

With the galloping advancement of digital technologies, the internal market has also more recently acquired the label of Digital Single Market.[327] Generally speaking, the digital

[323] TEU art 3(3); TFEU art 9 ('In defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health.'). See also EEC Treaty ('[…] to promote throughout the Community a harmonious development of economic activities [and] an accelerated raising of the standards of living […]").

[324] Delia Ferri and Fulvio Cortese, *The EU Social Market Economy and the Law: Theoretical Perspectives and Practical Challenges for the EU* (Routledge 2018) ('The introduction of the social market economy, as highlighted by Ferri and Cortese, "seems to pay homage to the need for economic activity to serve the common social good."); Ramalho (n 18) 91; Erika Szyszczak, 'Antidiscrimination Law in the European Community' (2009) 32 Fordham International Law Journal 624, 624–659.

[325] E.g. Defrenne; Viking; Laval; Joint Cases C-234/96 and C-235/96 Deutsche Telekom AG v Agnes Vick and Ute Conze, [2000] EU:C:2000:73. See for a thorough analysis Ferri and Cortese (n 324).

[326] A high number of legislative acts ranging from Council Directive 85/374/EEC on the approximation of laws, regulations and administrative provisions of the Member States concerning liability for defective products (Product Liability Directive) [1985] OJ L210/29 to Directive 2011/83/EU on consumer rights (Consumer Rights Directive) [2011] OJ L304/64 up to the most recent Directive 2014/40/EU on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products [2014] OJ L127.

[327] *Inter alia*, European Commission, 'A Digital Single Market Strategy for Europe' (Communication) [2015] 192 final.

environment has been seen by the EU legislator as an opportunity to boost the EU economy[328] and modernize the *acquis*, so to minimize the obstacles to online transactions and protect the rights of the players at stake.[329] From this perspective, in the last twenty years the emphasis on the need for solid EU regulation of IP rights and, in particular, the push towards an enhanced harmonization of copyright rules across the Union has reached its peak.[330]

These two evolutions of the notion of EU internal market have a radiating effect over the objectives of EU law. Being the EU legislator entrusted with a competence tightly connected to the purpose of establishing and promoting the internal market, the substantial meaning of this notion inevitably has an impact on the legislation. This impact translates into a push towards a wider range of objectives of EU law. It may be even argued that the acquired social and digital dimensions potentially lead to a creeping effect on the EU legislator's initiative by stretching the boundaries fixed by the principle of proportionality.[331]

Accomplice in this expansion of EU law objectives is the normative vagueness (as Pescatore anticipated more than forty years ago) of the Treaties on what a 'well-functioning' internal

[328] See European Commission, 'Creative Content in a European Digital Single Market' (Report) (n 290) ('New technologies can bring content to new audiences.'); European Commission, 'A Digital Agenda for Europe' (Communication) [2010] 245 final/2, 3-5; European Commission, 'European Commission launches reflection on a Digital Single Market for Creative Content Online' (Press Release) [2009] IP/09/1563 ('[A] truly Single Market without borders for Creative Online Content could allow retail revenues of the creative content sector to quadruple if clear and consumer-friendly measures are taken by industry and public authorities.'); European Commission, 'Over 400% growth for creative content online, predicts Commission study – An opportunity for Europe' (Press Release) [2007] IP/07/95.

[329] European Commission, 'A Digital Agenda for Europe' (Communication) (n 328).

[330] See, *inter alia*, European Commission, 'Single Market Act. Twelve levers to boost growth and strengthen confidence' (Communication) [2011] 206 final, 2.3; European Commission, 'A Single Market for Intellectual Property Rights' (Communication) (n 227) 9-10; European Commission, 'Creative Content in a European Digital Single Market' (Report) (n 290) 14-20.

[331] Of inspiration in this line of critique is the view of a necessary choice between the mutually exclusive goals of forming an economic and political union. See, in this regard, the analysis by Dani Rodrik, *The Globalization Paradox: Why Global Markets, States, and Democracy Can't Coexist* (Oxford University Press 2011) 218 ('Ultimately, the European Union will either bite the political bullet or resign itself to a more limited economic union.').

market should be like, i.e. how the pursuit of economic and social goals ought to be implemented in EU secondary law.[332] The CJEU has tried to prevent Article 114 TFEU from becoming a normative open window by asserting that the provision enables EU law provisions whose *main* goal is the establishment and functioning of the internal market.[333] Embracing the mirroring interpretation, the Court by this token also acknowledges the possible presence of secondary goals pursued by the legislation, thus allowing for the growing *acquis* to acquire a multi-faceted connotation.

2.3. A multi-functional EU copyright law

The EU copyright legislation is a representative example of the expansive trend in the stated objectives of EU law. As will be demonstrated below, in the vast body of harmonizing copyright rules the references to the functions of the law are numerous and not limited to restatements of the EU competence.

As the analysis has anticipated, the purpose of establishing and promoting the EU internal market plays a central role in the justification and legitimation of EU lawmaking in copyright matters. Nevertheless, this EU law objective is far from being an exhaustive explanation of the conception and functions that EU copyright has acquired during twenty-eight years of

[332] TFEU artt 26, 114. See also Ioannis Lianos, 'Competition Law in the European Union after the Treaty of Lisbon' in Diamond Ashiagbor, Nicola Countouris and Ioannis Lianos (eds), *The European Union after the Treaty of Lisbon* (Cambridge University Press 2012) 252–253; Sganga, 'Towards a More Socially Oriented EU Copyright Law: A Soft Paradigm Shift after Lisbon?' (n 253) 25; Ramalho (n 18) 18.

[333] See Case C-376/98 Federal Republic of Germany v European Parliament and Council of the European Union (Tobacco Advertising I) [2000] EU:C:2000:544, para 78; Joined cases C-465/00, C-138/01 and C-139/01 Rechnungshof v Österreichischer Rundfunk and Others and Christa Neukomm and Joseph Lauermann v Österreichischer Rundfunk (Österreichischer Rundfunk) [2003] EU:C:2003:294, para 41. See also de Witte (n 310) 25.

harmonization.[334] Another highly recurring objective is the 'high level of protection of the copyright holder', which carries a legacy of the *droit d'auteur* conception.[335]

These two objectives – i.e. the establishment of the internal market and the high level of protection of the right holder – are leading examples of the functions that the EU legislator attaches to, respectively, the harmonization of national copyright rules and the protection of copyright as such. Yet, they are not the only objectives expressed in the legislation. The plurality of copyright functions is highly evident in some explanatory passages, where the legislator combines, in few lines, several purposive arguments related to copyright. Evocative examples are Recital 5 Orphan Works Directive and Recital 2 CDSM Directive:

> Copyright is the economic foundation for the creative industry, since it stimulates innovation, creation, investment and production. Mass digitization and dissemination of works is therefore a means of protecting Europe's cultural heritage. Copyright is an important tool for ensuring that the creative sector is rewarded for its work.[336]
>
> The directives that have been adopted in the area of copyright and related rights contribute to the functioning of the internal market, provide for a high level of protection for rightholders, facilitate the clearance of rights, and create a framework in which the exploitation of works and other protected subject matter can take place. That harmonised legal framework contributes to the proper functioning of the internal market, and stimulates innovation, creativity, investment and production of new content, also in the digital environment, in order to avoid the fragmentation of the internal market. The

[334] Sganga, 'Towards a More Socially Oriented EU Copyright Law: A Soft Paradigm Shift after Lisbon?' (n 253) 2 ('Predominant market inspirations have overshadowed other copyright functions, more closely related to cultural and social policies.'); Giuseppe Mazziotti, *EU Digital Copyright Law and the End-User* (Springer 2008) 45 ff.; Tobias Cohen Jeroham, 'European Copyright Law: Even More Horizontal?' (2001) 32 International Review of Intellectual Property and Competition Law 537.
[335] See on the legacy of the *droit d'auteur* tradition, Ginsburg, 'Histoire de Deux Droits d'auteur: La Propriété Litteraire et Artistique Dans La France et l'Amerique Revolutionnaires' (n 27).
[336] Orphan Works Directive recital 5.

> protection provided by that legal framework also contributes to the Union's objective of respecting and promoting cultural diversity, while at the same time bringing European common cultural heritage to the fore.[337]

These two examples showcase three main aspects of EU copyright law that are particularly interesting to note. First of all, the wording of the EU legislator presents a *mixed* focus on economic elements (e.g. 'economic foundation for the creative industry', 'functioning of the internal market', 'exploitation of works', reward) and social elements (e.g. 'protecting Europe's cultural heritage', 'promoting cultural diversity', 'bringing European common cultural heritage to the fore'). In light of the analyzed evolutions of the EU political project, distribution of legislative competences and of the same notion of internal market, this comes with no surprise.

Second, between the lines of the two Recitals one may read hints at both the copyright justifications of the Anglo-Saxon and the continental copyright traditions:[338] for the former, the references to the stimulation of creation, investment and production; for the latter the evocation of the protection of the copyright holder and the due reward. There is, in fact, nothing to prohibit a coexistence of these two traditional approaches,[339] which the EU inevitably has to relate to, since it does not replace, but harmonize national copyright systems.[340]

[337] CDSM Directive recital 2.
[338] In support of the thesis of a combined justificatory nature of EU copyright law, Ohly (n 23) 85, 109 ff.
[339] See, for instance, Stephen M Stewart, *International Copyright and Neighbouring Rights* (Butterworths 1983) 146 commenting on the UCC and highlighting that its aim was to fill the gaps and provide a synthesis of the two main copyright traditions of *droit d'auteur* and copyright.
[340] In this regard, Vivant offers an interesting insight portraying the continental *droit d'auteur* and Anglo-Saxon copyright traditions as "one-dimensional" and not necessarily mutually exclusive answers to the question, as to what copyright seeks to achieve. Vivant (n 13) 48–49; see also Ramalho (n 18) 9.

The third and last consideration before delving into the analysis of the specific functions of EU copyright legislation deals with the effects pursued by the EU legislator. The main difference between the two Recitals quoted above lies in the fact that the first sheds light on what *copyright* is intended to achieve, while the second further specifies what its *harmonization* in the EU purports to do. The combination of these two typologies of functions, i.e. the functions of EU copyright harmonization and the functions of EU copyright protection, is the distinctive character of the multi-functional conception of copyright at EU level.

These two types of objectives are often entangled in the same Recitals, if not the same sentences, of the Directives and Regulations here under analysis, thus opening room for overlaps and interpretative puzzles. A systematic analysis based on this macro-categorization can help the understanding of the role and purposes of EU copyright law.

2.4. The functions of EU copyright harmonization

Due to the principle of subsidiarity, the EU legislator has to state the legal basis and the objectives pursued by way of harmonization in order to legitimize its legislative intervention, explaining how it is more effective than national laws. For this reason, detecting the expressed EU functions of copyright harmonization results a facilitated task. These objectives stem directly from the founding Treaties[341] and mainly focus on the positioning of the EU within the international law scenario and on its internal market.

[341] Reason why Ramalho talks of Treaty-based objectives. Ramalho (n 18) 28 ff.

2.4.1. The compliance with international law obligations

The compliance with the international law obligations is an important driver for the EU harmonization. The process of internationalization of copyright, as seen above, started even before the regional harmonization and brought to several copyright related conventions. The EU is signatory party of the WIPO Internet Treaties and the Marrakesh Treaty.[342] In addition, even though the Berne Convention and the Rome Convention have been singularly signed by Member States, the EU, entering the TRIPs Agreement, ensures across its territory the respect of the substantive provisions of the Berne Convention[343] and the possibility of protecting performers, phonogram producers and broadcasters to the extent provided in the Rome Convention.[344] Besides complying with the obligations arising from the signed conventions,[345] the EU proves committed to the promotion of international standards and the further approximation of copyright rules, the underlying intention being to avoid collisions between the international legal framework and its own harmonization process.[346]

[342] Council Decision 94/800/EC concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) [1994]; Council Decision 2000/278/EC on the approval, on behalf of the European Community, of the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty [2000]; Council Decision 2014/221/EU on the signing, on behalf of the European Union, of the Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired, or otherwise Print Disabled [2014].

[343] TRIPs Agreement art 9(1) obliging signatory countries to comply with Berne Convention art 1-21 as amended in 1971.

[344] TRIPs Agreement art 14(6).

[345] InfoSoc Directive recital 15; Term Directive of 1993, recitals 24, 25; Marrakesh Regulation recitals 1, 4-8, 12; Marrakesh Directive recitals 4-6, 22. See also European Commission, 'Explanatory Memorandum to the Proposal of Information Society Directive' (Communication) [1997] 628 final, para 5; European Commission, 'Impact Assessment On The Legal And Economic Situation Of Performers And Record Producers In The European Union' (Staff Working Document) [2011] 464 final, 7, 22. See Ramalho (n 18) 52.

[346] E.g. Computer Programs Directive recitals 9, 11; Rental Directive recitals 7, 15; Database Directive, recitals 35, 37. See also reference to the UNESCO Convention on Cultural Diversity 2005 in European Commission, 'A Digital Agenda for Europe' (Communication) (n 328) 30, and to the UN Convention on the Rights of Persons with Disabilities in European Commission, 'Towards a modern, more European copyright framework' (Communication) [2015] 626 final, 2.

2.4.2. The establishment of the EU internal market

Reference to the objective of establishing and promoting the internal market can be found in all analyzed Directives, the wording imperceptibly swinging from 'the well-functioning of the market' to 'the removal of market obstacles'.[347] The key importance of this function is well conveyed by the view expressed by Margoni, according to which '[i]t is the internal market – rather than copyright – that has driven the harmonization of EU copyright law to date.'[348]

The conception of internal market is rather pragmatic, portrayed as the safeguard of the four market freedoms,[349] with no explicit references to the social market economy. Through this objective, the EU legislator aims at facilitating cross-border market exchanges within the EU boundaries by lowering transaction costs and confronting legal uncertainty.[350] Some Recitals suggest that the focus is mainly set on commercial cross-border transactions, such as the expressed intentions to support the cross-border transmission of audio-visual content in the SatCab Directive[351] and to eliminate trade barriers in the Rental Directive.[352] Yet, although more rarely, non-commercial transactions of copyrighted content are also included in the discourse. It is the case of the Orphan Works Directive, which aims at promoting the dissemination of works whose copyright holders cannot be identified or located, emphasizing

[347] E.g. Computer Programs Directive recitals 4, 5; SatCab Directive recitals 2, 21; Rental Directive recitals 1–3; Term Directive recitals 2, 9; Database Directive recitals 2–4; InfoSoc Directive recitals 3, 6, 7; Resale Directive recitals 9–15, 23; Orphan Works Directive recitals 8, 14, 25; Marrakesh Directive recital 3, 6, 11, 18; CDSM Directive recitals 1, 2.
[348] Margoni (n 230) 85.
[349] E.g. InfoSoc Directive recital 3.
[350] *ibid* recitals 6, 7.
[351] SatCab Directive recitals 2, 10, 14, 21,33.
[352] European Commission, 'Explanatory Memorandum to the Proposal of Rental and Lending Rights Directive' (Communication) [1990] 586 final, para 39.

the need for free movement of knowledge and innovation across the Union,[353] and also of the Marrakesh Directive, which introduces a mandatory exception 'to increase the availability of books and other printed material in accessible formats, and to improve their circulation in the internal market',[354] with no reference to the profitable nature of the exchanges.

A well-functioning internal market is also an environment where fair competition is granted across Member States. In this light, the SatCab Directive aims to ensure equal treatment of all suppliers of cross-border broadcasts[355] and the InfoSoc, Resale and CRM Directives show a common focus on the safeguard of fair competition across the Union.[356] More peculiar is the wording adopted in the Database Directive, among whose aims is to fill the lack of harmonized unfair competition rules to prevent behavior in violation of exclusive rights.[357]

While no mentioning of the notion of social market economy can be detected, the references to the digital environment are instead numerous.[358] It is worth asking whether the idea of a well-functioning internal market matches with the most recent policy direction of the Digital Single Market. From a copyright perspective, the Digital Single Market policy plan is in line with the intent of facilitating market transactions of copyrighted content and, more precisely,

[353] Orphan Works Directive recitals 2, 3; European Commission, 'Impact Assessment on the Cross-border Online Access to Orphan Works' (Staff Working Document) [2011] 615 final, 21.
[354] Marrakesh Directive recital 3.
[355] SatCab Directive recital 13.
[356] InfoSoc Directive recital 1 ('The Treaty provides for the establishment of an internal market and the institution of a system ensuring that competition in the internal market is not distorted. Harmonisation of the laws of the Member States on copyright and related rights contributes to the achievement of these objectives.'); Resale Directive recital 9 ('[…] a significant impact on the competitive environment within the internal market, since the existence or absence of an obligation to pay on the basis of the resale right is an element which must be taken into account by each individual wishing to sell a work of art.'); CRM Directive recital 1.
[357] Database Directive recitals 6, 8.
[358] E.g. Database Directive recital 38; InfoSoc Directive recitals 17, 38, 54, 59; Orphan Works Directive recitals 21, 22; CRM Directive recitals 32, 38; Marrakesh Regulation recital 6; Marrakesh Directive recitals 1, 7; CDSM Directive recitals 2, 3, 5-10, 19-25, 39, 46, 54.

to maximize the number of such transactions.[359] The intent to exploit the digital environment to expand copyright markets leads the Digital Single Market strategy to a broader spectrum of policy objectives, which looks, on the one side, at the benefits for the user and, on the other side, at the protection of copyright holders.[360]

2.4.3. The global competitiveness of the EU economy

The intent of establishing and, above all, promoting the internal market acquires a further specific meaning in the purpose of rising the global competitiveness of the EU economy. The notion of competitiveness can be found in EU primary law associated with an aspiration of growth of the EU economy.[361] This goal emerges in more specific terms in the copyright legislation through its emphasis on the attraction of investments and the economic development of the Union.[362]

The broader objective of boosting the EU economy by maximizing revenue flows emerges, in particular, in Directives having wider scope, such as those pursuing horizontal harmonization. The InfoSoc Directive puts forward the objective of fostering the EU

[359] E.g. European Commission, 'A Digital Agenda for Europe' (Communication) (n 328) 8 ('Europe needs to push ahead with the creation, production and distribution (on all platforms) of digital content.'); European Commission, 'A Digital Single Market Strategy for Europe' (Communication) (n 328) 5.
[360] European Commission, 'Towards a modern, more European copyright framework' (Communication) (n 346); European Commission, 'Creative Content in a European Digital Single Market' (Report) (n 290) 14-20; European Commission, 'A Single Market for Intellectual Property Rights' (Communication) (n 227) 9-10.
[361] TFEU 173(1) ('The Union and the Member States shall ensure that the conditions necessary for the competitiveness of the Union's industry exist'). See also Ramalho (n 18) 143–146.
[362] See Directive 2004/48/EC on the enforcement of intellectual property rights (Enforcement Directive) [2004] OJ L195, recital 1 ('The protection of intellectual property is important not only for promoting innovation and creativity, but also for developing employment and improving competitiveness.'); see also European Commission, 'Green Paper on the online distribution of audiovisual works in the European Union: opportunities and challenges towards a digital single market' (Green Paper) (Green Paper 2011) [2011] 427 final, 4; European Commission 'A Single Market for Intellectual Property Rights' (Communication) (n 227) 9-10.

economic development and competitiveness, further specifying that such a growth would raise employment rates across the Union.[363] Exceptional is the case of the Database Directive, which, despite having a highly sectorial scope, refers to the need to solve factual imbalances in the investments between the EU and third countries.[364] In the explanatory documentation, it is further explained that there is a 'gap to be filled' *vis-à-vis* the United States in the production and exploitation of databases, which represent fundamental instruments for the information society and its economy.[365]

2.5. The functions of EU copyright protection

During the harmonization process, the EU legislator inevitably shows the intention to preserve and continue to rely on copyright as a useful tool not only to comply with international copyright law, establish and boost its internal market, but also to achieve intrinsic normative objectives of the copyright protection.[366]

Recital 2 InfoSoc Directive helps understanding the difference between the EU functions of copyright harmonization and the EU functions of copyright protection, which presents consecutively first the former and, in the last sentence, the latter:

> The European Council (…) stressed the need to create a general and flexible legal framework at Community level in order to foster the development of the information society in Europe. This requires, *inter alia*, the existence of an internal market for new products and services. Important Community legislation to ensure such a regulatory framework is already in place or its

[363] InfoSoc Directive recital 4.
[364] Database Directive recital 11.
[365] European Commission, 'First Evaluation of Directive 96/9/EC on the legal protection of databases' (Staff Working Document) [2005] Annex Figure 1.
[366] In Vivant's words, the 'functions assigned to a right'. See Vivant (n 13) 46.

> adoption is well under way. Copyright and related rights play an important role in this context as they protect and stimulate the development and marketing of new products and services and the creation and exploitation of their creative content.[367]

Recitals and explanatory documents are studded with references to the specific purposes of copyright protection, with more or less emphasis attached. At first blush, these functions may seem to follow the categorization of the key copyright actors, i.e. creators, industries and the public.[368] Nevertheless, drawing the lines between these categories is harder than one may expect. As the analysis shows below, in fact, the legislator tends to address more than one category of addressees, pooling two, if not all, categories together.[369]

2.5.1. The 'high level of protection of the right holder': a synecdoche for the remunerative function

The objective of setting up and maintaining a high level of protection of the right holder is highly recurrent across the Directives.[370] This prompts two core definitional questions, according to which it becomes essential to identify who the copyright holder is and what the expected benefits of the high level of protection are.

[367] InfoSoc Directive recital 2.
[368] Ramalho in her analysis, after illustrating the treaty-relatd objectives, stops talking of goals and focuses on addressess, in her words on the 'protection of specific interests'. See Ramalho (n 18) 39 ff.
[369] E.g. Term Directive recital 11('[…] [The]protection ensures the maintenance and development of creativity in the interest of authors, cultural industries, consumers and society as a whole.'); see also European Commission, 'Impact Assessment On The Legal And Economic Situation Of Performers And Record Producers' (Staff Working Document) (n 345) 22.
[370] Expressed mentioning is excluded in the Computer Program Directive, Rental Directive, Database Directive and Resale Directive. Particular emphasis on this notion can be detected in the Term, InfoSoc and CDSM Directives. See Term Directive recitals 11, 12; InfoSoc Directive recitals 4, 9; CDSM Directive recitals 2, 3, 62.

Although in some occasions the EU legislator takes into specific consideration the individual roles and interests of specific players,[371] the wording across the legislation pivots on the wide-ranging notion of right holder. Since EU copyright law does not harmonize the criteria of authorship,[372] this term encompassed all possible holders of national copyright entitlements, including neighboring rights and *sui generis* rights. This means that authors, co-authors, performers, publishers, producers, broadcasters and all their respective heirs may potentially fall under the umbrella notion of 'right holder'. The EU legislator, in fact, makes no distinction between original and derivative acquisition of copyrights by way of transfer via assignment or license.[373]

The protection to be granted to right holders, according to this function, shall be high, as it promises to bring benefits that are 'fundamental to intellectual creation' and go in favor not only of right holders themselves, but of society as a whole.[374] This, as will be further elaborated in Chapter 4, is a crucial passage in the analysis, as it sets the so-called welfare standard for the assessment of the effectiveness of the regulation.[375] At the current stage of the analysis, suffice it to observe that the need to maintain, if not increase, the level of protection is often linked to the intent to effectively respond to the structural changes brought about by computer

[371] E.g. Term Directive of 2011 recital 18; Rental Directive recital 6.
[372] See Computer Programs Directive artt 2, 3; Database Directive art 4. See also Stamatoudi and Torremans (n 231) 16.
[373] E.g. InfoSoc Directive recitals 30, 55 ('The rights referred to in this Directive may be transferred, assigned or subject to the granting of contractual licences'); CRM Directive recital 2 ('The dissemination of content […] requires the licensing of rights by different holders of copyright and related rights, such as authors, performers, producers and publishers.'); CDSM recitals 6, 7. See also European Commission, 'Copyright in the Knowledge Economy' (Green Paper) (n 271) 4 ('A rigorous and effective system for the protection of copyright and related rights is necessary to provide authors and producers with a reward for their creative efforts.').
[374] E.g. Term Directive recital 11 ('The level of protection of copyright and related rights should be high, since those rights are fundamental to intellectual creation. Their protection ensures the maintenance and development of creativity in the interest of authors, cultural industries, consumers and society as a whole.').
[375] See Chapter 4 Section 4.2.

and, above all, digital technologies.[376] More precisely, the intent to compensate and prevent the economic losses caused to right holders by practices like the rental of content or online piracy is typically attached to the objective of high level of protection, with particular emphasis in the Computer Program, Term and Rental Directives.[377]

The 'high level of protection of the right holder' can potentially refer to a wide number of rights and benefits of economic and non-economic nature, from the protection of the personality sphere to an efficient system of enforcement and prevention of rights violation. Nevertheless, closely analyzing the legislative texts, it turns out that this notion carries a predominant focus on the remuneration of the right holder, most often referring to the exploitation of protected content and licensing of rights, thus leaving non-commercial scenarios mostly implicit.[378] The only exception is represented by the InfoSoc Directive, which in Recital 11 acknowledges the need 'to safeguard the independence and dignity of authors'.[379] Besides the fact that moral rights are not subjet to harmonization,[380] the literal

[376] European Commission, Green Paper 2011 (n 362) 15; Term Directive 2006 recital 6; European Commission, 'Impact Assessment on the Legal and Economic Situation of Performers and Record Producers' (Staff Working Document) (n 345), 13, 18.
[377] E.g. Computer Programs Directive recital 4, 5; Rental Directive recital 2; Term Directive recital 6.
[378] E.g. Database Directive recital 48 ('Whereas the objective of this Directive, which is to afford an appropriate and uniform level of protection of databases as a means to secure the remuneration of the maker of the database […]'); CRM Directive recital 1, 2 ('The Union Directives […] already provide a high level of protection for rightholders and thereby a framework wherein the exploitation of content protected by those rights can take place.'); CDSM Directive recital 2 ('The directives […] provide for a high level of protection for rightholders, facilitate the clearance of rights, and create a framework in which the exploitation of works and other protected subject matter can take place.'). Highlighting also the underlying 'economic purpose' of exploitation rights and, in particular, the purpose to provide a financial reward to copyright holders, Bechtold (n 23).
[379] InfoSoc Directive recital 11. This restrictive interpretation of the protection of the right holder will occasionally find room for broader readings by the CJEU, which in few occasions opens towards non-economic aspects have of the protection or affirms the preventive nature of copyright exclusive rights. E.g. Case C-301/15 *Marc Soulier and Sara Doke v Premier ministre and Ministre de la Culture et de la Communication (Soulier)* [2016] EU:C:2016:878, para 33; Case C-5/08 *Infopaq International A/S v Danske Dagblades Forening (Infopaq)* [2009] EU:C:2009:465, paras 57, 74; 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 162. For a detailed analysis, see Chapter 3 Section 3.3.
[380] See InfoSoc Directive recital 19; Database Directive recital 28.

interpretation of the legislation shows that the remunerative function prevails over other possible interpretations of the benefits of protection, such as for instance the granted right to exercise full control over the uses of the work by third parties.[381]

It can be therefore stated that the leading function underlying the notion of high level of protection of the copyright holder is the specific protection of his or her right to receive appropriate remuneration from the exploitation of the protected work. In this sense, the phrasing used by the EU legislator seems to conceal a synecdoche: while referring to a whole (i.e. the vast idea of protection of the right holder), it indicates a part of it (i.e. its remunerative function).

From this finding, two main considerations follow. First, 'high' is not intended to be unlimited. In the expressed references to the remunerative function of copyright protection, adjectives such as 'fair', 'adequate', 'appropriate' usually accompany the notion of remuneration and, in this light, particular emphasis emerges on the fact that all right holders shall receive remuneration.[382]

[381] E.g. CDSM Directive recital 61 ('[…]That uncertainty affects the ability of rightholders to determine whether, and under which conditions, their works and other subject matter are used, as well as their ability to obtain appropriate remuneration for such use.[…] Rightholders should receive appropriate remuneration for the use of their works or other subject matter."). In the scholarship the perspective of the protection as a right to control the use of the work in the public sphere is vastly explored. See, *inter alia*, Dusollier, 'Realigning Economic Rights with Exploitation of Works' (n 23) 163.

[382] E.g. Recital 5 Rental Directive; Recital 3 Resale Directive; Resale Report, 10; InfoSoc Directive recital 10 ('[…] [authors and performers] have to receive an appropriate reward for the use of their work, as must producers in order to be able to finance this work.'). See also European Commission, 'A Single Market for Intellectual Property Rights in Europe' (Communication) (n 227) 9-14 ('Authors and other creators expect a fair return for the use of their work, be they books, newspaper articles, sound recordings, performances, films or photographs. This is also true of publishers and producers who provide investments to produce and disseminate creative works. The potential exists to increase authors' and creators' returns if a proper copyright environment facilitates the licensing and the dissemination of works in a digital single market. […] The Commission is committed to ensuring that all forms of creativity are rewarded.').

Second, it ought to be noted that, in conjunction with the focus on the remuneration of the right holder, utilitarian arguments inevitably prevail over other justificatory elements. The *ex post*, or forward-looking, justificatory argument,[383] according to which the remuneration of the copyright holder stimulates the creation of content to the benefit of the society strongly comes through from the reading of numerous recitals,[384] the antithetic backward-looking justification of copyright protection based on the justice of rewarding intellectual effort and creativity being significantly more rare and involute.[385] The utilitarian approach underlying the remunerative function is visible also in the specific references to the need to generate income to help finance new talents, thus overlapping with the function of cultural diversity.[386]

The remunerative function and its underlying utilitarian connotation manifest themselves not only in relation to the encouragement of creation, but also with specific regard to the expressed intent to protect and attract investments. Here, the wide-ranging notion of right holder reveals itself, the focus shifting from the authors of creative content to the investors supporting its production and distribution.[387] An interesting case of overlap between the role of the creator and the investor is presented by the Database Directive, which aims to secure a

[383] Strowel (n 27) 235–238; Lemley (n 212) 129.
[384] InfoSoc Directive recitals 9, 10, 11; Term Directive recital 11; Rental Directive recital 5; Orphan Works Directive recital 5; CRM Directive recital 1; Marrakesh Directive recital 1; CDSM Directive recital 2. European Commission, 'Explanatory Memorandum to the Proposal of Information Society Directive' (Communication) (n 345) para 2.2; European Commission, 'Impact Assessment On The Legal And Economic Situation Of Performers And Record Producers' (Staff Working Document) (n 345) 22; European Commission, 'A Single Market for Intellectual Property Rights in Europe' (Communication) (n 227) 5 ('Copyright stimulates the creation of creative content, such as software, books, newspapers and periodicals, scientific publications, music, films, photography, visual arts, video games or software.').
[385] E.g. Orphan Works Directive recital 5 ('Copyright is an important tool for ensuring that the creative sector is rewarded for its work.').
[386] European Commission, 'Impact Assessment On The Legal And Economic Situation Of Performers And Record Producers' (Staff Working Document) (n 345) 49.
[387] E.g. InfoSoc Directive recital 10; Rental Directive recital 5.

remuneration for the database maker, who is seen both as the creator of the database, but fundamentally also as an investor, whose initiative and undertaken risks shall be protected.[388]

The specific purpose of protecting and attracting investors can be retraces in the Computer Programs and Database Directives, where the investments required to create the protected works are under risks due to the low-cost possibility of copying.[389] Similarly, the Rental Directive highlights the high investments required for the production of phonograms and movies,[390] hence the importance to secure the returns. On a broader scale, the extensions of the duration of copyright entitlements promoted by the Term Directives are justified by the purpose of fostering investments to the creative industry to the benefit of all actors involved.[391]

The translation of the remunerative function into the protection of the economic return of the investor proves a connection between the function of 'high level of protection' and the one of boosting the competitiveness of the EU economy, which, as highlighted by Hugenholtz, is promised by the EU legislator, but requires empirical evidence to be proven effective.[392] This interrelation of the two EU functions of copyright protection and copyright harmonization should not be underestimated. The protection and stimulation of investments in digital goods,

[388] Database Directive recitals 41, 48. The EU legislator seems to be more cautious in relying on the utilitarian argument of incentivization to the production of databases, since the correlation between sui generis right and production of databases result hard to prove. See European Commission, 'First evaluation of Directive 96/9/EC'' (n 365). See also 'Hugenholtz, 'Is Harmonization a Good Thing? The Case of the Copyright Acquis' (n 226) 66.
[389] Computer Programs Directive recitals 2, 3, 4, 40; InfoSoc Directive recital 4.
[390] Rental Directive recital 5.
[391] European Commission, 'Impact Assessment On The Legal And Economic Situation Of Performers And Record Producers In The European Union' (Staff Working Document) (n 345) 2, 19, 22, 45.
[392] Hugenholtz, 'Is Harmonization a Good Thing? The Case of the Copyright *Acquis*' (n 226) 66 ('[T]he desire of the European legislature to seek "a high level of protection of intellectual property", which would lead to "growth and competitiveness of European industry" - a proposition that has yet to be proven').

networks and services has, in fact, become pillar to the EU policy agenda on the Digital Single Market and, in turn, to EU copyright regulation.[393]

2.5.2. Facilitating the dissemination of content and promoting culture

The analysis of the objectives in the EU copyright legislation brings to the surface the expressed function of promotion of the dissemination of content and, more generally, of culture. These purposes are interconnected and relate to the view of the EU legislator towards the beneficial potentials of the evolving technology.[394] The focus on the dissemination objective has, in fact, gained centrality especially with the Digital Single Market policy plan,[395] whose intents are to exploit the Internet to expand markets 'enabling the use of copyrighted content' across the Union and reaching a wider audience.[396]

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[393] European Commission, 'Towards a modern, more European copyright framework' (Communication) (n 346) 2; European Commission, 'Promoting a fair, efficient and competitive European copyright-based economy in the Digital Single Market' (Communication) [2016] 592 final, 2-3.

[394] E.g. Rental Directive recital 5; Orphan Works Directive recital 1 ('Creating large online libraries facilitates electronic search and discovery tools which open up new sources of discovery for researchers and academics who would otherwise have to content themselves with more traditional and analogue search methods.'); CDSM Directive recital 8 ('[T]here is widespread acknowledgment that text and data mining can, in particular, benefit the research community and, in so doing, support innovation. Such technologies benefit universities and other research organisations, as well as cultural heritage institutions since they could also carry out research in the context of their main activities.'); see also *ibid* recitals 19-22 with regards to technologies in support of distance learning and cross-border education. See also European Commission, 'Creative Content in a European Digital Single Market' (Report) (n 290) 14-20 ("New technologies can bring content to new audiences."); European Commission, 'Copyright in the Knowledge Economy' (Green Paper) (n 271) 4 ('Creation, circulation and dissemination of knowledge in the Single Market are directly linked to the broader goals of the Lisbon Strategy.'); European Commission, 'Towards a modern, more European copyright framework' (Communication) (n 346) 3-6.

[395] CDSM Directive recital 3 ('[…] This Directive provides for rules to adapt certain exceptions and limitations to copyright and related rights to digital and cross-border environments […] with a view to ensuring wider access to content.'); European Commission, 'A Digital Agenda for Europe' (Communication) (n 328) 3 ('Wider deployment and more effective use of digital technologies will enable Europe to address its key challenges and will provide Europeans with a better quality of life through, for example, […] new media opportunities and easier access to public services and cultural content.'); particularly evocative are also public statements of European Commissioners, e.g. European Union, 'Statement by EU Commissioners McCrevy and Reding' (2009) <http://europa.eu/rapid/press-release_IP-09-1544_en.htm?locale=en> ('The vast heritage in Europe's libraries cannot be left to languish but must be made accessible to our citizens.').

[396] European Commission, 'A Digital Agenda for Europe' (Communication) (n 328) 8 ('Digital distribution of cultural, journalistic and creative content, being cheaper and quicker, enables authors and content providers to

Addressees of the dissemination function are users, i.e. the 'consumers' of creative content. The entry onto the scene of the notion of consumer in the copyright legislation is not a trivial matter.[397] This term refers to the public interest, i.e. to the whole society who, according to the utilitarian justification of copyright, should benefit from it.[398] Yet, there may be fundamental differences between specific types of use. A fundamental consideration is that consumers of creative content can be themselves creators of derivative works, who access, draw inspiration, build on others' works and, by so doing, foster creativity.[399] Particular attention is paid to users with disabilities: from a broad reference to the goal of 'facilitat[ing] access to works by persons suffering from a disability, which constitutes an obstacle to the use of the works themselves', expressed in the InfoSoc Directive,[400] with the Marrakesh Regulation and related Directive the focus has narrowed on visual impairment and print

reach new and larger audiences. Europe needs to push ahead with the creation, production and distribution [on all platforms] of digital content.'); European Commission, 'Towards a modern, more European copyright framework' (Communication) (n 346) 3; European Commission, 'Impact Assessment on the modernization of copyright rules' (Staff Working Document) [2016] 301 final, 7, 13;. See also Jütte (n 230) 68 ("Although unwritten in the communication, this is a clear statement against further restricting the use of copyright protected material by increasing the scope of protection and thereby limiting uses by third parties.").

[397] European Commission, 'Creative Content in a European Digital Single Market' (Report) (n 290) 3 ('The starting point of this reflection paper is therefore the objective of creating in Europe a modern, pro-competitive, and *consumer-friendly* legal framework for a genuine Single Market for Creative Content Online.') (emphasis added); European Commission, 'A Single Market for Intellectual Property Rights' (Communication) (n 227) 5-6 ('[…] to optimize the relationship between the three main players: creators, service and content providers and consumers.').

[398] E.g. InfoSoc Directive recitals 3, 9, 14; Orphan Works Directive recitals 18, 20, 23; CRM Directive recitals 3, 15; Marrakesh Directive recitals 1, 14 ('[…] due account should be taken of the […] public interest objectives pursued by this Directive.'); CDSM Directive recital 12. See also European Commission, Green Paper 1988 (n 214) paras 1.3.1.–1.3.6. ('[D]ue regard must be paid not only to the interests of right holders but also to the interests of third parties and the public at large.').

[399] InfoSoc Directive recital 2; European Commission, 'A Single Market for Intellectual Property Rights' (Communication) (n 227) 10. See also Christophe Geiger, 'Promoting Creativity through Copyright Limitations: Reflections on the Concept of Exclusivity in Copyright Law' (2010) 12 Vanderbilt Journal of Entertainment and Technology Law 515.

[400] InfoSoc Directive recital 43. See also reference to the UN Convention on the Rights of Persons with Disabilities 2006 in European Commission, 'Towards a modern, more European copyright framework' (Communication) (n 346) 2.

disabilities promoting both the accessibility of literary works and the circulation thereof in accessible formats.[401]

The EU legislator associates two main dimensions to the dissemination function. The first is pragmatic and relates to the need for efficient systems of management of copyright entitlements and facilitation of licensing.[402] The intention to reach a broad dissemination of works through well-managed licensing systems aligns with the harmonization function of internal market and with the remunerative function, as, once again, it shows reliance on the utilitarian argument, which seeks to maximize the revenue for the copyright holder and the repertoires of content available at the public.[403] A unique exceptional case in this regard is represented by Recital 82 CDSM Directive, which seems to hint at the dissemination function in a detached way from the remuneration function, stating that

> [n]othing in this Directive should be interpreted as preventing holders of exclusive rights under Union copyright law from authorising the use of their

[401] Marrakesh Directive recitals 3, 7-9, 18.

[402] E.g. CDSM Directive recitals 3, 45, 47; CRM Directive recitals 3, 44; see also European Commission, 'Executive Summary of the Impact Assessment on the Proposal for a Directive on the collective management of copyright and related rights' (Staff Working Document) [2012] 205 final, 4 ('This should help to improve consumers' access to a wider variety of cultural goods and services. Commercial users will benefit from better functioning and more transparent collecting societies and, in the online environment, from a framework facilitating access to licences for the provision of music services throughout the EU'); European Commission, 'Impact Assessment on the modernization of copyright rules' (Staff Working Document) (n 396) 13 ('The specific objectives are therefore defined in terms of facilitating clearance of rights (and negotiation) between the relevant parties.'); European Commission, 'A Digital Agenda for Europe' (Communication) (n 328) 8 ('Easier, more uniform and technologically neutral solutions for cross-border and pan-European licensing in the audiovisual sector will stimulate creativity and help the content producers and broadcasters, to the benefit of European citizens.').

[403] European Commission, 'A Single Market for Intellectual Property Rights' (Communication) (n 227) 9 ('In the era of globalization and international competition, the revenue potential of IP is just as important as the access to commodities or the reliance on a manufacturing base. […] The potential exists to increase authors' and creators' returns if a proper copyright environment facilitates the licensing and the dissemination of works in a digital single market.').

> works or other subject matter for free, including through non-exclusive free licences for the benefit of any users.[404]

The facilitation of the dissemination and access to works is also fundamentally linked to the objective of cultural promotion.[405] Cultural purposes are listed among the key goals of the Union[406] and, as seen previously, the Treaties foresee also a supportive role of the EU in the promotion of its cultural progress.[407] The most relevant provision is Article 167(4) TFEU, which bounds the EU legislator to take into consideration cultural aspects in its legislative actions.[408] In this respect, it ought to be recalled that EU secondary law shall be inspired by the CFREU, which enshrines the principle of freedom of the arts and science[409] and the protection of cultural, religious and linguistic diversity.[410]

It is crucial to pay attention to the terminology used to understand the specific purposes falling under the umbrella notion of 'cultural promotion'. Its meaning is twofold: on the one side, cultural promotion translates into the preservation of the EU cultural heritage and the promotion of its cultural diversity; on the other side, culture is intended as fundamental part of the formation of each individual.

[404] CDSM Directive recital 82.
[405] See InfoSoc Directive recitals 9, 12 ('[…] Adequate protection of copyright works and subject matter of related rights is also of great importance from a cultural standpoint […]'); CDSM Directive recital 2 ('[…] The protection provided by that legal framework also contributes to the Union's objective of respecting and promoting cultural diversity, while at the same time bringing European common cultural heritage to the fore. Article 167(4) of the Treaty on the Functioning of the European Union requires the Union to take cultural aspects into account in its action.').
[406] TEU art 3(3) ('[The Union] shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced.')
[407] TFEU art 6.
[408] InfoSoc Directive recital 12; Resale Directive recital 5; CRM Directive recital 3. See also Ramalho (n 18) 39.
[409] CFREU art 13.
[410] CFREU art 22.

The legislator' focus on the EU cultural heritage and cultural diversity precedes the birth of EU copyright law[411] and has consolidated in the harmonization process.[412] Boosting the dissemination of broader repertoires of creative works is deemed to play in favor of the preservation of the European cultural heritage and of its diversity, a central role being acknowledged to cultural heritage institutions in granting the citizens of the Union with equal opportunities to access cultural goods.[413]

The EU cultural scenario being as an *ensemble* of repertoires, due to the rich background of peoples, nationalities, languages and traditions of the Union,[414] references to the objective of promoting this cultural diversity can be found in several Directives.[415] Among them, the Rental Directive dedicates great attention to it, even depicting the author, not as market player, but rather as a creator of important resources for the society and the building of a EU identity.[416] Also in this occasion, an overlap with the remunerative function of the right holder may be detected, in the sense that the remuneration granted through copyright protection represents a source of living and an incentive also for creators at the peripheries and *niche*

[411] See European Commission, 'Community action in the cultural sector' (Communication) [1977] 560; Europan Commission, 'Stronger Community in the cultural sector' (Communication) [1982].
[412] Orphan Words Directive, recitals 25-29; CDSM Directive ('[…] to bring European common cultural heritage to the fore'). See also European Commission, Green Paper 2011 (n 362) 18; European Communication, 'A Single Market for Intellectual Property rights' (Communication) (n 227) 6-10.
[413] E.g. SatCab Directive recitals 3-5; InfoSoc Directive recitals 34, 40; Orphan Works Directive recitals 4, 21, 23; Rental Directive recital 10. See also European Commission, 'Explanatory Memorandum to the Proposal of Rental and Lending Rights Directive' (Communication) (n 352) ('[T]he availability and accessibility of, for example, books in public libraries, must be guaranteed for cultural reasons.'); European Commission, 'Impact Assessment on the modernization of copyright rules' (Staff Working Document) (n 396) 7, 120; European Commission, 'A Digital Agenda for Europe' (Communication) (n 328) 30 ('Europe's cultural heritage should also be made better accessible to all Europeans by advancing and using modern translation technologies.').
[414] European Commission, 'Explanatory Memorandum to the Proposal of Rental and Lending Rights Directive' (Communication) (n 352) para 39.
[415] CDSM Directive recital 2; CRM Directive recitals 3, 38, 39, 44; see also European Commission, 'Impact Assessment On The Legal And Economic Situation Of Performers And Record Producers' (Staff Working Document) (n 345) 2, 19, 22, 45.
[416] European Commission, 'Explanatory Memorandum to the Proposal of Rental and Lending Rights Directive' (Communication) (n 352) paras 7-9, 39.

artists, for a cultural pluralism not only across the Union but also within Member States and creative sectors.[417]

The other interpretation attributed to the notion of culture is more tightly connected with its role in the personal formation of the individual. The definition of its boundaries is left rather blurred, with relevant references to the freedom of expression[418] up to the freedom of information and public debate.[419] The promotion of learning and education is perhaps the most structured notion included in this cultural dimension.[420] Particular emphasis has been put on the aim to facilitate the access to out-of-commerce works, orphan works and works belonging to the public domain.[421] The digital dimension confirms to be of particularly strong input to re-state the function of promotion of cultural enrichment of the society,[422] the CDSM

[417] See CDSM Directive recital 54; Database Directive recital 16; European Commission, 'Impact Assessment on the modernization of copyright rules' (Staff Working Document) (n 396) 4. See also Ramalho (n 18) 37 ('Measures that protect authors and performers may perhaps have a positive impact on cultural matters, but the latter is not necessarily their main or direct goal.').

[418] E.g. InfoSoc recital 3 ('The proposed harmonisation will help to implement the four freedoms of the internal market and relates to compliance with the fundamental principles of law and especially of property, including intellectual property, and freedom of expression and the public interest.')

[419] See Recital 54 CDSM Directive ('A free and pluralist press is essential to ensure quality journalism and citizens' access to information. It provides a fundamental contribution to public debate and the proper functioning of a democratic society.').

[420] InfoSoc Directive recital 14 ('[The Directive] should seek to promote learning and culture by protecting works and other subject-matter while permitting exceptions or limitations in the public interest for the purpose of education and teaching.'); Orphan Works Directive recital 18; CRM Directive recital 3; Marrakesh Directive recitals 7, 9, 16.

[421] Orphan Works Directive recital 3 ('Creating a legal framework to facilitate the digitisation and dissemination of works and other subject-matter which are protected by copyright or related rights and for which no rightholder is identified or for which the rightholder, even if identified, is not located — so-called orphan works — is a key action of the Digital Agenda for Europe'); CDSM Directive recitals 3 ('[The Directive] also contains rules to facilitate the use of content in the public domain''), 30 (''Cultural heritage institutions should benefit from a clear framework for the digitisation and dissemination, including across borders, of works or other subject matter that are considered to be out of commerce for the purposes of this Directive'). See also European Commission, 'A Digital Agenda for Europe' (Communication) (n 328) 30 ('*Europeana* - the EU public digital library - should be strengthened. Increased public funding is needed to finance large-scale digitisation').

[422] CDSM Directive recitals 5, 12, 13, 19-23, 62; Database Directive recitals 36, 50, 51. See also European Commission, 'Impact Assessment on the modernization of copyright rules' (Staff Working Document) (n 396) 7, 120.

Directive renewing the focus on the education and the Union's competitiveness not only with regards to its creative industries, but also as a scientific research area.[423]

2.5.3. Fostering technological progress and innovation

Related to the promotion of scientific research, the EU copyright legislation expresses also the specific objective to promote technological progress and innovation.[424] As highlighted in multiple passages of the analysis, technology has been the main driver for copyright evolution since its very origins. The EU legislator does not limit the role of technology *vis-à-vis* copyright in taking into consideration technological developments as input factor for the application of copyright rules.[425] Copyright protection itself is also deemed to be a fundamental stimulus for technological advancement and to spur innovation.[426]

This objective is expressed by way of a twofold approach in the legislation. On the one side, it fully embraces the utilitarian perspective by pointing at the incentive mechanism embedded in copyright following the consolidated logic: technological advancement implies high costs and risks, copyright encourages investments by protecting the economic returns.[427]

On the other side, the EU legislator acknowledges the risk of copyright stifling innovation, hence translates the objective of promoting technological progress in an opposite approach

[423] CDSM Directive recital 10; see also European Commission, 'A Digital Agenda for Europe' (Communication) (n 328) 6, 21-24. See also Ramalho (n 18) 36.
[424] TEU art 3(3) ('[The Union] shall promote scientific and technological advance.'); European Commission, Green Paper 2008 (n 270) 4.
[425] E.g. InfoSoc Directive recital 5; CDSM Directive recital 3.
[426] European Commission, 'A Digital Agenda for Europe' (Communication) (n 328) 19, 23.
[427] Computer Programs Directive recital 2; Database Directive recitals 7, 12; InfoSoc Directive recital 4 ('A harmonised legal framework on copyright and related rights […] will foster substantial investment in creativity and innovation, including network infrastructure'); CRM Directive recital 1 ('Those Directives contribute to the development and maintenance of creativity. […] [P]rotecting innovation and intellectual creation also encourages investment in innovative services and products.').

towards regulation. The sectorial nature of the EU legislator's intervention, in particular in the vertical harmonization of the first-generation Directives, helps understanding this approach by delving into the specificities the technologies at stake. The Computer Programs Directive puts emphasis on the need not to obstruct the interoperability, study and testing of software products to ensure the efficient functioning of technology and support its further development.[428] Similarly, the Database Directive highlights the essential role played by databases in the information society and aims to stimulate the development of innovative technological means to process, store and make information more easily available.[429]

2.6. Conclusion

If, for over two centuries, national legislators in Europe enjoyed full powers to regulate copyright according to their sovereign will, the advent of the EU has added a supranational level of legislation, affecting the structure, but also the conception and role of copyright law in Europe. The long-standing process of harmonization of national copyright rules, legitimized by the EU competence to regulate and promote the internal market, is situated within a context of evolving and expanding EU law objectives, the Union moving towards an enhanced integration of economic and political policies and towards the modernization of its own rules to make them fit for the digital era.

EU copyright law reflects this expansion, showing a proliferation of objectives explicitly stated in the harmonizing legislation, which can be classified into two distinct categories, i.e.

[428] Computer Programs Directive recitals 3, 10, 15, 16; InfoSoc Directive recital 33; see also European Commission, 'A Digital Agenda for Europe' (Communication) (n 328) 15.
[429] Database Directive recitals 9, 10; European Commission, 'First Evaluation of Directive 96/9/EC' (Staff Working Document) (n 365) 4.

the EU functions of copyright harmonization and the EU functions of copyright protection. As far as the former are concerned, the EU legislator *harmonizes* national copyright rules pursuing three main objectives: (i) to comply with international copyright law obligations; (ii) to establish and promote the EU internal market by lowering the transaction costs for cross-border exchanges and ensuring fair competition within the Union; (iii) to boost the EU economy and global competitiveness. The functions that the EU legislator attributes to copyright by *relying* on this legal institute to are (i) to ensure appropriate remuneration to copyright holders; (ii) to promote the dissemination of created content and of culture, thus meaning to preserve the cultural heritage of the Union, value its cultural diversity and the cultural flourishment of the society; and (iii) to foster technological innovation.

The inquiry into these functions has unveiled three main elements. First, EU copyright law stands on a hybrid justification of copyright stemming from both the Anglo-Saxon and continental traditions, yet showing a predominance of the latter utilitarian approach. This trend, which is in line with the developments at international level,[430] is particularly evident in the identification of a remunerative function underlying the pillar objective of 'high level of protection'. Second, the EU copyright system has a multi-functional configuration. The analysis shows how the EU legislator by way of copyright aims to achieve numerous purposes, whose effects may clash. In this respect, the take on the digital environment, one of the protagonist of the harmonization, is exemplary, the Internet being deemed both a threat and an opportunity. Third, the identified functions present overlaps and interconnections, both within the same macro-category (e.g. the dissemination function and the remunerative

[430] See Maciej Barczewski and Dorota Pyc, 'Intellectual Property and Sustainable Development: A Distributive Justice Perspective' in Graeme Dinwoodie (ed), *Methods and Perspectives in Intellectual Property* (Edward Elgar 2013) 208.

function) and also *infra*-categories (e.g. the promotion of technological innovation and of EU competitiveness).

These findings prompt a fundamental question: how is this 'web of functions' to be interpreted? Since guidance is neither provided in the binding parts of the legislation nor in its explanatory Recitals, it is the turn of the CJEU to shed light on how these multiple functions are accounted for and, if at all, ordered. In this light, Chapter 3 is dedicated to the functional analysis of the vast copyright case law of the CJEU and aims to unveil how the multi-functional approach of the legislator has affected the teleological interpretation of EU copyright law.

Chapter 3 - The EU copyright functions at play before the CJEU

The case law of the Court of Justice of the European Union (CJEU) represents a meaningful component and interesting viewpoint on the evolution of EU copyright law. The rocketing number of copyright decisions in the years following 2009 has attracted the attention of the scholarship.[431] Trends in the judicial interpretation of the Court have been investigated mostly by operating a topical or chronological ordering of the decisions. Many of the studies take note of the significance of the teleological approach and, in some cases, raise the need for more serious consideration of it.[432] Yet, no detailed systematization of the vast CJEU jurisprudence has been compiled in light of the interpretation of the functions of EU copyright law.

This Chapter aims to fill this gap embracing a functional perspective in the study of the case law, thus complementing the analysis of the previous Chapter searching for convergences and divergences with the stated objectives of the EU copyright legislation. The analysis encompasses a selection of cases decided by the CJEU within the time frame from 1980 to

[431] *Inter alia*, Eleonora Rosati, *Copyright and the Court of Justice of the European Union* (Oxford University Press 2019); Christophe Geiger, Craig Allen Nard and Xavier Seuba, *Intellectual Property and the Judiciary* (Edward Elgar Publishing 2018); Raquel Xalabarder, 'The Role of the CJEU in Harmonizing EU Copyright Law' (2016) 47 International Review of Intellectual Property and Competition Law 635; Christophe Geiger, 'The Role of the Court of Justice of the European Union: Harmonizing, Creating and Sometimes Disrupting Copyright Law in the European Union' [2016] Centre for International Intellectual Property Studies Research Paper No. 3; Matthias Leistner, 'Europe's Copyright Law Decade: Recent Case Law of the European Court of Justice and Policy Perspectives' (2014) 51 Common Market Law Review 559.

[432] See Marcella Favale, Martin Kretschmer and Paul Torremans, 'Is There a EU Copyright Jurisprudence? An Empirical Analysis of The Workings of The European Court of Justice' (2015) 79 Modern Law Review 31 ('[...] the alleged failure to develop coherent, copyright specific reasoning under a teleological interpretation of European Law. A better empirical understanding of how European jurisprudence is created and shaped will also contribute to identifying dysfunctions that need to be addressed by prospective institutional reforms.'); Eleonora Rosati and Carlo Maria Rosati, 'Data-Based Case Law Applied to EU Copyright (1998-2018): A Quantitative Assessment' [2019] Intellectual Property Quarterly 196, 210 ('Teleological interpretation of legal provisions is another basic legal interpretation method. The CJEU has employed it in close connection with the need to interpret norms in light of their wording and context.'); Leistner (n 431) 595.

October 2019, from which the textual and content analysis methodologies help teasing out references and trends of teleological interpretation. Before delving into the analysis of the Court's reasoning, introductory remarks will be provided on the role of the CJEU and the main features of its evolving jurisprudence (Section 3.1). The focus will then move to the interpretation of the EU functions of copyright harmonization (Section 3.2) and of copyright protection (Sections 3.3 and 3.4), shedding light on the centrality of the notion of fair balance in the EU copyright scene (Section 3.5).

3.1. The uniform interpretation of EU copyright law

The EU founding Treaties entrust the CJEU with jurisdiction over instances brought by national courts regarding, among others, the interpretation of EU law provisions.[433] Its interpretative role, together with the enforcement of Member States' obligations,[434] is therefore key to the unity of the EU and the uniform application of EU law within its boundaries.[435] The EU legal system, in fact, lacks explicit guidance on how to construe its legislation and the CJEU is in charge of assisting the formation of a common understanding of EU law provisions,[436] ensuring the same effects in all the Member States.[437] In this sense,

[433] TEU art 19(3)(b); TFEU artt 263, 267.
[434] See TFEU art 258.
[435] Harm Schepel and Erhard Blankenburg, 'Mobilizing the European Court of Justice' in Grainne De Burca and Joseph HH Weiler (eds), *The European Court of Justice* (Oxford University Press 2001) 10; Everling, 'Zur Begründung der Urteile des Gerichtshof der Europäischen Gemeinschaften' 29 Europarecht 127 (1994) 143.
[436] A '*gemeinschaftsrechtliches Auslegungsbedürfnis*' as called by Thomas Groh, *Die Auslegungsbefugnis Des EuGH Im Vorabentscheidungsverfahren. Plädozer Für Eine Zielorientierte Konzeption* (Duncker & Humblot 2005) 40.
[437] Court of Justice of the European Union, 'The Proceedings of the Court of Justice and Court of First Instance of the European Communities' (Report) (1995) 15/95, para 11. See also Schepel and Blankenburg (n 435) 10.

the CJEU serves as a 'good guardian'[438] of the Union and its founding Treaties, which embody its constitutional charter and the core source of validity of EU secondary legislation.[439]

Preliminary ruling decisions are an essential instrument for the Court to provide national judges, upon their request, with guidance on the interpretation of EU laws.[440] Not being decisions in the merits of the case, they do not result in acts of legal enforcement by the CJEU: the Court limits itself to deliver a clarification on the EU law provisions the national judge expressed uncertainty about.[441] However, as a matter of fact, in the reasoning of the Court it is not rare to find more or less indirect references to the factual circumstances of the case at stake, thus leading to a potential influence over national judges' decisions.[442]

Despite the fact that the Treaty of Lisbon has codified the supremacy of EU law over national law,[443] thus mitigating the uncertainty about the conflict between these two regulatory levels, the relevance of preliminary ruling decisions has not decreased. The Treaty of Lisbon plays a peculiar role in empowering and, at the same time, constraining the interpretative activity of the CJEU.[444] On the one hand, what was a spontaneous recourse to the general principle of observance of the fundamental rights, with the Treaty has become a fully-fledged obligation to interpret the law in light of the Charter of Fundamental Rights of the European Union

[438] Its role in watching over the uniform interpretation and coheren application of the law within the boundaries can be referred to as a nomophylactic function, from Greek *nómos* (law) + *phúlax* (guard).
[439] Bengoetxea, MacCormick and Moral Soriano (n 20) 44.
[440] Anthony Arnull, *The European Union and Its Court of Justice* (Oxford University Press 2006) 33, 97–104.
[441] It is for the referring national court or tribunal to apply the law in light of the binding interpretation provided by the CJEU. See *ibid* 105.
[442] As highlighted by Tito Rendas, 'Copyright, Technology and the CJEU: An Empirical Study' (2018) 49 International Review of Intellectual Property and Competition Law 153, 165; Morten Broberg and Niels Fenger, *Preliminary References to the European Court of Justice* (Oxford University Press 2014) 421.
[443] See Declaration 17, Annex to the Treaty of Lisbon.
[444] Favale, Kretschmer and Torremans (n 432) 36.

(CFREU).[445] This has empowered the judiciary, as EU secondary laws have been put under the shade of a powerful and flexible body of constitutional provisions.[446] On the other hand, the Treaty also redefines the constraints of the CJEU's pronouncements, which lie in international law obligations and in the objectives set in the EU Treaties.[447] As it will turn clear from the analysis, the case law related to EU copyright law is exemplary in showing the unaltered decisive impact of the Court over the uniform interpretation of secondary laws, *pre* as well as *post* the Treaty of Lisbon.

The evolution of the CJEU copyright case law is commonly categorized in three main phases.[448] During the first phase (1971-1990) the Court, in absence of secondary legislation on copyright, has dealt with conflicts between national copyright rules and EU primary law from the perspective of free competition and market freedoms. The second phase (1990-2006 or, alternatively, 2009) is characterized by the beginning of the copyright harmonization process, which has led to the first decisions on the uniform interpretation of EU copyright rules. The year 2006 is chosen as symbolic watershed due to the first ruling on the InfoSoc Directive,[449] while other scholars prefer to set 2009 as the turning point to the next phase due to the significance of the *Infopaq* decision in the evolution of the Court's approach.[450] The third phase

[445] TEU art 6.
[446] Griffiths (n 230) 174.
[447] Groh (n 436) 40, 169 ff.
[448] Vincent Cassiers and Alain Strowel, 'Intellectual Property Law Made by the Court of Justice of the European Union' in Christophe Geiger, Craig Allen Nard and Xavier Seuba, *Intellectual Property and the Judiciary* (Edward Elgar 2018) 183–186; Sganga, *Propertizing European Copyright* (n 26) 115–149; Rendas (n 442); Geiger, 'The Role of the Court of Justice of the European Union: Harmonizing, Creating and Sometimes Disrupting Copyright Law in the European Union' (n 431); Leistner (n 431); Alain Strowel and Hee-Eun Kim, 'The Balancing Impact of General EU Law on European Intellectual Property Jurisprudence' in Justine Pila and Ansgar Ohly (eds), *The Europeanization of Intellectual Property Law* (Oxford University Press 2013).
[449] Case C-479/04 *Laserdisken ApS v Kulturministeriet (Laserdisken)* [2006] EU:C:2006:549. See, *inter alia*, Sganga, *Propertizing European Copyright* (n 26); Rendas (n 442).
[450] Case C-5/08 *Infopaq International A/S v Danske Dagblades Forening (Infopaq)* [2009] EU:C:2009:465. See Cassiers and Strowel (n 448); Leistner (n 431); Strowel and Kim (n 448).

of CJEU interpretation of copyright rules is the contemporary one, characterized by an increasing number of preliminary ruling decisions and portrayed as the 'creative' period of the Court,[451] due to its proactive promotion and support to the on-going harmonization of national copyright rules.

Throughout these phases, the Court has mostly followed its precedents, in order to better achieve unity, stability, legitimacy and, above all, legal certainty.[452] By this token, it has shown a favorable attitude towards copyright harmonization, its assistance in achieving a uniform interpretation of the provisions of the Directives having grown ever more substantial. This has brought the scholarship to talk of a growing activism of the Court,[453] acting as an 'assistant legislator'[454] and heading towards a 'judicialization' of EU copyright law.[455]

[451] Geiger describes the shift from the second to the third phase of CJEU interpretation as an evolution of the underlying approach, focused first on how 'EU law should be implemented in the same manner everywhere' and then seemingly suggesting 'this is how EU law should look like'. Geiger, 'The Role of the Court of Justice of the European Union: Harmonizing, Creating and Sometimes Disrupting Copyright Law in the European Union' (n 431) 8.

[452] The CJEU is not subject to a regime of *stare decisis*, hence its precedents are not legally binding. Nevertheless, the precedent- and case-based reasoning is a consolidated key technique, upon which the Court relies heavily. See for a thorough general analysis on the matter Marc Jacob, *Precedents and Case-Based Reasoning in the European Court of Justice: Unfinished Business* (Cambridge University Press 2014). With particular regard to the copyright cases decided by the Court, the same observation applies. See, among others, Cassiers and Strowel (n 14) 197; Favale, Kretschmer and Torremans (n 1) 55–56; Gunnar Beck, *The Legal Reasoning of the Court of Justice of the EU* (Hart Publishing 2012) 274.

[453] Among others, Griffiths (n 230); Cassiers and Strowel (n 448); Sganga, *Propertizing European Copyright* (n 26); Hugenholtz, 'Is Harmonization a Good Thing? The Case of the Copyright *Acquis*' (n 226) 62; Using a more nuanced narrative, Rosati talks of a 'liberal approach' of the CJEU and Rendas of a trend to 'take off the straitjacket' of a highly inflexible EU copyright law 'in order to deliver what they think is the most reasonable judgment in the circumstances at hand'. See, respectively, Eleonora Rosati, 'CJEU says that linking to unauthorised content is not a communication to the public unless one seeks financial gain and has knowledge of illegality' (2016) <http://ipkitten.blogspot.de/ 2016/09/super-breaking-liberal-cjeu-says-that.html>; Rendas (n 442) 163; The arguments on the CJEU activism find solid ground in broader and long-standing critique of the interventionist attitude of the Court across all fields of EU law, which lists among its pioneers Hjalte Rasmussen, *On Law and Policy in the European Court of Justice: A Comparative Study in Judicial Policymaking* (Brill 1986).

[454] Cassiers and Strowel (n 448) 178; Favale, Kretschmer and Torremans (n 432).

[455] Geiger, 'The Role of the Court of Justice of the European Union: Harmonizing, Creating and Sometimes Disrupting Copyright Law in the European Union' (n 431) 7.

This prompts to three main considerations. First, numbers have been increasing, both of legislative acts and of cases referred to the CJEU.[456] This represents a vicious cycle, as the introduction of new – and often highly articulated – EU rules opens room for uncertain interpretation at national level and leads the Court to take stock of new aspects where EU legislative interventions would be needed.[457] Second, the principle of autonomous and uniform interpretation has acquired major relevance. The Court, fundamentally relying upon general principles of EU law,[458] in several occasions has felt the need to create autonomous concepts of EU law[459] to interpret mandatory, and sometimes even optional, harmonizing rules.[460] By this token, the CJEU has strenghtened its influence over national copyright laws, as autonomous concepts of EU law prevail over national legal provisions[461] and CJEU decisions are binding not only upon the referring court but for all national judges of the Member States.[462] Third, the resulting picture displays a significant degree of flexibility that

[456] Beck (n 452) 237 ('EU law has been, and remains, a rapidly expanding system of law, both in terms of the scope of the EU's law-making powers, as set out in and considerably extended by successive treaties, and the body of the Cout of Justice's jurisprudence.'); see also Cassiers and Strowel (n 448) 199; Strowel and Kim (n 448).
[457] The ambiguity potentially resulting from the wording of the Directives is Cassiers and Strowel (n 448) 178.
[458] Principles that stem from the founding principles of the Union, principles of public international law and common legal values enshrined in the constitutions of the Member States. See Armin Von Bogdandy, 'Founding Principles of EU Law: A Theoretical and Doctrinal Sketch' (2010) 16 European Law Journal 17, 104–108; Arnull (n 440) 335.
[459] Case C-510/10 *DR and TV2 Danmark A/S v Nordisk Copyright Bureau (TV2 Danmark)* [2012] EU:C:2012:244, para 33 ('[…] according to settled case-law, the need for a uniform application of European Union law and the principle of equality require that the terms of a provision of European Union law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an independent and uniform interpretation throughout the European Union.').
[460] E.g. the notions of originality in *Infopaq* para 27; fair remuneration in Case C 467/08 *Padawan SL v Sociedad General de Autores y Editores de España (Padawan)* [2010] EU:C:2010:620, para 33; equitable remuneration in Case C-245/00 *Stichting ter Exploitatie van Naburige Rechten v Nederlandse Omroep Stichting (SENA)* [2003] ECR I-1251, paras 22-23; parody in Case C-201/13 *Johan Deckmyn and Vrijheidsfonds VZW v Helena Vandersteen and Others (Deckmyn)* [2014] EU:C:2014:2132, para 14; work in Case C-310/17 *Levola Hengelo BV v Smilde Foods BV (Levola Hengelo)* [2018] EU:C:2018:899, para 33. For detailed analysis of EU autonomous concepts in copyright law, see Cassiers and Strowel (n 448) 176–177; Leistner (n 431) 594–595.
[461] See Case C-6/64 *Flaminio Costa v ENEL* [1964] ECLI:EU:C:1964:66.
[462] See Strowel and Kim (n 448) 122; Groh (n 436) 31–32.

the Court has promoted in order to reach *in concreto* uniform effects of EU copyright rules across the Union.[463]

Generally speaking, it can be stated that the Court has attempted to fill the gaps of the EU copyright harmonization.[464] Such an approach has been described as activist, but also as a necessary intervention in light of the problems of the political and, in turn, legislative activity on copyright harmonization.[465] Worth noting is the fact that, from the perspective of the strictly literal analysis of the decisions,[466] the Court's reasoning has been enriched by an increasing number of elements of systematic, contextual and, above all, teleological interpretation.[467]

3.1.1. Constitutionalization and teleological interpretation

Two specific approaches can be detected as beacons of the CJEU reasoning in copyright cases. The first is the so-called constitutionalization of copyright law,[468] which relates to the role of

[463] The same observation is brought by Rendas in form of a dichotomy between flexibility and formalism. Rendas (n 442) 170 ff.
[464] Griffiths (n 230); Cassiers and Strowel (n 448) 185; Harri Kalimo, Trisha Meyer and Tuomas Mylly, 'Of Values and Legitimacy - Discourse Analytical Insights on the Copyright Case Law of the Court of Justice of the European Union: Of Values and Legitimacy - Discourse Analytical' (2018) 81 The Modern Law Review 282, 294; Geiger, 'The Role of the Court of Justice of the European Union: Harmonizing, Creating and Sometimes Disrupting Copyright Law in the European Union' (n 431); Strowel and Kim (n 448) 126.
[465] Leistner (n 431) 599; Rendas (n 442) 160 ('Judicial discretion is of the essence in the current context, since legislators cannot effectively handle the task of adapting copyright law to new technologies.').
[466] Bengoetxea, MacCormick and Moral Soriano (n 20) 44 ('Judicial activism or judicial self-restraint, understood as normative or interpretative ideology, ar concepts that should be abandoned when analysing the ECJ's judicial decision-making process. Instead, one should embrace a legal reasoning approach. By analysing the legal reasoning of the Court, one draws attention to how the Court takes account of reasons - legal norms, values, principles, policies - to justify its decisions.').
[467] Leistner (n 431) 598 ('[T]he most remarkable characteristic of the Court case law is not only the sweeping horizontal breadth of the autonomous interpretation of many essential concepts of copyright law, but also the vertical depth, the clear willingness of the Court to go into detail in further specifying the underlying objectives, contents, structures and elements of assessment of the copyright directives central terms and concepts.').
[468] The scholarship unanimously acknowledges this approach as rising from the Lisbon Treaty and of great relevance for all sectors of IP law. See, *inter alia*, Griffiths (n 230); Cassiers and Strowel (n 448) 189–192;

the Court as a 'guardian' of the Treaties and carries the influence of the wider process of constitutionalization of private law in the EU.[469] This phenomenon refers to the CJEU intent, expressed in its interpretative activity, to anchor the effects of EU secondary law to the values and objectives set in the constitutional Treaties. Since the entry into force of the Treaty of Lisbon, the CJEU can rely on a substantial and detailed list of fundamental rights (the CFREU), which includes, among others, the right to property and to IP,[470] freedom of expression and information[471], freedom to conduct business,[472] the protection of personal and family life,[473] the right to equal treatment and the principle of non-discrimination.[474] Copyright disputes present varying but tight connections with the rights protected by the Charter, leaving EU copyright law significantly affected by the process of constitutionalization.

As argued by Griffiths, this approach moves beyond the strictly literal interpretation of the law and may open room for an expansive interpretation of exclusive rights, but also of copyright exceptions.[475] If this possibility seemed to move towards a heavy reliance on Article

Christophe Geiger, '"Constitutionalising" Intellectual Property Law? The Influence of Fundamental Rights on Intellectual Property in the European Union' (2006) 37 International Review of Industrial Property and Copyright Law; Godt (n 317); Tobias Cohen Jeroham, 'The Function Theory in European Trade Mark Law and the Holistic Approach of the CJEU' (2012) 102 Trademark Reporter 1243, 1252–1253. Mylly, Tuomas, "The Constitutionalization of the European Legal Order: Impact of Human Rights on Intellectual Property in the EU" (September 09, 2014) in Geiger, Christophe (ed.), Research Handbook on Human Rights and Intellectual Property (Edward Elgar, 2015) 103-131.

[469] Micklitz (2014); Mylly (n 39).

[470] CFREU art 17. Worth noting is that the CJEU explained that the fact that Article 17(1) addresses property and Article 17(2) IP is to ensure that IP is included in the previous paragraph, not to give IP a special protection. See Case C-360/10 *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA v Netlog NV (Netlog)* [2012] EU:C:2012:85, para 43; Case C-314/12 *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft mbH (UPC Telekabel)* [2014] EU:C:2014:192, para 61. See also Paul Torremans, 'Article 17(2)' in Steve Peers and others (eds), *The EU Charter of Fundamental Rights: A Commentary* (Bloomsbury 2014) 493–494.

[471] CFREU art 11.

[472] *ibid* art 16.

[473] *ibid* artt 7, 8.

[474] *ibid* art 20, 21.

[475] Griffiths (n 230) 156–159.

17 CFREU, thus in favor of right holders,[476] most recent developments show that the direction is far from being consolidated and still largely undefined.[477]

The second approach emerging from the CJEU reasoning is the development of a teleological interpretation, which is connected, yet not limited to the push towards the constitutionalization of EU copyright rules. The teleological interpretation of law is a common practice across national and international courts, which consists of expressed references to the objectives pursued by a specific legal provision or the entire legal order, used as basis for the development of an argument in the judicial reasoning.[478] Teleological references are highly frequent in the CJEU case law[479] and the copyright-related decisions, as this Chapter demonstrated, are no exception.

Bengoetxea depicts this approach as an intrinsically necessary development and highlights how it is a 'bounded teleology', which respects the limits imposed to the Court by the Treaties.[480] He also identifies three specific sets of elements within the purposive approach of the Court: teleological, functional and consequentialist elements.[481] Teleological elements are the references to the objectives of EU law as stated in the Treaties, i.e. the overarching aims

[476] E.g. *TV2 Danmark* para 57-58; Case C-277/10, *Martin Luksan v Petrus van der Let (Luksan)* [2012] EU:C:2012:65, para 71, Case C-49/17 *Bastei Lübbe GmbH & Co. KG v Michael Strotzer* (*Strotzer*) [2018] EU:C:2018:84, paras 48-49, 51; Case C-476/17 *Pelham GmbH and others v Ralf Hütter and Florian Schneider-Esleben (Pelham)* [2019] EU:C:2019:624, para 39.

[477] E.g. Case C-516/17 *Spiegel Online GmbH v Volker Beck (Spiegel Online)* [2019] EU:C:2019:625; Case C-469/17 *Funke Medien NRW GmbH v Bundesrepublik Deutschland (Funke Medien)* [2019] EU:C:2019:623. See also the analysis by Caterina Sganga, 'EU Copyright Law Between Property and Fundamental Rights: A Proposal to Connect the Dots' in Roberto Caso and Federica Giovanella (eds), *Balancing Copyright Law in the Digital Age* (Springer Berlin Heidelberg 2015); Griffiths (n 319).

[478] Joxerramon Bengoetxea, *The Legal Reasoning of the European Court of Justice: Towards a European Jurisprudence* (Oxford University Press 1993) 251; Favale, Kretschmer and Torremans (n 432) 54.

[479] Bengoetxea (n 478); Groh (n 436); Bengoetxea, MacCormick and Moral Soriano (n 20) 45.

[480] Bengoetxea, MacCormick and Moral Soriano (n 20) 45.

[481] Beck (n 452) 207–215; Bengoetxea, MacCormick and Moral Soriano (n 20) 57–58; Bengoetxea (n 478) 204–251.

behind the project of an 'ever closer Union', epitomized by the principle of equal treatment and the four freedoms of movement.[482] Functional elements relate to the principle of effectiveness of EU law, developed by the CJEU itself, which looks at the results of the application of EU law and their consistency with its stated aims.[483] Lastly, consequentialist elements are also oriented towards the effects of EU law provisions, but including factors that remain implicit in the EU legal order, e.g. social and economic consequences of the different interpretations.[484]

Elements of all these three kinds of purpose-oriented reasoning can be found throughout the evolution of the CJEU copyright case law.[485] The Court's generous recourse to this approach is prompted not only by divergences in the language versions of a same EU provision,[486] but also and in the vast majority of cases in conjunction with the interpretation of the scope of exclusive rights and the related considerations on the conflicting rules and values involved. In this respect, the principle of proportionality[487] plays a crucial role. The CJEU refers to this principle to assess the limits of EU law and its application, which are represented by the

[482] Beck (n 452) 208.
[483] According to which 'EU law provisions should be given full effect, practical effect, or their full useful effect.' See *ibid* 210–211 with reference to Case C-41/74 *Yvonne van Duyn v Home Office* [1974] ECR 1974 -01337 and subsequent case law.
[484] *ibid.*
[485] The analysis has detected expressed teleological references in over sixty out of eighty-two CJEU decisions.
[486] E.g. *TV2 Danmark* paras 39-43.
[487] TEU art 5(4) ('Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.'); CFREU art 52(1) ("Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.") (emphasis added). An insightful analysis on the essence of copyright in light of Articles 17 and 52 CFREU has been developed by Husovec, 'The Essence of Intellectual Property Rights Under Article 17(2) of the EU Charter' (n 23).

objectives set in the Treaties and the general interest of the Union.[488] As previously pointed out in the analysis, the exclusive-rights structure of copyright has an inevitable repressing effect over the free movement of goods and services, thus requiring an accurate assessment of the extent to which it is necessary for the society to prosper.[489]

It is worth observing how concretely the Court refers to the *telos*, the purpose of EU copyright law. Starting from a semantic point of view, it can be noted that the Court acknowledges the need to consider the 'context and objectives' of EU law provisions,[490] especially when they lack clear definitions,[491] and it never refers to the 'functions' of copyright, but rather to its 'objectives' and 'aims', looking for them in the recitals and explanatory documents accompanying the legislation.[492] Moreover, the practice of reliance and cross-reference to the Court's own precedent teleological references has consolidated, displaying the intent to weave a strong consistent case law. Interesting to note is also that teleological elements of reasoning find at times significant emphasis and elaboration in the opinions of the Advocate Generals (AG).[493] Finally, heading towards a more analytical perspective, an aspect worth drawing

[488] E.g. Case C-240/83 *Procureur de la République v Association de défense des brûleurs d'huiles usagées* [1985] ECR 531 and Case C-302/86 *Commission of the European Communities v Kingdom of Denmark* [1988] ECR 4607, as analyzed by Bengoetxea, MacCormick and Moral Soriano (n 20) 67–74.
[489] Beck (n 452) 170.
[490] E.g. Case C-518/08 *Fundación Gala-Salvador Dalí and Visual Entidad de Gestión de Artistas Plásticos v Société des auteurs dans les arts graphiques et plastiques and Others* (*Fundacion Salvador Dali*) [2010] EU:C:2010:191, para 25 ('It should be recalled, at the outset, that according to the settled case-law of the Court, in interpreting a provision of Community law it is necessary to consider not only its wording but also the context in which it occurs and the objectives pursued by the legislation of which it is part.'); *Padawan* para 32; Case C-306/05, *Sociedad General de Autores y Editores de España v Rafael Hoteles SA (SGAE)* [2006] ECR I-11519, para 34.
[491] E.g. Case C-160/15, *GS Media BV v Sanoma Media Netherlands BV and Others (GS Media)* [2016] EU:C:2016:644, para 29 ('As Article 3(1) of Directive 2001/29 does not define the concept of 'communication to the public', its meaning and its scope must be determined in light of the objectives pursued by that directive and of the context in which the provision being interpreted is set.'); *FAPL* para 184-185; *SGAE* paras 33-34.
[492] Rosati and Rosati (n 432) 4.8.
[493] E.g. AG Opinion in Case C-169/05 *Uradex SCRL v Union Professionnelle de la Radio et de la Télédistribution and Société Intercommunale pour la Diffusion de la Télévision (Uradex)* [2006] ECR I-4973, paras 26-29 ('Both aspects of copyright (the economic and the innovative) that concern the Community system are to be found in that development. While the first group of directives responds to the need to remove the impediments to industry and the free movement of goods and services raised by a narrowly domestic view of those rights, the directives

attention on is the fact that the CJEU does not identify an 'essential function' of copyright protection.

3.1.2. The (missing) essential function doctrine

In their seminal critical discourse analysis, Kalimo, Meyer and Milly have illustrated how the CJEU is confronted with an increasing number of hard cases on relevant issues for the European society, which involve clashes of values, rights and interests.[494] Their application of the notion of value pluralism, as framed by Beck,[495] turns out to be an interesting and fitting entry point to inquire the CJEU copyright case law. The presence of a value pluralism in EU law is based on three main arguments. First, the EU legal system poses on 'value-based and purpose-oriented' Treaties,[496] which present objectives of unclear scope falling under the umbrella goal of an effective and ever closer Union. This carves out room for CJEU discretion to determine the extent of integration that specific legal provisions aim to achieve.[497] Second, the multiplicity of the objectives enshrined in EU primary law inevitably influence the interpretation of secondary law, opening towards the consolidation of new approaches, as it has been the case with the constitutionalization of EU private law.[498] Third and last, the arising pluralism of values is reflected in the judicial reasoning, which increasingly relies on extra-legal factors and *topoi*.[499]

in the second group are intended to afford harmonised protection for the creators of intellectual property.'); AG Opinion in *Funke Medien* para 58.
[494] Kalimo, Meyer and Mylly (n 464).
[495] Beck (n 452).
[496] *ibid* 215.
[497] *ibid* 164.
[498] *ibid* 164–168.
[499] *ibid* 161 ff.

In light of these arguments, it can be stated that, while interpreting any EU law, the CJEU is fundamentally confronted with a pluralism of values. An interesting case, both from the perspective of the teleological interpretation and the value pluralism, is the interpretation of EU trademark law. Rooted in the same EU primary law as EU copyright rules, the secondary legislation on trademark protection presents significantly less expressed objectives. It can be asserted that the value pluralism, in the passage from the EU Treaties to the secondary law, is not experiencing an expansion equal to the one enshrined in the EU copyright legislation.[500]

Interestingly, the CJEU trademark case law has experienced the development of a so-called essential function doctrine,[501] in particular with regards to the recognition of infringements. The Court, in order to verify the presence of a trademark infringement, has investigated whether the use was adversely affecting the key function of the trademark protection, i.e. the indication of the origin of the product.[502] With time, more objectives of trademark protection have been identified,[503] yet the tendency towards identifying one 'essential' function of

[500] See Chapter 2.

[501] Annette Kur, 'Trade Marks Function, Don't They? CJEU Jurisprudence and Unfair Competition Principles' (2014) 45 IIC - International Review of Intellectual Property and Competition Law 434; Martin Senftleben, 'Function Theory and International Exhaustion Why It Is Wise to Confine the Double Identity Rule to Cases Affecting the Origin Function' (2014) 36 European Intellectual Property Review 518; Strowel and Kim (n 448) 134; Cohen Jeroham (n 468); Mark Lemley and Mark McKenna, 'Owning Mark(et)s' (2010) 109 Michigan Law Review 137.

[502] This doctrine has been first adopted by the CJEU in Case 1/81 *Pfizer Inc v Eurim-Pharm GmbH* [1981] ECR 2913, para 8 and found further application in Case C-10/89 *SA CNL-SUCAL NV v HAG GF AG* [1990] ECR *1990 I-03711,* para 14; Case C-206/01 *Arsenal Football Club v Reed* [2003] 3 WLR 450, paras 50-51; C-245/02 *Anheuser-Busch v Budvar* [2004] ECR 1-10989*;* Case C-48/05 *Opel v Autec* [2007] ECR 1-01017*;* Case C-337/95 *Parfums Christian Dior SA and Another v Evora BV* [1997] ETMR 323. See Jane Cornwell, 'Keywords, Case Law and the Court of Justice: The Need for Legislative Intervention in Modernising European Trade Mark Law' (2013) 27 International Review of Law, Computers & Technology 85, 91; Jehoram (n 13) 1244. Cohen Jehoram particularly emphasizes on the fact that the function theory developed by the CJEU remarkably impacts the burden of proof in trademark infringement cases, as 'it would be up to the defendant to show that, even though all elements of the infringement article are fulfilled, the rationale of the law would stand in the way of finding for infringement.' *ibid* 1247.

[503] See Case C-487/07 *L'Oréal SA v Bellure NV* [2009] ETMR 55; Case C-323/09 *Interflora Inc and Interflora British Unit v Marks & Spencer plc and Flowers Direct Online Ltd* [2011] EU:C:2011:604. In his analysis Cohen Jehoram identifies five functions emerging from the reasoning of the CJEU, respectively referring to the origin,

trademark protection remained, the indication of origins being deemed 'what is universally acknowledged to be the core of the way in which trademarks function: their ability to allow consumers to distinguish between the goods of different undertakings'.[504] This approach got also reflected in the indication of the function of indication of origin in the recitals of the most recent Trademark Directive of 2015[505] and EUTM Regulation of 2017.[506] Playing in favor of the consolidation of an essential function doctrine is the same structure of trademark protection. In fact, the interests of the trademark holder and the consumer are not at odds with each other, but aligned against infringing uses: the more the holder is protected in the exclusive use of his or her mark, the more the latter benefits, as he or she receives reliable information about the marketed product. In this sense, the functions of identification, quality, advertising, investment and goodwill remain meaningful, yet can become secondary to the core function of guarantee of origin.

The essential function doctrine developed by the CJEU in trademark law profoundly differs from the EU copyright law scenario. Here, attempts to identify the essential function of copyright protection are extremely rare and dated back in time. A first overlap between the purposes and the specific subject matter of copyright law can be detected in very early decisions, when, the EU lacking competence to regulate the discipline, the CJEU was in charge of merely checking on the possible violations of the internal market freedoms by way

identification, quality, advertising and investment on the commercialized products, and a further one, the function of goodwill, which remains implicit, yet pursued in most of the cases. Cohen Jeroham (n 468).

[504] Ilana Simon, 'How Does the "Essential Function" Doctrine Drive European Trade Mark Law?' (2005) 36 International Review of Intellectual Property and Competition Law 418.

[505] Directive (EU) 2015/2436 to approximate the laws of the Member States relating to trade marks (Trademark Directive) [2015] OJ L336, recital 16.

[506] Regulation (EU) 2017/1001 on the European Union trade mark (EUTM Regulation) [2017] OJ L154, recital 11. The literal reading of the Recital conveys that the legislator does not fully exclude the possibility of CJEU detecting other functions, yet it posits the indication of origin as dominant function of the protection. See Kur (n 71) 436.

of national copyright laws. An exemplary case is the reasoning in *Phil Collins*,[507] where the Court identified the specific subject matter of national copyright laws in the rights 'ensur[ing] the protection of the moral and economic rights of their holders'.[508] The notion specific subject matter *vis-à-vis* the objectives of EU copyright law, or of copyright in general, remains nevertheless undefined and extremely elusive. The decisions in *Coditel I and Coditel II* represent a unique case, as the Court referred only in these two occasions to the 'essential function of copyright', identified in the protection of the right holder's right to receive remuneration from exploitations of the work.[509] In *Magill*,[510] a case where the Court was asked whether a refusal to license the right of reproduction represented an abuse of dominant position, the CJEU took note of the referring Court's emphasis on the 'essential function' of copyright protection lying in the protection of moral rights and reward of the right holder, yet did neither endorse nor reject it.[511] An interesting wording is the one proposed by AG Szpunar in his Opinion in *Funke Medien*, who refers to the 'two main objectives' of copyright – identified in the protection of the personal relationship between the author and the work and the right of exploitation for the purpose of earning an income[512] –, interpretation that yet was ignored by the Court in the following decision.

[507] Joined Cases C-92/92 e C-326/92 *Phil Collins v Imtrat Handelsgesellschaft mbH and Patricia Im- und Export Verwaltungsgesellschaft mbH and Leif Emanuel Kraul v EMI Electrola GmbH (Phil Collins)* [1993] EU:C:1993:847.
[508] *ibid* para 20.
[509] Case C-62/79 *Coditel SA and others v Ciné Vog Films and others (Coditel I)* [1980] ECR 881, para 14; Case C-262/81 *Coditel SA and others v Ciné-Vog Films SA and others (Coditel II)* [1982] ECR 3381, para 12. See also AG Opinion in Case 395/87 *Ministère public v Jean-Louis Tournier (Tournier)* [1989] EU:C:1989:319, para 25. See also Sganga, *Propertizing European Copyright* (n 26) 116–117.
[510] Joined Cases C-241/91 and C-242/91 *Radio Telefis Eireann and Independent Television Publications Ltd v Commission of the European Communities* (*Magill*) [1995] EU:C:1995:98.
[511] *ibid* paras 28, 30; see also AG Opinion in *Magill* paras 26-27, 36-37, 57, 64 bringing in the analysis also references to the essential function doctrine in EU trademark law.
[512] AG Opinion in *Funke Medien* para 58.

The fact that no other reference to an 'essential' or predominant function of copyright protection could be found in the CJEU case law is indicative of a teleological approach, which is different from the interpretation of trademark law. In order to unveil the main features of the Court's teleological approach to copyright, a close investigation of its references to the functions is needed, starting with the EU copyright functions of harmonization.

3.2. The internal market: EU functions of copyright harmonization

The initial phase of CJEU copyright case law is distinctively characterized by a focus on the interrelation between copyright exclusive rights and market freedoms.[513] Before the entry into force of the Treaty of Lisbon, in fact, the EU had no specific competence to regulate copyright and Article 114 TFEU represented the only basis of legitimation for its intervention. The protection of the internal market was, therefore, the main and only criterion the CJEU could adopt to ensure that national and EU copyright provisions were complying with EU primary law.

Even after 2009, the protection of the internal market has remained pivotal to the EU copyright law, the legislator having opted for a harmonization process (still relying on the competence *ex* Article 114 TFEU) and not to the introduction of unitary copyright entitlements. The harmonization of national copyright laws is still on-going mainly because, embedded in the objective of promoting the internal market, is the ambition of an 'ever closer

[513] Leistner (n 431) 599; Strowel and Kim (n 448) 125.

Union', which translates into the ideas of an ever better functioning internal market (and digital single market) and an ever more prosperous economy.[514]

In this light, the CJEU case law relies heavily on this EU function of copyright harmonization.[515] The remarkable emphasis on this objective is related not only to a restatement of the legitimation of EU copyright law, but also to the obstacles that the harmonization encounters in the political negotiation and resulting legislation.[516] A typical example is represented by the difficulty in harmonizing copyright exceptions and limitations.[517] A political compromise has been reached with the InfoSoc Directive, which provides a closed list of optional exceptions and leave discretion to the Member States.[518] Further effort is shown by the CDSM Directive, which manages to introduce (highly sectorial) mandatory exceptions for text and data mining, digital use for teaching purposes and preservation of the cultural heritage.[519] By and large, the CJEU has shown a proactive engagement in enhancing the harmonization of copyright exceptions, pursuing a regulatory level playing field to avoid internal market distortions.[520] In this light, the interpretation of the

[514] See Chapter 2 Section 2.2.2. See Case C-270/80 *Polydor Limited and RSO Records Inc. v Harlequin Records Shops Limited and Simons Records Limited (Polydor)* [1982] EU:C:1982:43*,* para 16 ('As the Court has had occasion to emphasize in various contexts, the Treaty, by establishing a common market and progressively approximating the economic policies of the Member States, seeks to unite national markets into a single market having the characteristics of a domestic market.'); Case C-200/96 *Metronome Musik GmbH v Music Point Hokamp GmbH (Metronome)* [1998] EU:C:1998:172, para 22; *Laserdisken*, paras 34, 56.

[515] Particularly evocative is the AG Opinion in *Laserdisken* para 75 ('The objective of the [InfoSoc] Directive, in particular Article 4, is the realisation of the internal market […] Nothing in the Directive suggests that it has any other objective."). See also Sganga, 'Towards a More Socially Oriented EU Copyright Law: A Soft Paradigm Shift after Lisbon?' (n 253) 2–3; Godt (n 317) 219 ff.

[516] Leistner, 'Europe's copyright law decade: Recent case law of the European Court of Justice and policy perspectives' (2014) 51 Common Market Law Review 2, 559–600, 598-599.

[517] In this sense, it ought to be recalled that the mandatory exception introduced by the Marrakesh Directive has been introduced to comply with international obligations.

[518] InfoSoc Directive art 5.

[519] CDSM Directive artt 3-6.

[520] See Case C-572/13 *Hewlett-Packard Belgium SPRL v Reprobel SCRL (Reprobel)* [2015] EU:C:2015:750, para 32 ("This list [of exceptions and limitations] takes due account of the different legal traditions in Member States, while, at the same time, aiming to ensure a functioning internal market. Member States should arrive at a

objective of promoting the internal market has acquired a twofold focus on the safeguard of the free movement of goods and services and the prevention of distorted competition.

3.2.1. Free movement of goods and services

Caught between the prohibition of any national measure imposing quantitative restrictions on the imports or exports across the Union[521] and the exemption of those laws protecting the (undefined) specific subject matter of IP,[522] in *Deutsche Grammophon* the CJEU interpreted that the existence of national copyright entitlements is not problematic, but their exercise shall comply with the internal market freedoms,[523] thus leading to the doctrine of Community exhaustion of the exclusive right of distribution.[524]

The developments following this famous decision are less straight-forward than one may expect. References to the intent to safeguard of the free movement of goods and services has been in the frontline of numerous decisions.[525] Sometimes the wording is very general, sometimes attention is paid to a specific sector or service. In *Egeda*,[526] for example, the Court interpreted provisions of the SatCab Directive emphasizing that 'the aim of the Directive is to

coherent application of these exceptions and limitations, which will be assessed when reviewing implementing legislation in the future."); *Deckmyn* para 32.
[521] TFEU artt 34, 35.
[522] *ibid* art 36.
[523] *Deutsche Grammophon* para 7.
[524] E.g. *ibid*; *Musik Vertrieb* para 10. See also Leistner (n 431) 575.
[525] E.g. *Metronome* para 22; *SENA* para 4; *Laserdisken* paras 31-34; *Phil Collins*, para 20.
[526] Case C-470/14 *Entidad de Gestión de Derechos de los Productores Audiovisuales and Others v Administración del Estado and Asociación Multisectorial de Empresas de la Electrónica, las Tecnologías de la Información y la Comunicación, de las Telecomunicaciones y de los contenidos Digitales (EGEDA)* [2016] EU:C:2016:418.

supplement, with reference to copyright, the legal framework for the creation of the single audiovisual area'.[527]

The priority set on the function of protection of the free movement of goods shows to play sometimes in favor of and sometimes to limit the exclusive rights of copyright holders. The decision in *Peek & Cloppenburg* can be considered a turning point. For the first time, the Court was asked to balance the protection of the copyright holder *vis-à-vis* the free movement of goods.[528] Emphasizing the fact that copyright protection does not encompass any possible act of commercial exploitation of a work, the CJEU ruled that the exhibition of a lawfully acquired copy of a copyrighted work does not amount to a violation of the right to distribution.[529] This means that, in light of intention not to obstacle the free movement of goods, the exclusive right of distribution was interpreted in a restrictive way. Similarly, in *Svensson* the Court gave a restrictive interpretation of the exclusive right to communication to the public in light of the objective of safeguarding the functioning of the internal market.[530] As Sganga points out, '[a]ccording to this reading, the scope of existing exclusive rights should have been defined on the basis of their essential function, the extent of which derived also from the interplay between copyright goals and other potentially conflicting policies.'[531]

[527] *ibid* paras 16, 20.
[528] Case C-456/06 *Peek & Cloppenburg KG v Cassina SpA* (*Peek & Cloppenburg)* [2008] EU:C:2008:232, paras 21-22.
[529] *ibid* para 41.
[530] Case C-466/12 *Nils Svensson and Others v Retriever Sverige AB (Svensson)* [2014] EU:C:2014:76, para 36 (' It is true that recital 7 in the preamble to the [InfoSoc] directive indicates that the directive does not have the objective of removing or preventing differences that do not adversely affect the functioning of the internal market. Nevertheless, it must be observed that, if the Member States were to be afforded the possibility of laying down that the concept of communication to the public includes a wider range of activities than those referred to in Article 3(1) of the directive, the functioning of the internal market would be bound to be adversely affected.'). See also *Musik Vertrieb*, paras 7, 15, 17, 18, 25, in which the CJEU did not allow collecting societies to claim, on behalf of copyright owners, additional royalties for uses of music works in other Member States.
[531] Sganga, *Propertizing European Copyright* (n 26) 133–134.

The interpretation of the internal market objective has led also to extensive interpretation of the exclusive rights,[532] protecting the exclusive rental right in cross-border uses[533] and the right to distribution of goods in altered medium form.[534] Interestingly, in *Dimensione Direct Sales*, in which the Court overruled its decision in *Peek & Cloppenburg* by providing a broad interpretation of the distribution right,[535] the reference to the *harmonization* is followed by functions of copyright *protection*, thus generating a misleading teleological ground for the decision:

> […] the objectives of that [InfoSoc] directive set out in recitals 9 to 11, which state that the harmonisation of copyright must take as a basis a high level of protection, that authors have to receive an appropriate reward for the use of their work and that the system for the protection of copyright must be rigorous and effective.[536]

Also in the case law specifically concerning the free movement of services and reporting the function of internal market promotion, the protection of the author and performers have prevailed in the Court's interpretation over the freedom of broadcasting movies and sporting events on TV across the Union.[537]

What most of these decisions have in common, from a functional perspective, is the great attention paid to the economic consequences in the Court's reasoning. By expressing evaluations on the impact of copyright exclusive rights on the internal market trade, the CJEU

[532] Case C-572/17 *Criminal Proceeding v Imran Syed (Syed)* [2018] U:C:2018:1033, paras 30-36.
[533] *Metronome*, paras 18, 26.
[534] Case C-419/13 *Art & Allposters International BV v Stichting Pictoright (Allposters)* [2015] EU:C:2015:27, paras 39-49.
[535] Case C-516/13 *Dimensione Direct Sales srl and Michele Labianca v Knoll International Spa (Dimensione Direct Sales)* [2015] EU:C:2015:315, paras 31-33.
[536] *ibid* para 34.
[537] *Coditel I* paras 14-18; *Coditel II* paras 10, 15, 16, 20; *FAPL* paras 104, 186.

advances a practice, which is not unfamiliar to courts dealing with copyright disputes,[538] i.e. the introduction of consequentialist arguments in the reasoning: the Court considers, in fact, the remarkably profitable potential for copyright owners of hiring-out markets,[539] the negative consequences of a lower protection of producers,[540] the equal economic value of computer programs on CD and online version[541] and the alteration in economic value between posters and pictures on canvas.[542]

3.2.2. Undistorted competition and non-discrimination

The first Recital of the InfoSoc Directive[543] and the first IP law case[544] reaching the CJEU in the late 60s have in common the expressed objective of ensuring a fair and undistorted competition in the EU internal market. This goal has been, in fact, a beacon since the very start of the creation of the common market and, in turn, pillar objective of the copyright harmonization.[545] The CJEU confirms its importance speaking against differences in national copyright regulation, which can represent trade barriers, thus excluding competitors from the internal market. [546]

[538] Ohly (n 23) 107 ('[...] courts sometimes draw on economic considerations openly or tacitly when determining scope, when analysing economic rights or when interpreting defences.').
[539] *Metronome* para 15.
[540] *ibid* para 24.
[541] Case C-128/11 *UsedSoft GmbH v Oracle International Corp (UsedSoft)* [2012] EU:C:2012:407, para 61.
[542] *Allposters* para 48. See also *Musik Vertrieb* para 17.
[543] InfoSoc Directive recital 1 ('The Treaty provides for the establishment of an internal market and the institution of a system ensuring that competition in the internal market is not distorted. Harmonisation of the laws of the Member States on copyright and related rights contributes to the achievement of these objectives.').
[544] Joined Cases C-56/64 and C-58/64 *Consten and Grundig v Commission* [1966] ECR 382.
[545] Strowel and Kim (n 448) 136.
[546] E.g. *SENA* para 4; *Laserdisken* paras 26, 31, 34.

By and large, EU copyright law is interpreted by the CJEU as limited in its exercise, as it is not allowed to create market distortions, abuses of dominant positions or discriminatory behaviors. The recurrent reference to the notion of undistorted competition is, in fact, associated with the prohibition of abuse of dominant position,[547] the principle of non-discrimination,[548] and, more often, with the possibility of market distortions directly caused by copyright exclusive rights.

Particularly relevant in this latter regard is the so-called exceptional circumstances doctrine,[549] which the Court developed in *Magill* and *IMS Health*.[550] According to this interpretation, the exercise of copyrights may qualify as abusive conduct under some particular circumstances, hence making compulsory licensing sometimes necessary to prevent anti-competitive behaviors.[551] Interestingly, in the Opinion preceding the *Magill* decision, AG Gulman referred to the 'essential function of copyright', which he described as the 'auxiliary concept' used by the Court to assess the legitimate nature of copyright holders' behavior:[552]

> […] a concept of Community law but it is based on the national copyright laws. It is an expression of the Court of Justice's view of the essential aim pursued by the national copyright laws and is applied, as stated below, *inter alia,* to determine

[547] TFEU artt 101, 102. For instance, with regards to copyright collecting societies, in charge of managing copyrights on behalf of right holders. E.g. Case 45-71R *GEMA v Commission of the European Communities* [1971] ECLI:EU:C:1971:90; Case C-127/73 *Belgische Radio en Televisie and société belge des auteurs, compositeurs et éditeurs v SV SABAM and NV Fonior (BRT)* [1974] ECLI:EU:C:1974:25*;* Joined cases C-110/88, C-241/88 and C-242/88 *François Lucazeau and others v SACEM and others* [1989] ECLI:EU:C:1989:326.

[548] CFREU art 21(2); TFEU art 18. See *Phil Collins*, para 32 emphasizing the intent to put all citizens on a "completely equal footing" by national copyright laws. Differences in the duration of national copyright entitlements and imposed conditions regarding the place of first publication have been considered discriminatory on the ground of nationality. See Case C-360/00 *Land Hessen v G. Ricordi & Co. Bühnen- und Musikverlag GmbH (Ricordi*) [2002] EU:C:2002:346; Case C-28/04 *Tod's SpA and Tod's France SARL v Heyraud SA (Tod's*) [2005] EU:C:2005:418.

[549] Cassiers and Strowel (n 448) 193–194.

[550] *Magill*; Case C-418/01 *IMS Health GmbH & Co. OHG contro NDC Health GmbH & Co. KG (IMS Health)* [2004] EU:C:2004:257.

[551] See *Magill*, para 54; *IMS Health* para 52.

[552] *ibid* para 79. See also Sganga, 120.

> where, pursuant to Article 86, it is possible to interfere with rights within the specific subject-matter of copyright. It does not make sense therefore to incorporate the aim of the competition rules in the determination of the essential function of copyright. […] the essential function of copyright is to protect the moral rights in the work and ensure a reward for creative effort.[553]

What emerges is a clear-cut distinction between an EU function of copyright harmonization (promoting fair competition) and an EU function of copyright protection (protecting moral rights and ensuring a reward). In this light, the AG convened with the national judge in the first instance decision of the case in arguing that when the exercise of copyright does not correspond to its essential function, EU competition rules shall prevail.[554]

3.3. The high level of protection: EU functions of copyright protection

As seen previously,[555] the high level of protection for the copyright holder is one of the pillars of the EU copyright legislation and it is also most frequently cited by the CJEU. In the vast majority of decisions, the high level of protection is specifically associated with the InfoSoc Directive, with particular reference to its Recitals 4 and 9.[556] Emphasis by the Court on this objective often leads to a broad interpretation of exclusive rights.[557]

[553] *ibid* paras 70-73.
[554] *ibid* paras 76-77, 80.
[555] See Chapter 2 Section 2.5.1.
[556] E.g. *Soulier* para 34; *Infopaq* para 40; *Strotzer* para 30; *Netlog*, para 14; *FAPL* para 186; *SGAE* para 36; *EGEDA* para 25; *UPC Telekabel* para 31; *Laserdisken* para 75; *Allposters* para 47; Case C-275/15 *ITV Broadcasting Limited and Others v TVCatchup Limited and Others (ITV Catchup II)* [2017] EU:C:2017:144, para 22; *Case C-610/15 Stichting Brein v Ziggo BV and XS4All Internet BV (Ziggo*) [2017] EU:C:2017:456, para 22; Joined Cases C-24/16 and C-25/16 *Nintendo Co. Ltd v BigBen Interactive GmbH and BigBen Interactive SA (Nintendo)* [2017] EU:C:2017:724, para 27; AG opinion in *Syed* para 58.
[557] E.g. *Infopaq*, paras 40-41; *Dimensione Direct Sales*, paras 33-34; see also the case of restrictive interpretation of the right to distribution, in which the objective of high level of protection was found not to be relevant under the circumstances. *Peek & Cloppenburg*, paras 36-37. See also Favale, Kretschmer and Torremans (n 432) 56.

The dimension of the 'high protection' seems twofold, covering both his or her moral and economic rights. This emerges in a straight-forward manner from two early rulings, *Musik Vertrieb* and *Phil Collins*, in which the CJEU asserted that

> [i]t is true that copyright comprises moral rights of the kind indicated by the French Government. However, it also comprises other rights, notably the right to exploit commercially the marketing of the protected work, particularly in the form of licences granted in return for payment of royalties.[558]

Some AG Opinions strongly support the twofold – moral and economic – dimension of copyright protection.[559] A solid confirmation of this dual interpretation of this EU function of copyright protection lies in the focuses on, respectively, the remuneration and dignity of the author emerging from the CJEU case law.

3.3.1. The remunerative function

The CJEU construes the objective of high level of protection primarily by way of reference to the notion of appropriate reward.[560] This is not the only term used, the Court referring also to

[558] *Musik Vertrieb*, para 12. See also *Phil Collins*, para 20.

[559] AG Ruiz-Jarabo Colomer opted for a concise and evocative description of copyright as a right to the 'fame and fortune' of the intellectual creation. AG Opinion in *Ricordi* para 33; AG Opinion in *Uradex* para 20. See also AG Szpunar who, more recently, traced the function of protection of moral and economic rights of the author in a clear-cut and unprecedented way ('Copyright has two main objectives. The first is to protect the personal relationship between the author and his work as his intellectual creation and therefore, in a sense, an emanation of his personality. This primarily involves the area of moral rights. The second objective is to enable authors to exploit their works economically and thus earn an income from their creative endeavours.') AG Opinion in *Funke Medien* para 58.

[560] E.g. *SGAE* para 36 ('[T]he principal objective of the Copyright Directive is to establish a high level of protection of authors, allowing them to obtain an appropriate reward for the use of their works, including on the occasion of communication to the public.'); *Infopaq* paras 40-41; *FAPL* para 186; *Svensson* para 17; *Dimensione Direct Sales* paras 33-34; *ITV Catchup II* para 22; *Netlog* para 14; *GS Media* para 30; *Ziggo* para 22; *Allposters* para 48; Case C-607/11 *ITV Broadcasting Ltd and Others v TVCatchUp Ltd (ITV Catchup I)* [2013] EU:C:2013:147, para 20; Case C-161/17 *Land Nordrhein-Westfalen v Dirk Renckhoff (Renckhoff)* [2018] EU:C:2018:634, para 18; Case C-117/13 *Technische Universität Darmstadt contro Eugen Ulmer KG (Ulmer)* [2014] EU:C:2014:2196, para 16.

equitable remuneration, fair compensation, satisfactory return/recoupment of the investment. None of these terms finds specific definition in the EU secondary law, reason why the CJEU decided to set an EU autonomous concept of fair compensation.[561] A meaningful consideration to draw is the blurred interchangeability of these terms in the CJEU case law, which leads to a problematic overlap between 'remuneration' and 'compensation'.

Remuneration, in fact, mainly refers to the income of the authors 'as a basis for further creative and artistic work'.[562] This is also tightly related to the need for investors, which emerges as a consequential element in the CJEU analysis in cases involving works of particular expensive creative productions, e.g. movies and databases,[563] hence shedding light on an understanding of remuneration as recoupment of the investments.[564] Interesting case in this regard is *Pelham*, in which the Court explicitly differentiates the protection of the investment:

> That literal interpretation of Article 2(c) of Directive 2001/29 is consistent, first, with the general objective of that directive which is […] to establish a high level of protection of copyright and related rights, and, second, the specific objective

[561] *Padawan* para 33. See also Case C-271/10 *Vereniging van Educatieve en Wetenschappelijke Auteurs v Belgische Staat (VEWA)* [2011] EU:C:2011:442, para 36 with particular regard to the remuneration for public lending.
[562] *Luksan* para 77 ('[…] the creative and artistic work of authors and performers necessitates an adequate income as a basis for further creative and artistic work […]'). See also e.g. *Infopaq* para 40 ('[…] its main objective is to introduce a high level of protection, in particular for authors to enable them to receive an appropriate reward for the use of their works […] in order to be able to pursue their creative and artistic work'); *Fundacion Salvador Dalì*, para 27 ('[…] it should be borne in mind that the adoption of Directive 2001/84 is based on two objectives, namely first, as is apparent from recitals 3 and 4 in the preamble to that directive, to ensure that *authors of graphic and plastic works of art share in the economic success* of their original works of art […]'); *Metronome* para 22.
[563] *Luksan* paras 82-83 ('The objective of ensuring a satisfactory return on cinematographic investments extends beyond the context of just protection of the rental and lending right governed by Directive 2006/115, since it also appears in other relevant directives'); Case C-203/02 *The British Horseracing Board Ltd and Others v William Hill Organization Ltd (BHB)* [2004] EU:C:2004:695, paras 45, 86; *Pelham* para 30 ('[…] the investment required to produce products such as phonograms, is considerable to such an extent that it is necessary in order to guarantee phonogram producers the opportunity of satisfactory returns.'); AG Opinion in *BHB* paras 79, 113.
[564] *Luksan*, para 77 ('[…] the investments required particularly for the production of phonograms and films are especially high and risky.'); *Metronome*, paras 22, 24.

> of the exclusive right of the phonogram producer […] which is to protect a phonogram producer's investment.[565]

A fundamental aspect of the function of remuneration is its qualifying adjective, 'appropriate'. This word leads the Court in its interpretation to some highly pragmatic considerations. First of all, the remuneration is not deemed to be unlimited, nor is the high level protection function (in its remunerative declination) to be understood in absolute terms.[566] The Court has developed a highly pragmatic approach,[567] according to which the remuneration shall ensure a revenue to the copyright holder, which is proportionate to the uses of her work,[568] thus meaning that each independent economic use of a work shall be remunerated. The second pragmatic observation that the Court develops is the intent to prevent unjust enrichment by the unauthorized user, which emerges especially in *SGAE* and *FAPL*, where the Court argued that the enhanced financial results of hotels and public houses providing access to protected content was violating the right to equitable remuneration of the copyright holder.[569]

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[565] *Pelham* para 30.

[566] E.g. *FAPL* para 108 ('[...] the specific subject-matter of the intellectual property does not guarantee the right holders concerned the opportunity to demand the highest possible remuneration.'); Pelham para 33; Case C 70/10 *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (Scarlet Extended)* [2011] EU:C:2011:771, para 43; *UPC Telekabel* para 61; *Usedsoft* paras 48. See also Leistner (n 431) 574–575; Christopher Stothers, 'When Is Copyright Exhausted by a Software Licence?: UsedSoft v Oracle' (2012) 11 European Intellectual Property Review 787, 790.

[567] Leistner (n 431) 569.

[568] E.g. *FAPL*, para 109 ('[…] reasonable in relation to the economic value of the service provided. In particular, it must be reasonable in relation to the actual or potential number of persons who enjoy or wish to enjoy the service.'); *Coditel I* paras 12,14 ('[…] right holders have a legitimate interest in calculating the fees due in respect of the authorization to exhibit on the basis of the actual or probable number of performances […] the right of a copyright owner and his assigns to require fees for any showing of a film is part of the essential function of copyright in this type of literary or artistic work'); *Allposters* para 77; Case C-158/86 *Warner Brothers Inc and Metronome Video ApS v Erik Viuff Christiansen (Warner Brothers)* [1988] EU:C:1988:242, para 15 ('[…] to guarantee to makers of films a remuneration which reflects the number of occasions on which the video-cassettes are actually hired out and which secures for them a satisfactory share of the rental market.').

[569] *ibid; SGAE* para 44; *FAPL* para 205.

Within the remunerative function lies the notion of compensation, which nevertheless has a slightly different connotation. It relates to a suffered or possible harm and aims to 'compensate copyright holders adequately for the reproduction of protected works without their authorisation.'[570] In particular, two scenarios were brought to the attention of the CJEU: the private copying exception and the online piracy phenomenon.[571] With specific regard to the (optional) private copies exception to the reproduction right,[572] if a Member State implements it, it is subject to the obligation to set up a system of fair compensation,[573] which translates in most Member States in the collection of levies from the sale of equipment for private copying. The CJEU has made 'fair compensation' an EU autonomous concept of fair compensation, thus playing 'an active role in specifying the concept of fair compensation, thereby effectively framing the conditions for the establishment, collection and distribution of private copying levies in the Member States.'[574] The concept pivots on the 'possible suffered harm', as criterion to measure the due compensation.[575] The CJEU does not set standardized criteria to quantify

[570] *Reprobel* para 68; *EGEDA* para 26.

[571] E.g. *Pelham* para 45 ('[…] the protection conferred on a phonogram producer under [the Rental] directive aims, in particular, to fight piracy, that is […] the production and distribution to the public of counterfeit copies of phonograms. The distribution of such copies poses a particularly serious threat to the interests of such phonogram producers in that it is capable of significantly decreasing the revenue that they receive by making phonograms available.'); *UPC Telekabel*, para 31; *Metronome*, para 24; Case C-174/15 *Vereniging Openbare Bibliotheken v Stichting Leenrecht (VOB)* [2016] EU:C:2016:856, paras 67-68; Case C-435/12 *ACI Adam BV and Others v Stichting de Thuiskopie and Stichting Onderhandelingen Thuiskopie vergoeding (ACI Adam*) [2014] EU:C:2014:254, para 48 ff; Case C-463/12 *Copydan Båndkopi v Nokia Danmark A/S (Copydan)* [2015] EU:C:2015:144, para 25; Case C-521/11 *Amazon.com International Sales Inc. and Others v Austro-Mechana Gesellschaft zur Wahrnehmung mechanisch-musikalischer Urheberrechte Gesellschaft mbH (Amazon)* [2013] EU:C:2013:515. See also AG opinion in *Laserdisken* para 56 ('[…] combating piracy was not the legislator's primary objective in adopting the provision. In any event, it seems to me that the fact that the exclusive distribution right is not exhausted for pirated copies (because such copies are not put into circulation with the author's consent) demonstrates that Article 4 is indeed an appropriate provision for combating unlawful distribution.').

[572] InfoSoc Directive art 5(2)(b).

[573] *ibid* recital 52 does not explicitly refer to fair compensation, but to 'voluntary measures to accommodate achieving the objectives of such exception or limitation'.

[574] *Padawan*, para 33. See also Leistner (n 431) 590.

[575] E.g. *Padawan* paras 39-42 ('[…] the purpose of fair compensation is to compensate authors "adequately" for the use made of their protected works without their authorisation. In order to determine the level of that compensation, account must be taken – as a "valuable criterion" – of the "possible harm" suffered by the author

the compensation, thus leaving leeway to national legislators and judges. Particularly interesting is the CJEU decision in *OTK*, where the Court allowed for a compensation in form of a lump-sum in the amount of twice or three times the royalty which would have been due for the authorization to use, thus not excluding the possibility of an additional punitive effect of the institution of fair compensation.[576]

3.3.2. The protection of author's reputation

While referring to the high level of protection, the CJEU offers not only arguments on the remuneration of the copyright holder, but also – even though more seldom – references to the moral rights of the author. This dimension of the 'high level of protection' is interpreted as 'the right of an author to claim authorship of the work and to object to any distortion, mutilation or other alteration thereof, or any other action in relation to the said work which would be prejudicial to his honor or reputation'.[577] In support of this view, reference is usually made to Recital 11 InfoSoc Directive and, in general, to its objectives, which – as Leistner reminds – 'are not exclusively focused on the economic interests of the authors, but also refer

as a result of the act of reproduction concerned, although prejudice which is "minimal" does not give rise to a payment obligation. The private copying exception must therefore include a system 'to compensate for the prejudice to rightholders'.); *ACI Adam* para 50; Joined Cases C-457/11 to C-460/11 *Verwertungsgesellschaft Wort v Kyocera and Others and Canon Deutschland GmbH and Fujitsu Technology Solutions GmbH and Hewlett-Packard GmbH v Verwertungsgesellschaft Wort (VG Wort)* [2013] EU:C:2013:426, para 49; Case C-462/09 *Stichting de Thuiskopie v Opus Supplies Deutschland GmbH and Others (Stichting de Thuiskopie)* [2011] EU:C:2011:397, para 22.

[576] Case C-367/15 *Stowarzyszenie "Oławska Telewizja Kablowa" w Oławie v Stowarzyszenie Filmowców Polskich w Warszawie (OTK)* [2017] EU:C:2017:36, para 30 ('[…] where an intellectual property right has been infringed, mere payment of the hypothetical royalty is not capable of guaranteeing compensation in respect of all the loss actually suffered, given that payment of that royalty would not, in itself, ensure reimbursement of any costs […] that are linked to researching and identifying possible acts of infringement, compensation for possible moral prejudice.').

[577] *Musik Vertrieb* para 11; *Phil Collins* para 20.

to the independence and dignity of artistic creators and performers as a precondition of cultural creativity.'[578]

Sometimes teleological elements within the dimension of moral rights are added to the reasoning, as to strengthen the logic behind the high level of protection and, in particular, its remunerative kernel:

> […] any harmonisation of copyright and related rights must take as a basis a high level of protection, since such rights are crucial to intellectual creation and a rigorous, effective system for their protection is one of the main ways of ensuring that European cultural creativity and production receive the necessary resources and of safeguarding the independence and dignity of artistic creators and performers.[579]

In other occasions, even in absence of explicit mentioning, the Court seems to hint at the complementary moral dimension of copyright protection. It is the case, for instance, of *Deckmyn*, where the author of a comic book sued the producer of a calendar, where his work was reproduced in an altered form, claimed to be a parody, adding racist elements to the drawings.[580] It can be argued that the CJEU implicitly relied on moral rights while founding its reasoning on the protection of the reputation of the comic book's author. The main argument of the Court, was, indeed that the freedom of expression of the producer of the calendar must comply with the principle of non-discrimination.[581] Such reasoning was not grounded on reasons of public interest or immorality, but rather on the Court's identification of a legitimate interest of the author 'in ensuring that the work protected by copyright is not

[578] Leistner (n 431) 571.
[579] *Laserdisken* para 75; *Amazon* para 52.
[580] *Deckmyn* paras 31 ff.
[581] CFREU art 21.

associated with [a racist] message'.[582] In a similar way, the Court hints at the moral right of paternity whenever it puts emphasis on the need for proper indication of the author's name by the user who is enjoying a copyright exception, such as in the case of quotation.[583]

3.4. The promotion of the information society between culture and technology

From the CJEU case law emerges one further interpretation, whose boundaries are sketched in a discursive way and thus call for an analytical structuring. This teleological set of arguments pivots on the notion of information society, which is protagonist not only of the title of the InfoSoc Directive, but of the EU copyright policy as a whole.[584]

The teleological references linked to this notion move towards the objectives of promotion of culture and technological innovation, both in separated and joint ways. This reflects the findings of Chapter 2 regarding these two EU functions of copyright protections, which are also, to some extent, intertwined in the legislation and which also rely on the importance that EU primary law attributes to cultural aspects.[585]

[582] *Deckmyn* para 31. See also Peter Oliver and Christopher Stothers, 'Intellectual Property under the Charter: Are the Court's Scales Properly Calibrated?' (2017) 54 Common Market Law Review 517, 553.
[583] Unless the first publication of the copyrighted work was made under public security exception *ex* Art.5(3)(e) InfoSoc Directive. See Case C-145/10 *Eva-Maria Painer v Standard VerlagsGmbH and Others (Painer)* [2013] EU:C:2013:138, paras 135, 137-149.
[584] See, *inter alia*, European Commission, 'Copyright and Related Rights in the Information Society' (Green Paper) [1995] 382 final; European Commission, 'A Digital Agenda for Europe' (Communication) (n 328); European Commission, 'Towards a modern, more European copyright framework' (Communication) (n 346).
[585] TFEU art 167.

3.4.1. Cultural promotion

The objective of promoting the well-being of the society in terms of its cultural development results rather malleable. In some decisions, the protection and dissemination of culture is an argument adopted to strengthen the rationale behind a strong copyright protection, deemed to incentivize the production of creative works:

> […] adequate protection of copyright works and subject-matter of related rights is also of great importance from a cultural standpoint.[586]

> (…) the objective of proper support for the dissemination of culture must not be achieved by sacrificing strict protection of rights or by tolerating illegal forms of distribution of counterfeited or pirated works.[587]

While, in other occasions, the CJEU takes into account the public interest underlying access to culture and, above all, to education as a means of limitation of the scope of exclusive rights and promotion of the effectiveness of copyright exceptions.[588] In this light, the Court's interpretation sheds light on a new dimension, that is the creation of a EU cultural identity or, more precisely, the promotion of culture as a 'tool for the development of Europe'.[589]

[586] *Laserdisken* paras 57, 76.
[587] *ACI Adam* para 36; *Reprobel* para 59; *Metronome* para 23 ('[…] not only is 'industrial and commercial property' recognised as a justifiable limitation on free movement, but also that the cultural development, including aims of encouraging artistic and literary creation, is one of the objectives of the founding treaties').
[588] E.g. *Laserdisken* paras 64, 77 ('[T]he [InfoSoc] Directive should seek to promote learning and culture by protecting works and other subject-matter while permitting exceptions or limitations in the public interest for the purpose of education and teaching.'); *Pelham* para 32 ('[…] a fair balance between, on the one hand, the interest of the holders of copyright and related rights in the protection of their intellectual property rights now guaranteed by Article 17(2) of the Charter and, on the other hand, the protection of the interests and fundamental rights of users of protected subject matter as well as of the public interest.'); *Renckhoff* para 41. See also AG Opinion in *Ulmer*, para 24 ('A teleological interpretation also requires, in view of the general interest objective pursued by the Union legislature, namely to promote learning and culture, that the user is able to rely on that exception').
[589] AG Opinion in *Uradex* para 24 ('It was impossible that the Community legal order should ignore that sector. Its economic importance affects the creation of a single market by stimulating investment, growth and employment; furthermore, its protection serves other purposes, such as the fostering of cultural creativity, identity and diversity, which is not only an objective but also a tool for the development of Europe.').

The creation and fostering of an 'European cultural creativity and production' is mentioned both as a goal enshrined in EU primary law[590] as well as drawn from EU secondary legislation on copyright.[591] Interestingly, the references to the independence and dignity of all artists have been read in the scholarship as showing an additional insight by the Court towards the protection of cultural diversity in the Union: in this view, EU copyright law serves not only as a tool for cultural and economic growth, but also 'as social contribution [system] to less well-off artists, and not just as compensation for harm caused to right-holders.'[592] On a final note, it ought to be noted that an opposite, although rare, scenario is represented the interpretation of the EU copyright function of promotion of culture in light of Article 5 Rental Directive as a subject of strictly national policy, thus leaving Member States decide upon the system and amount of remuneration due to the copyright owners.[593]

3.4.2. The *favor* towards the Internet

The CJEU in its reasoning looks at the objective of setting a prospering information society also from a technological point of view, with particular emphasis on the need to adapt the EU

[590] *Metronome* para 23 ('It should also be noted that the *cultural development of the Community* forms part of the objectives laid down by Article 128 of the EC Treaty, as amended by the Treaty on European Union, which is intended in particular to encourage artistic and literary creation.') (emphasis added).
[591] *Amazon* para 53 ('[…] it must be observed that such a system of indirect collection of fair compensation by those entitled to it meets one of the objectives of the appropriate legal protection of intellectual property rights under Directive 2001/29, which is, as is apparent from recitals 10 and 11 of that directive, to ensure that *European cultural creativity and production* receive the necessary resources to continue their creative and artistic work and to safeguard the independence and dignity of artistic creators and performers.') (emphasis added); *Laserdisken* para 57.
[592] Kalimo, Meyer and Mylly (n 464) 289.
[593] *VEWA* para 36 ('[…] the wording of Article 5(1) of Directive 92/100 reserves a wide margin of discretion to the Member States. The latter may determine the amount of the remuneration due to authors in the event of public lending in accordance with their own cultural promotion objectives'). See also AG Opinion in *SENA* para 27.

copyright framework to a rapidly evolving digital scenario.[594] The idea of a flourishing technological environment requires favorable conditions for the development of innovative and creative ideas.[595] These conditions have concretized in the Court's emphasis on the exclusion of technical or functional elements from the subject matter of copyright protection[596] and, as with regards to culture, on the principle of effectiveness of copyright exceptions and limitations to protect the interests of the users.[597]

The Court has shown to be aware of the fact that copyright can stifle innovation and condemns potential abuses of copyright not only when competition rules are invoked, but also by adopting a consequentialist approach:

> […] the consequence of conferring a monopoly on certain companies on the computer program market, thus significantly hampering creation and innovation on that market, […] would run contrary to the objective of Directive 2001/29.[598]

> […] all television viewers using modern sets which, in order to work, need those acts of reproduction to be carried out would be prevented from receiving broadcasts containing broadcast works, in the absence of an authorisation from copyright holders. That would impede, and even paralyse, the actual spread and contribution of new technologies, in disregard of the will of the European Union legislature as expressed in recital 31 in the preamble to the Copyright Directive.[599]

[594] Case C-283/10 *Circul Globus Bucureşti v Uniunea Compozitorilor şi Muzicologilor din România - Asociaţia pentru Drepturi de Autor (Circul Globus Bucuresti*) [2011] EU:C:2011:772, para 38; *VG Wort* para 71 ('[…] the aim of Directive 2001/29 is to create a general and flexible framework at European Union level in order to foster the development of the information society and to adapt and supplement the current law on copyright and related rights in order to respond to technological development, which has created new forms of exploitation of protected works.').
[595] Leistner (n 431) 565.
[596] E.g. Case C-604/10 *Football Dataco Ltd and Others v Yahoo! UK Ltd and Others (Footbal Dataco)* [2012] EU:C:2012:115, para 42.
[597] *FAPL*, paras 163 ff.
[598] Case C-393/09 *Bezpečnostní softwarová asociace - Svaz softwarové ochrany v Ministerstvo kultury (BSA)* [2010] EU:C:2010:816, para 76.
[599] *FAPL*, para 179. See also Rendas (n 442) 162.

Moreover, the CJEU has developed a specific focus on the Internet. Even though, in close connection with the notion of fair compensation, the negative effects of online piracy to copyright holders have been taken into consideration and often referred to,[600] the Court has also recognized that the Internet is 'of particular importance to freedom of expression and of information'.[601]

The case law has so far touched upon three main aspects related to the online environment, showing a transversal and consistent attempt not to turn copyright protection into an obstacle to the operability of this widespread technology. The first aspect is hyperlinking. The core issue arising from acts of posting online the link providing direct access to a content is the potential infringement of the exclusive right of communication to the public. In several rulings, the CJEU has tried to identify the circumstances where such activity may amount to an infringement and when, instead, it does not fall under copyright protection.[602] Particularly significant is the reasoning in *GS Media*, as it unveils the importance acknowledged by the Court to hyperlinks as means of expression and information by the Internet users and, hence, essential element of the Internet as we know it.[603]

[600] E.g. *Pelham* para 45.
[601] *GS Media* para 45. See also AG Opinion in *GS Media* para 77 ('I consider that any other interpretation of that provision would significantly impair the functioning of the Internet and undermine one of the main objectives of Directive 2001/29, namely the development of the information society in Europe. Such an interpretation could also distort the 'fair balance of rights and interests between the different categories of rightholders, as well as between the different categories of rightholders and users of protected subject-matter.').
[602] See *Svensson*; *UPC Telekabel*; *ibid* paras 49, 51.
[603] *ibid* para 45 ('[…] hyperlinks contribute to [the] sound operation [of the Internet] as well as to the exchange of opinions and information in that network characterised by the availability of immense amounts of information.'). Worth noting is the accompanying Opinion, as AG Wathelet suggested to the Court to fully and explicitly exclude hyperlinks from the scope of the right of communication to the public grounding his reasoning also on the importance on freedom of expression and information in the digital world, yet without convincing the Court to do so. See also AG Opinion in *ibid* paras 42 ff.

The other two aspects explored by the CJEU are the prohibition of monitoring obligations to the Internet Service Providers (ISP) and the central role played by online databases. In both these regards, the CJEU has mirrored the intent of the EU legislator relying on straight-forward EU provisions prohibiting Member States to impose obligations to the ISP to preventively monitor the content uploaded by the users[604] and allowing instead copyright owners to monitor themselves and claim injunctions.[605] The Court's interpretation has never jeopardized such prohibition,[606] emphasizing on the fundamental rights to conduct business and to information attached to the service provided by ISPs.[607] Similarly, supported by the fact that the Database Directive does not list in its Recitals the objective of high level of protection of the database maker, but rather specifically describes what the protection is about,[608] the Court asserted that

> the objective is to stimulate the establishment of data storage and processing systems which contribute to the development of an information market against a background of exponential growth in the amount of information generated and processed annually in all sectors of activity.[609]

[604] E-Commerce Directive art 15.
[605] InfoSoc Directive art 8(3); Enforcement Directive art 11.
[606] *Netlog* paras 39-53.
[607] *Scarlet Extended* paras 46-52.
[608] Database Directive recital 39 ('[…] this Directive seeks to safeguard the position of makers of databases against misappropriation of the results of the financial and professional investment made in obtaining and collection the contents by protecting the whole or substantial parts of a database against certain acts by a user or competitor.').
[609] *BHB* paras 30-31; *Football Dataco* para 34; Case C-202/12 *Innoweb BV v Wegener ICT Media BV and Wegener Mediaventions BV (Innoweb)* [2013] EU:C:2013:850, para 35. See also AG Opinion in *Football Dataco* para 18 ('[…] the objective of the Directive is to encourage the creation of systems for collecting and consulting information, not the creation of data.').

3.5. The key for interpretation: the fair balance of rights and interests

The analysis of the CJEU case law has so far confirmed the multiplicity of functions recognized both to the EU copyright harmonization and to copyright protection as such, showing a significant convergence between the objectives stated in legislations and the ones cited by the Court. A further, key element to the teleological approach of the CJEU to copyright is its reliance on the 'fair balance of rights and interests'.

This observation stands on two premises. First, as highlighted in the analysis of the interpretation of the remunerative function,[610] the protection of the copyright holder, although 'high' and interpreted in light of Article 17 CFREU, is not absolute. This interpretation is also to be found in the case law of the European Court of Human Rights (ECtHR), which asserted IP to be an exception to the freedom of expression as set in Article 10 European Convention of Human Rights (ECHR), and, as such, to be interpreted narrowly.[611] Second, the objectives identified and confirmed by the CJEU involve clashing rights and interests, a prevision that the same EU legislator had in mind and addressed with some references to the need to strike a 'fair balance' between them, yet without further specifying mode and criteria to do so.[612]

[610] See *supra* Section 3.3.1.
[611] *Ashby Donald and others v France* (2013) App no 36769/08 (ECHR, 10 January 2013); *Fredrik Neij and Peter Sunde Kolmisoppi (The Pirate Bay) v Sweden* (2013) App no 40397/12 (ECHR, 19 February 2013). See Geiger (n 15) 12; Strowel, "Pondération entre liberté d'expression et droit d'auteur sur Internet: De la réserve des juges de Strasbourg à une concordance pratique par les juges de Luxembourg", 100 *Revue Trimestrielle des Droits de l'Homme* 889 (2014).
[612] E.g. InfoSoc Directive recitals 3, 31.

The CJEU makes this notion central to its copyright jurisprudence.[613] Sometimes the Court enjoins Member States to strike this balance, both in the sense of national legislators[614] and of national judges,[615] in the name of minimal harmonization.[616] It has been highlighted how the recourse to 'fair balance', due to the intrinsic vagueness of the same idea of 'balance',[617] is to be associated to the introduced flexibility in the application of EU copyright rules,[618] in particular to its application of the principles of rule of reason and proportionality.[619] At the same time, the notion of fair balance entails a connection with the principle of effectiveness, when it implies a balancing of the broad interpretation of exclusive rights with the effective application of exceptions.[620]

In other words, the interpretative result of the reference to the 'fair balance' is uncertain. The empirical study conducted by Favale et al shows that, within the time frame 1993-2014, 'fair

[613] *Deckmyn* paras 26-35; *Netlog* paras 43-51; *Padawan* para 49; *FAPL* para 164; *Scarlet Extended* para 44; *UPC Telekabel* para 46; *Painer* paras 132-135; *ACI Adam* para 53; *Amazon* paras 25, 27; *Copydan* paras 53, 77; *Reprobel* para 86; *EGEDA* para 35; *Ulmer* para 31; Case C-275/06 *Productores de Música de España v Telefónica de España SAU (Promusicae)* [2008] EU:C:2008:54, paras 62-68; Case C-461/10 *Bonnier Audio AB and Others v Perfect Communication Sweden AB (Bonnier)* [2012] EU:C:2012:219, para 49; Case C 484/14 T*obias Mc Fadden v Sony Music Entertainment Germany GmbH (McFadden)* [2016] EU:C:2016:689, para 83, 84, 89. The notion has started being referred to in connection with the digital environment as fair balance between copyright owner and Internet user since *GS Media* para 31 ('[...] in particular in the electronic environment'); *Renckhoff* para 41; *Strotzer* paras 45-51. See also Favale, Kretschmer and Torremans (n 432) in which, as far as the CJEU decisions within the period 1993-2014 are concerned, identifies a frequent *topos* in the notion of fair balance associated with Judge Malenovský.

[614] *Promusicae* para 68 ('Member States must rely on an interpretation of the directives which allows a fair balance to be struck between the various fundamental rights.').

[615] *McFadden* para 83 ('Where several fundamental rights protected under EU law are at stake, it is for the national authorities or courts concerned to ensure that a fair balance is struck between those rights.').

[616] E.g. *Promusicae* para 68; *Scarlet Extended* para 46.

[617] Oliver and Stothers (n 154) 546; Griffiths argues that "the concept of 'fair balance' is, without further elucidation, vacuous and unhelpful" Griffiths, "Constitutionalising or harmonising? The Court of Justice, the right to property and European copyright law", (2013) EL Rev., 74.

[618] Strowel and Kim (n 448) 122.

[619] The adoption of the rule of reason as interpretative criteria dates back to case C-240/83 *Association de defense des bruleurs d'huiles usagés* [1985] ECR 531, in which the CJEU argues the non-absolute nature of fundamental rights, due to the limitations justified by the pursue of general interests by the European Community (para 12).

[620] *Deckmyn* para 23 ('[…] the interpretation of the concept of parody must, in any event, enable the effectiveness of the exception thereby established to be safeguarded and its purpose to be observed.'); *FAPL* para 163.

balance of rights and interests is argued in many cases with an unfavourable outcome for the rightholder'.[621] Yet, some recent decisions end in the opposite result. An example is *Deckmyn*, in which the Court relied on fair balance between copyright and freedom of expression,[622] giving generous guidance to the national judge in favor of the protection of the right holder.[623] By the same token, in *Renckhoff*, the Court drew a distinguishing between online posting and hyperlinking,[624] stating:

> […] to allow such a posting without the copyright holder being able to rely on the rights laid down in Article 3(1) of Directive 2001/29 would fail to have regard to the fair balance […] which must be maintained in the digital environment between, on one hand, the interest of the holders of copyright and related rights in the protection of their intellectual property […] and, on the other hand, the protection of the interests and fundamental rights of users of protected subject matter, in particular their freedom of expression and information, guaranteed by Article 11 of the Charter of Fundamental Rights, as well as the public interest.[625]

This quote, exemplary of the CFREU-inspired interpretation of fair balance by the CJEU, well displays the emphasis on the presence of right- and interest-holders other than the copyright owner,[626] be they individually (e.g. the creator of a parody) or collectively defined (e.g. users at large, public interest). This prompts the questions as to who the CJEU identifies

[621] Favale, Kretschmer and Torremans (n 432) 64.
[622] *ibid* para 35.
[623] *ibid* paras 27-32.
[624] *Renckhoff* para 40; *GS Media* ('[…] unlike hyperlinks which, according to the case-law of the Court, contribute in particular to the sound operation of the internet by enabling the dissemination of information in that network characterised by the availability of immense amounts of information […], the publication on a website without the authorisation of the copyright holder of a work which was previously communicated on another website with the consent of that copyright holder does not contribute, to the same extent, to that objective.').
[625] *ibid* para 41.
[626] Indicative of this opening is also the wording in some AG opinions, which evolves and, through small additions, shows the plurality of interest holders within the copyright picture. E.g. AG Opinion in *Soulier* para 34 ('[…] the principal objective of Directive 2001/29 is to establish a high level of protection of, *inter alios*, authors […]'); AG Opinion in *Ziggo* para 3 ('[…] the objective of EU legislation in the relatively abundant field of copyright, which is precisely to harmonise the scope of the rights enjoyed by authors *and other rightholders* within the single market.') (emphasis added). See also Rendas (n 442) 162; Leistner (n 431) 570.

as 'copyright holder' and which rights and interests lie, in its interpretation, on the other scale pan.

3.5.1. Between different categories of right holders

It has been pointed out how in EU copyright legislation the original copyright holder (the author) and the derivative holder (the assignee) are often considered together under the generic notion of right holder.[627] This broad concept, potentially encompassing a plurality of individuals entitled copyrights on a same work, is directly connected with the neutral approach of the EU legislator with regards to authorship and ownership of copyright, leaving these two fundamental aspects largely unharmonized.[628]

In some cases, the interests of a specific category of right holders stemming from the case referred to the Court have led the CJEU to embrace a more specific definition of the addressees of copyright protection, such as 'authors'[629] and 'performers'.[630] In this vein, the

[627] See Chapter 2 Section 2.5.1. See also Sylvie Nérisson, *La Gestion Collective des Droits des Auteurs en France et en Allemagne: quelle légitimité?* (IRJS 2013), 46-49.

[628] The EU legislator imposes a few presumptions of transfers of copyrights. See for instance Rental Directive art 2(5). The fact that the EU copyright law fails to address in a distinct and specific matter the interests of the authors and the investors has been subjected to strong criticism in the scholarship. See Sylvie Nérysson, 'Ownership of Copyright and Investment Protection Rights in Team and Networks: Need for New Rules?' in Jan Rosén (ed), *Individualism and Collectiveness in Intellectual Property Law* (Edward Elgar 2012) 129–130; Antoon Quaedvlieg, 'Authorship and Ownership: Authors, Enterpreneurs and Rights' in Tatiana-Eleni Synodinou (ed), *Codification of European Copyright Law. Challenges and Perspectives* (Wolters Kluwer 2012) 197–198; van Eechoud and others (n 230) 47–55.

[629] E.g. *Nintendo* para 27 ('[…] the principal objective of Directive 2001/29 which, as is apparent from recital 9 thereof, is to establish a high level of protection in *favour, in particular, of authors, which is crucial to intellectual* creation.') (emphasis added).

[630] *SENA* para 36 ('[…]call upon the Member States to ensure the greatest possible adherence throughout the territory of the Community to the concept of equitable remuneration, a concept which must […] be viewed as enabling a proper balance to be achieved between the interests of performing artists and producers in obtaining remuneration for the broadcast of a particular phonogram, and the interests of third parties in being able to broadcast the phonogram on terms that are reasonable.').

cases of conflicts among categories of copyright holders are of high significance and show to have in common a marked and concurrent focus on the remunerative function.

Luksan represents a prominent example, opposing the director and the producer of a documentary movie in the merits of the right of exploitation and fair remuneration. The CJEU left no room for doubting that, according to EU secondary law, the original ownership of copyright vests in the movie director,[631] and so the right to fair remuneration.[632] It further argued that national law can provide for a rebuttable presumption of transfer of exploitation rights to the producer.[633] While AG Trstenjak in her Opinion emphasized the protection of the movie director in light of Article 17 CFREU,[634] the Court employed another approach, declaring

> […] categorically rejected any system that would transfer the compensation to publishers without obliging them to ensure that authors benefit from it, even if only indirectly, for publishers are not listed among the holders of the reproduction right, and are consequently not exposed to any harm caused by the exercise of the exception of private copying.[635]

Another interesting example of conflicting categories of right holders, is offered by *Fundacion Salvador Dalì*, the only preliminary ruling focusing on the interpretation of the Resale Directive. In opposition to each other are the interests of the Salvador Dalì's heirs, on the one side, and of the legatees and successors in title, on the other. In absence of clear indications

[631] *Luksan* para 53.
[632] *ibid* paras 96-109. See also Leistner (n 431) 578–579.
[633] *ibid* paras 73-87. See also Oliver and Stothers (n 582) 543.
[634] Arguing that, if national law provides for a presumed assignment of copyright to the producer, the movie director remains entitled to fair remuneration. See Luksan AG opinion, paras 133-134. Oliver and Stothers see this as a 'paternalistic' approach, according to which "if the allocation of rights is left to be decided in the contract between the parties, directors will be unable to ensure adequate compensation for their rights" *ibid* 544.
[635] *Luksan*, para 108. See also Sganga, *Propertizing European Copyright* (n 26) 142.

on these two categories in the Directive, the Court has relied on its underlying objective to ensure remuneration for artists – in the Court's words 'to ensure that authors of graphic and plastic works of art share in the economic success of their original works of art (…)'.[636]

3.5.2. Between copyright holder and the public

In the preliminary ruling request in the *Padawan* case, the referring Spanish court posed, among others, the question of 'who, apart from the authors affected, are the persons concerned between whom a 'fair balance' must be established'.[637] Until today, the query has remained crucial to the understanding, application and assessment of EU copyright rules in an increasingly digital environment.[638]

The CJEU has extensively dealt with the role of 'users' in the (mostly, digital) copyright scene.[639] This is particularly evident in the vast case law concerning the right to communication to the public, in which the interpretation has moved from a broad conception of communication of public towards an ever higher particularism.[640] In fact, if, at an initial stage, the Court interpreted the right solely in light of objective of high level of protection,[641] in a second moment it started taking into account the conducts and intentions of the users referring to the aim of striking a fair balance between copyright holders' interests and users'

[636] *Fundacion Salvador Dalì* para 27.
[637] *Padawan* para 38.
[638] See the introductory analysis on the evolving notion of user in EU copyright law by Mazziotti (n 334).
[639] E.g. *GS Media* para 35.
[640] E.g. *ibid* para 33; Case C-117/15 *Reha Training Gesellschaft für Sport- und Unfallrehabilitation mbH v Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte eV (Reha Training)* [2016] EU:C:2016:379, paras 33-35.
[641] *SGAE* para 36; *FAPL* para 186; *ITV Catchup I* para 20.

freedoms.[642] In this process, the notion of 'public'[643] has also been been shifted towards more specific terms, such as 'targeted public'[644] and 'new public'.[645]

From a 'fair balance' perspective, the most important differentiation in this regard is between for-profit and non-profit users.[646] *GS Media* is perhaps the most insightful example of this distinction. The CJEU, in fact, while acknowledging the need for balancing copyright protection against user's freedoms,[647] drew a line between private users, for whom it is overly burdensome to ascertain whether the content has been uploaded on the Internet with or without the authorization of the copyright holder, and commercial users, who are instead expected to verify this.[648]

On the side of for-profit users, the right juxtaposed to copyright protection is the right to conduct business and trade enshrined in Article 16 CFREU,[649] the CJEU showing both a

[642] *GS Media*, para 31. Sganga calls it a 'creative attempt to balance the need to guarantee a high level of protection of authors with the respect for conflicting rights protected by the CFREU', hence relating the approach to the flexibility of the Court's reasoning. Sganga, *Propertizing European Copyright* (n 26) 130–131.
[643] Interpreted as an 'indeterminate number of potential listeners' and a 'fairly large group of people' in Case C-89/04 *Mediakabel BV v Commissariaat voor de Media (Mediakabel)* [2005] EU:C:2005:348, para 30; Case C-192/04 *Lagardère Active Broadcast v Société pour la perception de la rémunération equitable and Gesellschaft zur Verwertung von Leistungsschutzrechten mbH (Lagardère)* [2005] EU:C:2005:475, para 31; Case C-135/10 *Società Consortile Fonografici v Marco Del Corso (SCF)* [2012] EU:C:2012:140, para 59; *SGAE* paras 37-38.
[644] The use of protected music content in a dental clinic waiting room, the Court argued, addressed a public, who was not 'targeted and receptive', but rather 'merely caught by chance'. See *SCF* para 91.
[645] New public being defined as a public that was not already taken into account by the copyright holders when they authorised the initial communication to the public of their work. See *GS Media* paras 34, 37; *Svensson* para 24; *Metronome* para 15; *SCF*, para 79; *Reha Training* para 35.
[646] E.g. *Reha Training* para 49 ('[…] the profit-making nature of the broadcast of a protective work does not determine conclusively whether a transmission is to be categorised as a 'communication to the public', *it is not however irrelevant*, in particular, for the purpose of determining any remuneration due in respect of that transmission'); *FAPL* para 204. The scholarship showing some skepticism in embracing this categorization, mainly due to the uncertainty stemming from the evolving and somehow inconsistent CJEU interpretation. See Leistner (n 431) 571 Lucas-Schloetter, 'Das Recht der öffentlichen Wiedergabe in der Rechtsprechung des Europäischen Gerichtshofs' 5 Zeitschrift fuer Geistiges Eigentum/Intellectual Property Journal (2013) 84–102, 84 ff.
[647] *GS Media*, para 45.
[648] *ibid* paras 46-51.
[649] *TV2 Danmark* para 57; *Metronome* para 26.

restrictive take on this right[650] and an inclination towards stronger consideration.[651] The category of non-profit users is residual and encompasses broad concepts, such as the 'Internet users'[652] and the 'general public'.[653] In this scenario, the most prominent right balanced against copyright protection is the user's freedom of expression and information, under the aegis of Article 11 CFREU,[654] with a growing focus on the so-called 'informatory purpose', which, though, the CJEU has not defined yet in clear terms.[655] In addition, acquiring significance in the interpretation of 'fair balance' between copyright holders and the public are also the objective of public security,[656] the user's right to private life and personal data *ex* Article 8 CFREU[657] as well as the user's fundamental right to education. With regards to the latter, it is worth noting that the objective of promoting learning and research is not traced from Article 14 CFREU, but directly from the InfoSoc Directive, which, the Court states,

[650] *ibid*.
[651] *Scarlet Extended* paras 46, 48-49; *UPC Telekabel* paras 47-53. It ought to be noted that in both cases the balancing of copyright protection *vis-à-vis* the ISP's right to conduct business is presented tightly connected with the protection of ISP's customers in their right to protection of personal data and freedom of information, respectively enshrined in CFREU artt 8, 11. See *Scarlet Extended* para 50; *UPC Telekabel* para 55; *GS Media* para 45.
[652] *GS Media*, para 42 ("all internet users"); *Svensson*, paras 26 ("all Internet users"); *UPC Telekabel*, para 47 ("[…] ensuring compliance with the fundamental right of internet users to freedom of information"); *Scarlet*, para 50 ("ISPs customers"). See also, concerning the latter case, Strowel and Kim (n 448) 128 See also Geiger, Promoting Creativity through Copyright Limitations, Reflections on the Concept of Exclusivity in Copyright Law, Vanderbilt Journal of Entertainment & Technology Law 2010, Vol. 12, Issue 3, 2010, 515.
[653] E.g. *Deckmyn* para 25; *GS Media* paras 31, 44. For an analytical overview see Mireille Buydens and Séverine Dusollier (eds.), *L'intéret general et l'accès à l'information en propriété intellectuelle* (Bruylant, Bruxelles 2008); Christophe Geiger, 'Promoting Creativity through Copyright Limitations. Reflections on the Concept of Exclusivity in Copyright Law' (2010) Vanderbilt Journal of Entertainment and Technology Law 12(3) 515-548.
[654] E.g. *Scarlet Extended* paras 52-53 (the freedom of information prevailed over copyright protection, as the enforcement of copyright rules would have prevented users to access both lawful and unlawful content); *Deckmyn* para 25 (parody being defined as 'an appropriate way to express an opinion'); *Laserdisken* paras 63-64; *GS Media* paras 31, 44-45; *Painer* paras 113-115; AG Opinion in *Painer* para 163. See also Christophe Geiger and Elena Izyumenko, 'Freedom of Expression as an External Limitation to Copyright Law in the EU: The Advocate General of the CJEU Shows the Way' (2019) 41 European Intellectual Property Review 131.
[655] *Spiegel Online* paras 28-29, 64.
[656] *Painer* paras 101-111; AG Opinion in *Funke Medien* paras 47-49.
[657] *Promusicae* para 63-65, 70; *Scarlet Extended* paras 50, 51, 54.

> […] aims to promote the public interest in promoting research and private study, through the dissemination of knowledge, which constitutes, moreover, the core mission of publicly accessible libraries (…) [and] maintain a fair balance between the rights and interests of right holders, on the one hand, and, on the other hand, users of protected works who wish to communicate them to the public for the purpose of research or private study undertaken by individual members of the public.[658]

3.6. Conclusion

The CJEU case law is generally characterized by interpretative approaches and trends, which move away from the strictly semantic interpretation of the law. With regards to EU copyright matters, the considerable presence of teleological references in the decisions should not be underestimated. This trend mainly represents an attempt to solve problems emerging from the growing body of rules, which lack both systematization and essential definitions for their uniform application.[659] In this vein, the purposive interpretative efforts of the Court are seen as a way to 'fill the gaps' of the EU copyright legislation and provide guidance towards a more effective harmonization.[660] This entails a significant degree of flexibility, which manifests itself in particular in the Court's interpretation of the scope of exclusive rights. Yet, the analysis has demonstrated that the recourse to a certain teleological argument does not straight-forwardly

[658] *Ulmer* paras 27, 31. See also AG Opinion in *Ulmer* para 24 ('A teleological interpretation also requires, in view of the general interest objective pursued by the Union legislature, namely to promote learning and culture, that the user is able to rely on that exception.').
[659] See also Sganga, *Propertizing European Copyright* (n 26) 132.
[660] Favale, Kretschmer and Torremans (n 432). Griffith, "Constitutionalising or harmonising? The Court of Justice, the right to property and European copyright law" (2013) 38(1) ELR 65-78; Leistner, 'Europe's copyright law decade: Recent case law of the European Court of Justice and policy perspectives' (2014) 51 *Common Market Law Review* 2, 559–600; van Eechoud, 'Along the Road to Uniformity – Diverse Readings of the Court of Justice Judgments on Copyright Work' (2012) JIPITEC 1.

and consistently lead always to the same outcome, thus confirming the risk of legal uncertainty.[661]

By and large, the functional analysis has fundamentally unveiled a consolidated practice in the CJEU's judicial reasoning, based on the use of teleological 'building blocks'[662] extrapolated from the Recitals of the Directives and reiterated in a cross-referenced manner in the decisions. Moreover, an occasional, yet meaningful addition is the markedly pragmatic, consequentialist approach of the Court.

From the close examination and systematic reconstruction of the Court's main teleological *topoi* the following considerations can be drawn. First and foremost, the multi-functional nature of EU copyright law finds consolidation in the Court's reasoning. The plurality of functions recognized by the CJEU is particularly evident in decisions where the Court acknowledges several objectives 'bundling' them together in a few lines of reasoning.[663]

[661] Geiger, 'The Role of the Court of Justice of the European Union: Harmonizing, Creating and Sometimes Disrupting Copyright Law in the European Union' (n 431). Rendas has shown this with regards to cases related to technologically-enabled uses (the majority of which have been deemed non-infringing uses, despite the stringent legislation in protection of copyright holders) offering empirical results of the predominance of flexibility over formalism in cases concerning new technological uses of content. Rendas (n 9) 170 ff. The thorough empirical study carried out by Favale, Kretschmer and Torremans well shows how, from *Phil Collins* 1993 to *Svensson* 2014, the same *topoi* of teleological connotation have led to pro-right holder as well as against-right holder decisions, as visually put in their Figure n.8 *ibid* 62; Oliver and Stothers (n 158).

[662] Beck (n 452) 174 ("paragraphs which occur again and again in identical or nearly the same form in the Court's case law").

[663] E.g. *Laserdisken* para 57 ('[…] the protection of copyright and related rights helps to ensure the maintenance and development of creativity in the interests of *inter alia* authors, performers, producers and consumers. […] [L]egal protection of intellectual property rights is necessary in order to guarantee an appropriate reward for the use of works and to provide the opportunity for satisfactory returns on investment. In the same vein, […] a rigorous, effective system of protection is a way of ensuring that European cultural creativity and production receive the necessary resources and of safeguarding the independence and dignity of artistic creators and performers.').

The second main consideration is that, contrary to its interpretation of EU trademark law, the Court has not developed an 'essential function doctrine' of EU copyright law, thus meaning that its teleological approach to this legal field has a different configuration.

A core feature of the peculiar interpretation of EU copyright functions is the absence of an explicit hierarchy between them. The CJEU refers both to EU functions of copyright harmonization and EU functions of copyright protection,[664] at times hinting at the different roles of these two categories,[665] but never properly handled distinctively. Moreover, the functions of establishing the internal market and granting a high level of protection to the copyright holder, are the most recurring ones, reflecting their frequency in the legislation. Nevertheless, neither of these two functions is openly described or shows to be deemed *de facto* predominant. Not only the recognition of other objectives departs from such an assumption, but also their respective interpretations result highly articulated and, above all, adaptive to the case at stake. What lies at the center of the absence of a hierarchy of EU

[664] *Strotzer* paras 30, 33 ('The Court notes, in the first place, that the primary objective of Directive 2001/29 is, as is clear from recital 9 thereof, to establish a high level of protection of copyright and related rights, *since such rights are crucial to intellectual creation*. (…) It must be borne in mind, in the second place, that the objective pursued by Directive 2004/48 is, as stated in recital 10 thereof, to approximate the legislative systems of the Member States in respect of the means of enforcing intellectual property rights so as to *ensure a high, equivalent and homogeneous level of protection in the internal market*.'); *Fundacion Salvador Dalì* para 27 ('[…] it should be borne in mind that the adoption of Directive 2001/84 is based on two objectives, namely first, as is apparent from recitals 3 and 4 in the preamble to that directive, to ensure that *authors of graphic and plastic works of art share in the economic success* of their original works of art and, second, as recitals 9 and 10 in the preamble to the directive indicate, to *put an end to the distortions of competition on the market in art*, as the payment of a royalty in certain Member States might lead to displacement of sales of works of art into those Member States where the resale right is not applied.').

[665] *Metronome* paras 22-23 ('The object of the Directive is to establish harmonised legal protection in the Community for the rental and lending right […] such harmonisation is intended to eliminate differences between national laws which are liable to create barriers to trade, distort competition and impede the achievement and proper functioning of the internal market. […] the rental right, which, as a result of the increasing threat of piracy, is of increasing importance to the economic and cultural development of the Community must in particular guarantee that authors and performers can receive appropriate income and amortise the especially high and risky investments required particularly for the production of phonograms and films […] It should also be noted that the cultural development of the Community forms part of the objectives laid down by Article 128 of the EC Treaty, as amended by the Treaty on European Union, which is intended in particular to encourage artistic and literary creation.').

copyright functions is the notion of fair balance, which marks the evolution of the CJEU from a 'negative legislator' ensuring the compliance of national copyright rules with the market freedoms to a proactive 'moderator of conflicting rights and interests'.[666]

[666] See in support also Cassiers and Strowel (n 448) 197; Martin Husovec, 'Intellectual Property Rights and Integration by Conflict: The Past, Present and Future' (2016) 18 Cambridge Yearbook of European Legal Studies 239, 252 ff.

Chapter 4 - The role of welfare standards and the distributive rationale in EU copyright law

The study of the objectives of EU copyright law expressed in the legislation and related CJEU case law has unearthed a multi-functional approach, characterized by a significant influence of utilitarian justificatory arguments and a peculiar configuration, where there is no one single function prevailing over the others and the notion of fair balance becomes key to the interpretation of potentially clashing objectives. This sets the basis to deepen the analysis, searching for the purposes that remain unspoken in the legislation.

The term 'implicit functions' encompasses all objectives and goals pursued by the legislator, yet not openly recognized.[667] This does not necessarily signal flaws or deficiencies of the law. Rather, it has to do with the difficulties faced by the legislator in predicting all possible (and evolving) scenarios in which legal rules apply and in exhaustively regulating their functions *vis-à-vis* other legal institutions. Suffice it to think of hard copyright cases decided by the CJEU: in some decisions, EU copyright law is stated not to pursue the maximization of remuneration;[668] in others, it accounts for the profitable value of the exploitation of the protected work by third parties,[669] thus legitimately limiting the freedom to conduct business[670] and even unveiling a dissuasive function.[671] It can be observed that, while expressed functions are the beacons of the teleological interpretation, implicit functions underpin such an effort

[667] On the different definition of latent functions in the functional analysis of natural and social sciences, see supra Introduction; Merton (n 7) 51; Rosenberg (n 4) 147.
[668] E.g. *FAPL* paras 107-109; *UsedSoft* para 63.
[669] E.g. *Allposters* para 48.
[670] E.g. *Metronome* para 26.
[671] *OTK* paras 21, 28.

by tackling the relation among expressed functions and placing emphasis on the effects of the law.

In this light, the Chapter investigates the economic implications of the multi-functional configuration of EU copyright law and its underlying distributive rationale. To do so, it first explains the reasons behind the need to embrace the economic analysis to delve into the implicit functions of the law (Section 4.1). The economic study of copyright rules reckons with the remarkable differences between the traditionally analogue and the new digital scenarios (Section 4.2), which show to majorly help identifying the distributive core of the EU legislator's approach in its copyright response to technological progress (Sections 4.3 and 4.4).

4.1. Why an economic analysis?

Copyright is characterized by a consolidated economic narrative. The first economic analyses of this legal institution date back to mid-20th century[672] and, since its very early attempts, this methodology has proven apt to assess copyright rules.[673] In particular, the long-standing economic analysis of copyright law has served two main purposes, which often present themselves intertwined with each other.

[672] See Plant (n 40); Robert M Hurt and Robert M Schuchman, 'The Economic Rationale of Copyright' (1966) 56 The American Economic Review 421; Breyer (n 40).

[673] The economic analysis of law being understood as 'the application of economic methodology to explain and evaluate the formation, structure, process and impact of law and legal institutions'. See Niva Elkin-Koren and Eli M Salzberger, *The Law and Economics of Intellectual Property in the Digital Age. The Limits of Analysis* (Routledge 2013) 9. For compilations of the economic literature on copyright, see, *inter alia*, Elkin-Koren and Salzberger; Ruth Towse, Christian Handke and Paul Stepan, 'The Economics of Copyright Law: A Stocktake of the Literature' (2008) 5 Review on Economic Research on Copyright Issues 1; Peter S Menell and Suzanne Scotchmer, 'Intellectual Property Law' in Mitchell A Polinsky and Steven Shavell (eds), *Handbook of Law and Economics*, vol 2 (Elsevier 2007).

First, the economic inquiry into copyright has majorly helped to provide solid *justification* to the need for such a protection.[674] The utilitarian approach rooted in the Anglo-Saxon copyright tradition offers a particularly convenient entry point for economists into the justification of copyright law: in fact, the purpose of maximizing the production and distribution of creative content for the society to enjoy[675] well accommodates the main focus of economics – as well as law and economics – schools of thought, that is the welfare maximization.[676] The economic reasoning supporting the justification for copyright protection heavily relies on *a contrario* arguments, emphasizing the inefficient outcomes of an hypothetical underprotection or even a complete absence of copyright, which are generally outlined along the utilitarian line of argument of a weaker incentive to create and, in turn, a lowering number of works available.[677] Yet, the *a contrario* economic reasoning has attracted criticisms mostly based on the lack of satisfactory empirical data about the benefits of

[674] The seminal article co-written by Landes and Posner in 1989 is first in line in representing this use of the economic analysis of copyright law. Even though, by far the most cited one, as the chapter shows, it is yet not the only one. See William M Landes and Richard A Posner, 'An Economic Analysis of Copyright Law' (1989) 18 The Journal of Legal Studies 344; see also Plant (n 40); Hurt and Schuchman (n 672); Stanley M Besen and Leo J Raskind, 'An Introduction to the Law and Economics of Intellectual Property' (1991) 5 Journal of Economic Perspectives 3, 16–17.

[675] The maximization of content available to society can be stated to be the red thread connecting the justification of the evolving copyright laws in the Anglo-Saxon worlds, from the Statute of Anne to the US Constitution art 1 section 8 clause 8 (so-called progress clause). See, respectively, Ronan Deazley, 'The Myth of Copyright at Common Law' (2003) 62 Cambridge Law Journal 106, 108; Maria Pollack, 'What Is Congress Supposed to Promote? Defining "Progress" in Article I, Section 8, Clause 8 of the United States Constitution, or Introducing the Progress Clause' (2001) 80 Nebraska Law Review 754; Stanley M Besen and Sheila Nataraj Kirby, 'Private Copying, Appropriability, and Optimal Copying Royalties' (1989) 32 The Journal of Law & Economics 255.

[676] Be it maximization of wealth, as set by the Chicago School of Economics, or social welfare maximization, under the modern law and economics movement inspired by Coase. For close analysis of both developments, see, inter alia, Elkin-Koren and Salzberger (n 673) 23 ff.; Spencer Banzhaf, 'The Chicago School of Welfare Economics' in Rose B Emmett (ed), *The Elgar Companion to the Chicago School of Economics* (Edward Elgar 2010) 59 ff.

[677] Plant (n 40) 183 ('Without copyright, publishers no doubt would not issue all of the books which copyright elicits, for competition would reduce the receipts from those which succeed. [...] The higher the profits from the copyright monopoly, the greater the willingness to publish the doubtful successes.'); Hurt and Schuchman (n 672) 424–425; Breyer (n 40) 291–294; Barry W Tyerman, 'The Economic Rationale for Copyright Protection for Published Books: A Reply to Professor Breyer' (1971) 21 Copyright Law Symposium 5–6; Landes and Posner, 'An Economic Analysis of Copyright Law' (n 674) 326.

copyright law.[678] In the wake of this critique, increasing research efforts have been dedicated to, on the one hand, the empirical study of copyright law,[679] and, on the other, to its possible alternatives exploring the realms of tax and tort law as well as schemes of compensations, subsidies, grants and prizes.[680]

The second main driver for economic analysis of copyright law represents a rather opposite approach to the legal institution, as it investigates the *limits* of copyright protection. As the case against an excessive protection persisted across the centuries, the economic analysis turned a useful analytical tool not only for justifying the need for copyright, but also to unveil the consequences of its overprotection.[681] Economic studies in this direction dedicate attention to the expected implications of the expansion of scope and duration of copyright entitlements, most often taking cue from real legislative reforms or proposals.[682] This specific economic focus on the boundaries of copyright has gathered momentum with the entry into the scene

[678] Breyer (n 40) 322 ('[…] the case for copyright […] rests not upon proven need, but rather upon uncertainty as to what would happen if protection were removed.'); See also Michele Boldrin and David Levine, 'What's Intellectual Property Good For?' (2013) 64 Revue économique 29; Elkin-Koren and Salzberger (n 673) 37; Sacha Wunsch-Vincent, 'The Economics of Copyright and the Internet' in Johannes M Bauer and Michael Latzer (eds), *Handbook on the Economics of the Internet* (Edward Elgar 2016) 236–240; Bechtold (n 23) 63–64.

[679] E.g. Raymond Shih Ray Ku, Jiayang Sun and Yiying Fan, 'Does Copyright Law Promote Creativity? An Empirical Analysis of Copyright's Bounty' (2009) 63 Vanderbilt Law Review; Martin Kretschmer, 'Does Copyright Law Matter? An Empirical Analysis of Creators' Earnings' (2012) SSRN Scholarly Paper <https://papers.ssrn.com/abstract=2063735>; Peter C DiCola, 'Money from Music: Survey Evidence on Musicians' Revenue and Lessons About Copyright Incentives' (2013) 55 Arizona Law Review 301 ff.; Janis Jefferies and Sarah Kember (eds), *Whose Book Is It Anyway? A View From Elsewhere on Publishing, Copyright and Creativity* (Open Book Publishers 2019).

[680] See, inter alia, Hurt and Schuchman (n 672) 426; Breyer (n 40) 287; see also, among the most recent studies, Paul E Geller, 'Dissolving Intellectual Property' in Ysolde Gendreau (ed), *Intellectual Property: Bridging Aesthetics and Economics* (Éditions Thémis 2006); João P Quintais, *Copyright in the Age of Online Access: Alternative Compensation Systems in EU Law* (Wolters Kluwer 2017).

[681] E.g. Landes and Posner, 'An Economic Analysis of Copyright Law' (n 674); Ian Kilbey, 'Copyright Duration? Too Long!' (2003) 25 European Intellectual Property Review 105 ff.

[682] For instance, the US Copyright Revision Bill of 1969 inspired Breyer (n 40); the Sonny Bono Copyright Term Extension Act of 1998 provided the input for William M Landes and Richard A Posner, 'Indefinitely Renewable Copyright' (2002) 154 University of Chicago John M. Olin Law & Economics Working Paper 49.

of the digital environment.[683] Under the pressure of right holders – distribution companies *in primis* –, the general regulatory response to the digital revolution has, in fact, been a stretching of copyright protection and the economic analysis has sharpened its role as reliable yardstick to assess the efficiency of the enhanced protection, both in a sector-specific way[684] and on a more general scale.[685]

The economic analysis of copyright law in Europe and, specifically, of EU copyright law counts on contributions serving both the outlined purposes.[686] Particularly fortunate in the EU scenario is the fact that this methodology aptly fits the supranational level, as it manages to abstract the analysis from national legal traditions.[687] Given the substantial amount of economic research carried out in the field and also from a European perspective, why is further economic analysis of EU copyright law needed?

[683] See, among others, Ruth Towse, *Creativity, Incentive and Reward. An Economic Analysis of Copyright and Culture in the Information Age* (Edward Elgar 2001); Raymond Shih Ray Ku, 'The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology' [2002] The University of Chicago Law Review 62; Wendy J Gordon and Richard Watt, *The Economics of Copyright: Developments in Research and Analysis* (Edward Elgar 2003); Mark A Lemley and Phil Weiser, 'Should Property or Liability Rules Govern Information?' (2007) 85 Texas Law Review; Christian Handke, Paul Stepan and Ruth Towse, 'Cultural Economics and the Internet' in Johannes M Bauer and Michael Latzer, *Handbook on the Economics of the Internet* (Edward Elgar 2016); Wunsch-Vincent (n 678).

[684] Wunsch-Vincent (n 678) 244 (highlighting the fact that in the economic analysis of copyright rules in the digital age '[t]here has been uneven industry coverage, with a great deal of attention to music, moderate attention to scientific publishing and film, and much less attention to news and book publishing and software.'); Eger and Scheufen (n 34) 54 ff.

[685] Michael M Reich, *Die Ökonomische Analyse Des Urheberrechts in Der Informationsgesellschaft* (Herbert Utz Verlag 2006).

[686] See, inter alia, Ruth Towse, *Creativity, Incentive and Reward* (Edward Elgar Publishing 2001); Kamiel J Koelman, 'Copyright Law and Economics in the EU Copyright Directive: Is the Droit d'Auteur Passé?' (2004) 35 International Review of Intellectual Property and Competition Law 603; Giovanni Ramello, 'Intellectual Property, Social Justice and Economic Efficiency: Insights from Law and Economics' in Anne Flanagan and Maria Lillà Montagnani (eds), *Intellectual Property Law. Economic and Social Justice Perspectives* (Edward Elgar 2010); Joost Poort, 'Borderlines of Copyright Protection: An Economic Analysis' in Bernt Hugenholtz (ed), *Copyright Reconstructed. Rethinking Copyright's Economic Rights in a Time of Highly Dynamic Technological and Economic Change* (Wolters Kluwer 2018).

[687] Elkin-Koren and Salzberger (n 673) 21.

The main reason lies in the fact that the multi-functional nature of EU copyright law has been vastly overlooked by its economic analysis.[688] Such inquiry tends to embrace the utilitarian justification of copyright and detach itself from the specific objectives stated in the legislation. As a result, aspects related to the findings of the functional analysis carried out in the previous Chapters are not reflected in the economic literature on EU copyright law: among others, the intent not to leave the remuneration rise unbridled, the economic relevance of cultural and educational uses, the economic implications of the 'fair balance of rights'.

In this light, the economic analysis shows an untapped potential, that is to pave an analytical way to connect the functions and the effects of EU copyright law.[689] The step that this methodology enables to take is twofold: it holds the analysis tight to what the legislator promises to do and brings it further into the field of verification, showing the economic outcomes of the legal application.

The economic analysis of law embeds, in fact, a consequence-sensitive approach, which not only can provide insightful, realistic advice for the policy maker,[690] but also well matches with the background set up by the functions of EU copyright rules and their related interpretation. By closely focusing on the actors involved and the varying outcomes of copyright

[688] Not without exceptions, though; see Ramello (n 686); Federico Morando, 'Copyright Default Rule: Reconciling Efficiency and Fairness' in Anne Flanagan and Maria Lillà Montagnani (eds), *Intellectual Property Law. Economic and Social Justice Perspectives* (Edward Elgar 2010); Bechtold (n 23).

[689] See, in this regard, Bechtold (n 23) 62 ('[...] the influence of economics has been to encourage legal scholars, courts, and enforcement agencies to reconnect the scope of the law with its underlying economic purpose, to synchronize legal and economic concepts, and to take a less broad-brush approach to designing legal systems.').

[690] Elkin-Koren and Salzberger (n 673) 19; see also Besen and Raskind (n 674) 4 ('Although economists have written on topics of intellectual property for a long time, the impact of economics on public policy in this area has been slight, especially as compared to the influence of professional writings in areas such as antitrust and taxation. We believe that too few of the profession's resources have been devoted to these issues and that, of those resources that have been employed, too few have been devoted to empirical analyses.').

application,[691] the economic analysis pays great attention to the differences between different categories of copyright holders[692] as well as towards the role played by users,[693] thus providing important insights on how the stated objectives of EU copyright law are (or are not) fulfilled in the real world. The twofold focus on functions and effects of EU copyright law relies on a core characteristic of the identified functions, that is their predominant economic nature, which allows to synthesize the multi-functional approach by describing it as the EU legislator's attempt to solve various and ever evolving market failures.

4.1.1. The economic nature of the EU copyright functions

The two macro-categories of functions of EU copyright law – i.e. the functions of copyright harmonization and of copyright protection – share a fundamental feature, that is the considerable economic orientation of all objectives encompassed.[694] The economic dimension of the EU functions of copyright harmonization is rather intuitive, as they are tightly bound to the establishment and promotion of the internal market, thus embracing a necessarily economic language to define the specific purposes: lowering the transaction costs for cross-

[691] See the separated analyses of authors and producers in Plant (n 40) 185–186; Tyerman (n 677) 31; Hurt and Schuchman (n 672) 425–426; Ku (n 683); also Landes and Posner, who first set the premise that a joint analysis of the two categories would have been beneficial to their study, eventually highlighted relevant differences. See Landes and Posner, 'An Economic Analysis of Copyright Law' (n 674) 327, 341.
[692] *Inter alia*, Ruth Towse, 'Economics of Performers' Rights' in Richard Watt (ed), *Handbook on the Economics of Copyright. A Guide for Students and Teachers* (Edward Elgar 2014) (on performers); Thomas Eger and Marc Scheufen, *The Economics of Open Access. On the Future of Academic Publishing* (Edward Elgar 2018) 16–22 (on scientific authors and publishers).
[693] Niva Elkin-Koren, 'Copyright in a Digital Ecosystem: A User Rights Approach' in Ruth Okediji, *Copyright Law in an Age of Limitations and Exceptions* (Cambridge University Press 2017); Wunsch-Vincent (n 678) 230; Mazziotti (n 334).
[694] See also Elkin-Koren and Salzberger (n 673) 52–53.

border transactions, maximizing the number of such exchanges, boosting the global competitiveness of the EU.[695]

The category of EU functions of copyright protection appears more multi-faceted. At a first sight, the protection of the copyright holder, the facilitation of the dissemination of works, the promotion of culture and technology may seem to relate less to the economic dimension *stricto sensu* and, rather, more to a social and cultural nature of copyright.[696] Nevertheless, the close study of these objectives has unveiled a prominent utilitarian approach, which the EU legislator unravels by emphasizing the social benefit of copyright protection and its role in incentivizing the production and distribution of creative content. This approach leaves the continental legacy of *ex post* justificatory and teleological arguments not completely absent, yet more rarely in the foreground.[697] Rather than claiming the rising dominance and subsequent overshadowing of one or the other copyright tradition, it is crucial to observe that the Anglo-Saxon and continental copyright justifications share an economic component, which consolidates and strengthens the need for protection,[698] that is *profit* and, in particular, *revenue*. In fact, under the former, copyright is deemed necessary to secure an economic profit that can prove sufficient to incentivize the creation of works; whilst, following the latter, profit serves as just reward to the creator. As argued by Koelman, the increasing relevance of this

[695] See Chapter 2 Section 2.4. In this light, the words by Charlie McCreevy, European Commissioner for the Internal Market, are particularly insightful: 'The protection of intellectual and industrial property – copyrights, patents, trademarks or designs – is at the heart of a knowledge-based economy and central to improving Europe's competitiveness. This is a priority for reform: *grounded on sound economics, not just legal concepts,* and concentrating on solutions that foster innovation and investment in real life.' European Commission, 'European Commission launches reflection on a Digital Single Market for Creative Content Online' (Press Release) (n 328) (emphasis added).

[696] For a detailed overview of the emerging theories of copyright that make democratic and cultural values their philosophical basis, see Oren Bracha and Talha Syed, 'Beyond Efficiency: Consequence-Sensitive Theories of Copyright' (2014) 29 Berkeley Technology Law Journal 249–258.

[697] See the protection of the author's reputation in the CJEU case law, as analyzed in Chapter 3 Section 3.3.2.

[698] Elkin-Koren and Salzberger (n 673) 53.

economic component and related arguments is the driving force behind the coming together of the two copyright traditions, at EU level as well as beyond.[699]

The focus on revenue is reflected in the functions of EU copyright protection in various ways, from the centrality gained by the remunerative function in the interpretation of the notion of 'high level of protection'[700] to the emphasis on the potential of digital technologies in widening the dissemination of works through licensing,[701] up to the explicit recognition of the need for an 'incentive mechanism' behind the promotion of culture and technological progress, leading to forms of compensation as legal options.[702] In this light, observing the prominent economic nature of the functions of EU copyright law means moving a first step towards a consequence-sensitive assessment, where great attention needs to be paid to the allocation of copyright revenue.

4.1.2. The constant need for legislative intervention

It might be argued that the intervention by the EU legislator has been constrained to the strictly necessary minimum each time a Directive has been proposed and enacted. Yet, it cannot be ignored that the number of harmonizing interventions during the past three decades is rather high and the related CJEU case law remarkably vast. As highlighted by Bechtold, the story of copyright regulation can be generally described as a long chain of regulatory reactions not only to technological changes, but also to market failures and developments in

[699] Koelman (n 686) 603 ('Several commentators have observed that the differences in rationales between the U.S. and European copyright systems are fading. One reason for this tendency is that economic arguments are gaining weight in European copyright doctrine. Particularly, EU Directives on matters of copyright law indicate that economic insights are becoming more important in Europe.').
[700] See Chapter 2 Section 2.5.1 and Chapter 3 Section 3.3.1.
[701] See Chapter 2 Section 2.5.2.
[702] See *ibid* and Chapter 2 Secton 2.5.3.

the economic study of their possible solutions.[703] The growing body of EU copyright rules hints, in fact, at a persistent presence of old and new market failures and to the attempt by the legislator to tackle and prevent them. Having highlighted the predominant economic nature of the expressed functions, it should not come as a surprise that both the EU legislator and CJEU pay great attention to market failures and economic imbalances within the copyright scene. In particular, three failures are addressed with recurring and strong emphasis.

First, the legislator intends to solve is the fragmentation across the Union, both in terms of fragmented national copyright laws and of market partitioning. The main distortive effects of fragmentation lie in the higher transaction costs and in the legal uncertainty, which jeopardize the protection of the interests of all actors involved.[704] Second, a core concern for the EU economy is represented by the considerable imbalances in the investments flowing into the creative sectors across Member States and, even more significantly, between the EU and third countries.[705] More precisely, the EU legislator acknowledges the presence of a 'gap to be filled' between the EU and US markets of creative content.[706] Specific measures have been undertaken to tackle this specific issue, among which the harmonization of the so-called resale right (*droit de suite*) as it resulted being a leading factor in the choice of location for the sale of original artworks.[707]

The third main market failure accounted for by the EU legislator is the inadequate amount of revenue secured by copyright holders, especially in scenarios where they are confronted by a

[703] Bechtold (n 23) 63.
[704] *ibid* recitals 4, 9, 15, 22, 54; European Commission, Green Paper 1995 (n 270); European Commission, Green Paper 2008 (n 270) 4.
[705] E.g. Database Directive recital 11; InfoSoc Directive recitals 2, 4.
[706] See, *inter alia*, European Commission, 'First Evaluation of Directive 96/9/EC' (Staff Working Document) (n 365) 7.
[707] European Commission, 'Impact Assessment on the Legal and Economic Situation of Performers and Record Producers' (Staff Working Document) (n 345) 8.

significant risk of unauthorized uses.[708] The recognition and the remarkable attention devoted to these market failures adds to the need for an economic analysis of EU copyright law, which reflects both what the legislator intends to achieve and the most likely outcome of the provisions enacted.

4.2. The quest for the *optimum* of copyright protection

The common features emerging from the expressed functions of EU copyright law – i.e. their prominent economic nature and the targeted intervention on specific market failures – lead to embrace the economic analysis to verify the presence of implicit goals in the legislation. As anticipated above, the economic analysis of copyright law deals with the justification and the limits of this particular form of protection. In a nutshell, what lies at its core is the determination of the *optimum* of copyright protection. This usually refers to three specific dimensions, i.e. its duration, scope and so-called 'breadth',[709] which respectively indicate the length of the term of protection, the degree of originality required to protect a created work and the range of entitlements granted to the copyright holder – hence, to the range of uses for which it is necessary to seek authorization.

Assessing the adequacy of any of these dimensions of copyright protection necessarily requires a predetermined normative criterion, which serves as a welfare standard. The crucial importance of this passage can be illustrated by an example: be the standard of reference the

[708] See, *inter alia*, Computer Program Directive recital 2; Database Directive recital 11, Term Directive recital 6; European Commission, 'Impact Assessment on the Legal and Economic Situation of Performers and Record Producers' (Staff Working Document) (n 345) 13, 18.
[709] Hal Varian, 'Copying and Copyright' (2005) 19 Journal of Economic Perspectives 121, 124–125; Thomas Eger, 'Copyright under Fire: Some Comments from a Law and Economics Perspective on the Heated Debate on Copyright Law' (2015) 1 Hamburg Law Review 25, 36–38.

maximization of the author's revenue, any extension of the term of copyright protection results 'good'; if, on the contrary, the welfare criterion is set in the maximization of the number of works available to the society, the longer duration of exclusive rights turns inefficient. In order to carry out an economic analysis of the EU copyright legal framework, it is therefore crucial to first identify the welfare standard that most faithfully reflects the intentions of the EU legislator.

4.2.1. Setting the welfare standard

The 'traditional' economic analysis of copyright law stems from a neoclassical economic approach, which sets the 'social welfare' at the center of the discourse.[710] Pillar of this approach is the so-called incentive mechanism, which is fundamentally based on two main assumptions.

The first assumption is that society needs and desires creative works. From poems to newspaper articles, from theater plays to scientific publications, almost every activity of the individuals in the society relies on the expressions of creative ideas and such creative works do not exist in nature.[711] This assumption fundamentally binds the economic assessment of copyright protection to the ultimate goal of enhancing the benefits not for one or certain individuals, but for society as a whole. More precisely, what this first assumption deems

[710] Poort (n 686) 288 ('The optimum scope of copyright in the economic literature follows from the optimum long-term effect it has on total social welfare, taking account of the dynamic effects of copyright on the creation and quality of works, and the incentives it provides for their active exploitation.'); Landes and Posner, 'An Economic Analysis of Copyright Law' (n 674); William M Landes and Richard A Posner, *The Economic Structure of Intellectual Property Law* (Harvard University Press 2003).
[711] See, inter alia, Elkin-Koren and Salzberger (n 673) 57–59; Eger (n 709) 28; Lemley (n 212) 129.

essential are all works created independently, the fruits of the creative expression of individuals free from patronage constraints.[712]

This leads to the second assumption, according to which human desires are mostly profit-oriented.[713] The creation of works of intellect entails some costs, first among which time and labor, and if such production costs are not recouped and topped by a margin of profit, individuals will not create.[714] By the same token, with no foreseeable profit, the producer will hardly find the motivation to invest in setting distribution channels to distribute the works to the public.[715] What it is claimed to be necessary is a profit higher than the fixed costs of production and even higher than the so-called persuasion cost, thus meaning an extra-profit.[716]

From these two assumptions stems the so-called incentive mechanism (or incentive theory), the leading economic justification of copyright, epitomized by the approach of the Anglo-Saxon copyright tradition and embraced also by the EU legislator.[717] The highly pragmatic and consequence-sensitive nature of such theory manifests itself in its core logic: without

[712] The roots of this argument are dated back in the 19th century, when the first copyright legislations explicitly rejected patronage as viable alternative to copyright to finance literary and artistic works. See, I this regard, Macaulay's interventions in the House of Commons at the second reading of Serjeant Talfourd's Copyright Bill in 1841, available at Bently and Kretschmer (n 35) ("It is desirable that we should have a supply of good books; we cannot have such a supply unless men of letters are liberally remunerated. […] I can conceive no system more fatal to the integrity and independence of literary men, than one under which they should be taught to look for their daily bread to the favor of ministers and noble.").
[713] Plant (n 40) 183 ; Hurt and Schuchman (n 672) 425; Besen and Raskind (n 674) 5.
[714] Wunsch-Vincent (n 678) 230; Elkin-Koren and Salzberger (n 673) 65–71.
[715] The marginal profits of the producer need to be higher not only than the costs of reproduction and distribution, but also covering the so-called fixed costs of expression, i.e. the payment due to the creator or creators. See Landes and Posner, 'An Economic Analysis of Copyright Law' (n 674) 327; Ku (n 683) 299.
[716] As explained by Breyer, providing for a reward equal to the persuasion cost would not have any impact to the reality, since the author who sees the persuasion costs not fully covered will not be satisfied and will not create. Breyer (n 40) 285 ('It is unlikely that "fruit" or "reward" is meant to refer to the amount of money needed to persuade a man to write a book. One has no need for a copyright law in order to guarantee the payment of such a sum, for, in the absence of slavery, an author will not write unless he is paid his "persuasion" cost.').
[717] See *supra* Section 4.1.1.

copyright, no profit would be secured by the creators and distributors, thus meaning that original creative works would not be produced and this lowers the well-being of the society.[718]

Setting the 'good of the whole society' as the welfare standard leads the economic analysis of copyright to discern two fundamental desired outcomes of the law, represented by the maximization of the production and of the dissemination of creative works.[719] Both these outcomes find correspondence in the analysis of the functions of copyright protection stated in the EU legislation, thus consolidating the presence of both these purposes, yet not providing any additional implicit objective. It is with the full deployment of the economic analysis that further elements of relevance arise, stemming from the specific justification of the form and limits of copyright protection.

4.2.2. Giving shape to the copyright incentive

The form that the economic analysis indicates as most convenient for such incentive is that of a limited property rule. Both qualifying terms – 'limited' and 'property' – open wide room for insights and debate among legal and economic experts.[720] From a strictly economic perspective, the focus lies on the *effects* of such rule. First and foremost, copyright entitles the

[718] Landes and Posner, 'An Economic Analysis of Copyright Law' (n 674) 341.
[719] Elkin-Koren (n 693) 57 ff.
[720] Solely on the property nature of copyright, the literature presents a remarkably wide spectrum of contributions, ranging from applications of Calabresi and Melamed's theory of liability rules, to detailed studies on the meaning of property within the copyright paradigm. See, *inter alia*, Guido Calabresi and Douglas A Melamed, 'Property Rules, Liability Rules and Inalienability: One View of the Cathedral' (1972) 85 Harvard Law Review 1089; Douglas Lichtman and William M Landes, 'Indirect Liability for Copyright Infringement: An Economic Perspective' [2003] Harvard Journal of Law & Technology 395; Antonio Nicita and Giovanni Ramello, 'Property, Liability and Market Power: The Antitrust Side of Copyright' (2007) 3 Review of Law & Economics; Julie Cohen, 'Copyright as Property in the Post-Industrial Economy: A Research Agenda' (2011) Georgetown Public Law and Legal Teory Research Paper 11–25; John Gilchrist and Brian Fitzgerald, *Copyright, Property and the Social Contract: The Reconceptualisation of Copyright* (Springer 2018); Sganga, *Propertizing European Copyright* (n 26).

right holder to enjoy an exclusivity in the exploitation of the work, hence an insulation from price competition, which enables him or her to raise an extra-profit by selling or licensing the work at supra-competitive prices.[721] By this token, copyright does not only secure a profit but also attaches a so-called artificial excludability on the created content, empowering the right holder to prevent third parties from accessing and using the work.[722]

The economic explanation of the necessity for such a property rule for copyright protection has to do, on the one side, with the underlying incentive theory (society needs creative works, extra-profit incentivizes their production) and, on the other side, with the classification of intellectual works as public goods.[723] The subject matter of copyright protection are, in fact, expressions of ideas, not the physical mediums embedding them.[724] Being intangible, expressions of ideas can be deemed public goods, as they feature low rivalry and are hard to exclude. An intellectual work (the expression, not the physical object – e.g. the poem itself, not the book) can be used by multiple individuals without deteriorating, hence there is little or no costs whatsoever any time a newcomer starts enjoying the work.[725] On the contrary, it

[721] Lemley (n 212) 131; Glynn SJr Lunney, 'Reexamining Copyright's Incentives-Access Paradigm' (1996) 49 Vanderbilt Law Review 483 ff., 489; William W Fisher, 'Reconstructing the Fair Use Doctrine' (1988) 101 Harvard Law Review 1659, 1700 ff.; Breyer (n 40).

[722] *Inter alia*, Oren Bracha and Talha Syed, 'Beyond the Incentive-Access Paradigm - Product Differentiation & Copyright Revisited' 92 Texas Law Review 81, 1850 ff.

[723] In the literature, the term 'public good' is at times replaced by the notion of quasi-public goods or collaborative consumption goods, respectively emphasizing the role of the State in their allocation and the common mode of consumption in society. See, inter alia, Landes and Posner, 'An Economic Analysis of Copyright Law' (n 674) 326; Landes and Posner, *The Economic Structure of Intellectual Property Law* (n 710) 14; Paul A Samuelson, 'The Pure Theory of Public Expenditure' (1954) 36 The Review of Economics and Statistics 387; Eger and Scheufen (n 34) 38; Eger (n 709) 27.

[724] *ibid*. Interesting to note is that EU copyright law presents an exception, that is the protection of physical original artworks in the Resale Directive.

[725] Lemley (n 212) 143 ('[…] [I]nformation cannot be depleted […], its consumption is non-rivalrous. It simply cannot be "used up". Indeed, copying information actually multiplies that available resources, not only by making a new physical copy but by spreading the idea and therefore permitting others to use and enjoy is.'); see also Breyer (n 40) 289 ('Since ideas are infinitely divisible, property rights are not needed to prevent congestion, interference of strife.'); Robert P Merges, Peter Seth Menell and Mark A Lemley, *Intellectual Property in the New Technological Age* (Aspen Publishers 2003) 15–16; Harold Demsetz, 'The Private Production of Public Goods' (1970) 13 Journal of Law and Economics 293, 295.

is highly expensive to prohibit individuals from disposing of it.[726] Despite the fact that the low rivalry of intellectual works has been called under question,[727] the qualification of intellectual works as public goods still proves solid in the current digital era, as most of the creative works can *de facto* be enjoyed by many, maintaining – if not exacerbating – their value.[728]

The classification of intellectual creations under the notion of public goods helps streamlining the economic approach to copyright law: in an ideal world, where intellectual works did not require incentives to be created, the absence of exclusive rights would be the most efficient legal arrangement, as it would generate perfect competition and an abundance of creative content available in society, thus maximizing the social welfare.[729]

[726] Eger and Scheufen (n 34) 38; engaging with the specific problem of high costs of exclusion, in the forms of monitoring, identification of infringing uses and enforcement is the literature on the collective management of copyright, which sees, among its main contributors, Daniel Gervais, *Collective Management of Copyright and Related Rights* (Wolters Kluwer 2015); Maria Mercedes Frabboni, 'From Copyright Collectives to Exclusive "Clubs": The Changing Faces of Music Rights Administration in Europe' (2008) 19 Entertainment Law Review 100; Marco Ricolfi, 'Individual and Collective Management of Copyright in a Digital Environment' in Paul Torremans (ed), *Copyright Law. A Handbook of Contemporary Research* (Edward Elgar 2007); Christian Handke and Ruth Towse, 'Economics of Copyright Collecting Societies' (2007) 38 International Review of Intellectual Property and Competition Law 937; Ariel Katz, 'The Potential Demise of Another Natural Monopoly: Rethinking the Collective Administration of Performing Rights' (2005) 1 Journal of Competition Law and Economics.

[727] The criticisms pivoting on the detection of a certain degree of rivalry in the consumption of intellectual works. Exemplary of this minority view is the evolving reasoning by Landes and Posner, who originally theorized the efficiency of a limited property rule arguing that '[t]here is no congestion externality in the case of information, including the text of a book, and hence no benefit (yet potentially substantial costs) in perpetuating ownership beyond the period necessary to enable the author or publisher to recoup the fixed costs of creating the work.' Yet, in a subsequent contribution, they argued in favor of a potentially unlimited copyright assuming that creative works, although intangible, can be subject to congestion and overuse, due to technological or pecuniary externalities, which may lead to their depreciation and loss of value. See, respectively, Landes and Posner, 'An Economic Analysis of Copyright Law' (n 674) 362; Landes and Posner, 'Indefinitely Renewable Copyright' (n 682) 11–15.

[728] The digital environment does not trigger the phenomenon of so-called 'depreciation by over-sharing', around which orbits the critique against the public good definition of creative works, but rather magnifies the value added by the visibility and the market preference over a work. See *sub* Section 4.2.4.

[729] Lemley famously described such scenario as no 'tragedy', but rather a 'comedy, in which everyone benefits'. See Lemley (n 212) 143; Demsetz (n 725) 295.

Nevertheless, a second core problem adds to the need for an *ex ante* incentive.[730] From the widespread circulation of works in society stems the risk of free riding, that is the possibility that someone will profit from the work, without having borne any – or having borne significantly lower – costs for its production.[731] This not only poses an interesting question of public morality (to what extent is copying accepted in society?), but entails a fundamental economic consequence, that is the decline of the price of the work. In fact, who copies the work without seeking authorization faces no fixed cost of expression and can secure a substantial profit by offering a lower price than the original creator's supplied work.[732] It is important to note that the core of the problem is not the emergence of market competition *per se*,[733] rather its effect of jeopardizing the profits of the original creators and the subsequent rise of a disincentive.[734]

In this vein, the choice of a property rule as solution to both the incentive and free riding problems serves a twofold need: on the one side, to *set up a solid, profit-oriented and decentralized*

[730] All public goods (the typical examples being public infrastructures and national security) are characterized by the incentive problem, due to the high costs for their production and equally high risk not to recoup or profit from them. See Samuelson (n 723).

[731] Lemley (n 212) 129 ("[…] absent of intellectual property protection, most [people] would prefer to copy rather than create ideas, and inefficiently few ideas would be created."). This is an example of the so-called prisoner's dilemma, according to which, under the veil of ignorance, the preference goes to copying rather than creating ex novo. See Wendy J Gordon, 'Asymmetric Market Failure and Prisoner's Dilemma in Intellectual Property' (1992) 17 University of Dayton Law Review 853 ff.

[732] Landes and Posner, 'An Economic Analysis of Copyright Law' (n 674) 326.

[733] Lemley (n 212) 144 ('Economists have a term for markets in which different providers keep selling goods with less and less value until the point is reached where it would cost more to produce a good than the public is willing to pay for it. We call such a market "perfectly competitive", and we have thought for at least three centuries, since Adam Smith, that it is a good thing.'); In the literature, arguments have been raised in support of an opening towards more competition in the distribution of creative work, e.g. the so-called 'lead time factor' argument, which suggests that the profits raised by the original creator during the period of time when he or she inevitable faces no competition may suffice to cover the fixed costs of production and incentivize the creation of the work. See, inter alia, Breyer (n 40).

[734] This fundamental passage can be discerned by the a contrario reasoning often used to justify the need for copyright protection, according to which if no such a protection was granted, the competition and the creator's lower profits would make the incentive to create fade away, thus leading to underproduction of creative goods, which is detrimental to society. See Plant (n 40); Hurt and Schuchman (n 672) 424–425; Breyer (n 40) 291–294; Tyerman (n 677) 5–6; Landes and Posner, 'An Economic Analysis of Copyright Law' (n 674) 326.

incentive mechanism avoiding systems of State subsidies and patronage to solve the problem of creation typical of public goods;[735] on the other side, to *promote an efficient allocation of resources* majorly relying on the market.[736]

Copyright responds to both these needs by way of a legal fiction – i.e. the exclusive rights – that makes content 'artificially excludable', thus meaning available upon payment by the user. With the users internalizing the costs of expression and production, copyrighted works are moved away from the category of public goods and turned into toll (or club) goods.[737] This represents an act of forcing low rival goods out from their efficient allocation into a condition of high excludability, which, similarly to the opposite shift of private goods into a regime of low excludability,[738] entails inefficiencies.[739] This shift, in fact, proves an efficient regulatory response only if it respects the limits dictated by the needs to secure an incentive and prohibit third parties from generating profits from the unauthorized use of someone else's work.[740] This, as explained as follows, fundamentally draws boundaries to the scope of copyright protection.

[735] Tyerman (n 677) 20–23; Samuelson (n 723).
[736] Landes and Posner, 'An Economic Analysis of Copyright Law' (n 674) 325; Landes and Posner, 'Indefinitely Renewable Copyright' (n 682) 12; On the reliance of the copyright paradigm on the market logic, see Jessica Litman, *Digital Copyright* (Prometheus Books 2001) 111–149; Richard Watt, 'Licensing of Copyright Works in a Bargaining Model' in Richard Watt (ed), *Handbook on the Economics of Copyright: A Guide for Students and Teachers* (Edward Elgar 2014); Lemley (n 212) 133.
[737] See also Handke, Stepan and Towse (n 683) 147–148; Samuelson (n 723) 387–389.
[738] See also Garrett Hardin, 'The Tragedy of the Commons' (1968) 162 Science 6.
[739] On the same point, see Kevin Emerson Collins, 'Patent Failure: A Tragedy of Property' <https://ssrn.com/abstract=1156434> accessed 10 October 2019.
[740] Landes and Posner, 'An Economic Analysis of Copyright Law' (n 674) 346.

4.2.3. The limits of copyright: overprotection and underprotection

As illustrated above, the use of intellectual works by many individuals does not engender costs.[741] On the contrary, the economic analysis of copyright unveils how the property rule itself carries costs: the artificial exclusion operated on intellectual works by way of copyright aims to maximize the creation and dissemination of content, yet, at the same time, excludes from access those who are not willing or cannot afford to pay the price charged by the copyright holder.[742] This represents the underlying 'incentive-access' paradox of copyright protection, according to which the higher the protection of works, the stronger the incentive to produce them, the harder for the public to access them.[743]

Hence, the emerging costs are social costs:[744] in particular, costs of access, which are directly borne by consumers and mainly include the tracing costs to locate the copyright holder and transaction costs to collect authorization for use,[745] and deadweight losses, which represent the segments of the society excluded from accessing the works.[746] Both these typologies of social costs are in open contrast with the first assumption of its justification and with the

[741] *ibid* 362.
[742] See Lemley (n 212) 131; Towse, Handke and Stepan (n 673).
[743] Landes and Posner, 'An Economic Analysis of Copyright Law' (n 674); Lunney (n 721); Neil W Netanel, *Copyright's Paradox* (Oxford University Press 2008).
[744] The notion of social cost is famously associated with Coase's theory, which limits the role of the law to reducing transaction costs between market players, who – with perfect information and perfect rationality – will bargain and so achieve efficiency. See Ronald H Coase, 'The Problem of Social Cost' (1960) 3 Journal of Law and Economics; on social costs in the copyright paradigm, see also Poort (n 686) 292–293; Wunsch-Vincent (n 678) 232–233; Birgitte Andersen, 'If "Intellectual Property Rights" Is the Answer, What Is the Question? Revisiting the Patent Controversies' (2004) 13 Economics of Innovation and New Technology 417, 426 ff.; Richard Watt, *Copyright and Economic Theory: Friends Or Foes?* (Edward Elgar 2000) 116 ff.
[745] Landes and Posner, 'An Economic Analysis of Copyright Law' (n 674) 325; Landes and Posner, 'Indefinitely Renewable Copyright' (n 682) 5–8; Besen and Raskind (n 674) 5; Poort (n 686) 292–293.
[746] A deadweight loss is commonly defined as "a cost to society in terms of welfare without an offsetting gain to anybody". See Wunsch-Vincent (n 678) 243; Stewart Sterk, 'Rhetoric and Reality in Copyright Law' (1996) 94 Michigan Law Review 1197 ff., 1197.

welfare standard looking at the 'good of the whole society',[747] thus making it necessary to limit copyright protection to preserve its efficiency.[748]

The boundaries of copyright protection, as drawn by the economic analysis, are two mirroring benchmarks: on one side, copyright underprotection is inefficient, as it fails to grant a proper incentive to creation, hence leads to underproduction; on the other side, copyright overprotection is equally inefficient, as generates high social costs and, in turn, underconsumption of intellectual works, both these scenarios being to the detriment of the whole society.

With specific regard to copyright overprotection, an additional observation of fundamental relevance is that creators are themselves users of existing creative content. By taking inspiration, borrowing and transforming existing works, any author is subjected to the costs of access. The costs generated by copyright, if too high, may discourage creators to produce works, thus rebutting the argument 'the higher copyright protection, the higher incentives for creation' and resulting in both underuse and underproduction of works.[749] In other words,

[747] The first assumption of the economic justification of copyright being, as analyzed above, the society's need for intellectual and cultural works. See on this point also Lemley (n 7) 142.

[748] *ibid* 137; Richard Watt, 'The Past and the Future of the Economics of Copyright' (2004) 1 Review of Economic Research on Copyright Issues 151, 157; apparently contrary to the idea of limiting copyright protection, yet shedding light on crucial aspects of the efficient calibration of copyright's incentive and effects (e.g. the introduction of formalities) is the seminal contribution by Landes and Posner, 'Indefinitely Renewable Copyright' (n 682).

[749] See Ku (n 683) 280; Landes and Posner, 'An Economic Analysis of Copyright Law' (n 674) 332, 335 ("The less extensive copyright protection is, the more an author, composer, or other creator can borrow from previous works without infringing copyright and the lower, therefore, the costs of creating a new work. Of course, even if copyright protection effectively preventes all unauthorized copying from a copyrighted work, authors would still copy. […] The effect would be to raise the cost of creating new works – the cost of expression, broadly defined – and thus, paradoxically, perhaps lower the number of works created.").

stretching copyright protection beyond its *optimum* would lead to an excessive burden for creators, thus negatively influencing the incentive that it aims to achieve.[750]

The trade-off originating at the core of the economic analysis of copyright is, therefore, between a private incentive to create and the social costs to access or, otherwise said, between the underproduction and the underuse of creative works.[751] It is against this background that finding the *optimum* of copyright protection becomes a critical task for the legislator.

Determining the optimal level of copyright protection is far from an easy operation, as costs and benefits involved dramatically vary across the creative sectors and are hard to crystalize and aggregate.[752] The economic analysis sets the main equation, which has to be fulfilled: the social benefits of copyright need to be higher than its social costs.[753] As seen above, the former refer to the maximization of both the production and dissemination of creative works,[754] while the latter are mainly represented by costs of access and deadweight losses.[755]

[750] Elkin-Koren and Salzberger (n 673) 49 ("[…] as new creations in most cases rely on previous ones, if the latter are kept under private property and are too costly, then the likelihood of new creations decreases."). Landes and Posner, 'An Economic Analysis of Copyright Law' (n 674) 335, 343 ('[…] it would increase the incentive to create more works […] but would not be worth the costs in reduced welfare per work, the higher costs of expression [for works that would have been created anyway at a lower value for [the optimal level of protection]], and the greater administrative and enforcement costs.').

[751] Landes and Posner, 'An Economic Analysis of Copyright Law' (n 674) 361; Wunsch-Vincent (n 678) 233.

[752] Landes and Posner, 'An Economic Analysis of Copyright Law' (n 674) 326–328; emphasizing the impossibility to set objective measurements of the optimal level of copyright protection, Molly van Houweling, 'Distributive Values in Copyright' (2005) 83 Texas Law Review 1536, 1537 ('[...] the expense of building on the works of others is justified in copyright theory by the hope that the burden copyright imposes on creativity is outweighed by its benefits.').

[753] Landes and Posner, 'An Economic Analysis of Copyright Law' (n 674) 69, 326 ('A fundamental task of copyright law [is] to strike the optimal balance between the effect of copyright protection in encouraging the creation of new works by reducing copying and its effect in discouraging the creation of new works by raising the cost of creating them.').

[754] Elkin-Koren and Salzberger (n 673) 48 ("[…] maximizing their usage enhances collective utility and wealth").

[755] Landes and Posner, 'An Economic Analysis of Copyright Law' (n 674) 341. It is to note that the notion of producer surplus is intended broadly as surplus of the right holder, to use a more consistent terminology with the EU legislator's wording.

This equation indicates that the social benefits can outweigh the private benefits of copyright protection. Providing strong evidence to this argument is the demonstration of the inefficiency of copyright underprotection and copyright overprotection. Underlying both scenarios is, in fact, a common rationale, fundamentally aimed at avoiding the scarcity of creative content in society, be it in terms of underproduction or underuse. The divide between these two problematic scenarios lies in the difference between the two components of the 'social benefits' of copyright, i.e. the so-called consumer surplus and the right holder surplus. Copyright underprotection is not efficient *because* it leads to lower profits of the right holder, hence to a lower incentive to create and, in turn, to less works accessible to the public. Copyright overprotection is not efficient *even in case* it leads to an increase in the profits of the right holder, since it lowers the consumer surplus by rising the costs of access to works. It can be therefore concluded that the social benefits, which copyright protection aims to maximize, predominantly consist in the ability of the public to access a flourishing amount of creative works, while the private benefits enjoyed by the copyright holder are adjunct and necessarily aligned with the pursuit of social welfare.[756]

Not only interesting and timely appropriate, but also highly insightful from the viewpoint of the social benefits of copyright protection is the analysis of the impact of the digital revolution on the economic explanation of copyright law. In fact, the digital dimension, which, as emerged from the functional analysis, has increasingly been in the focus of the EU legislator, profoundly changes the costs and the benefits stemming from the creative markets, reaching the fundamental question as to whether the social benefits of a mass expansion of the

[756] Supporting this argument within the IP law sphere is the analysis of patent law by Collins (n 739) 18 arguing that the property right is '(...) designed to maximize personal welfare into greater alignment with the decisions that maximize social welfare.'

dissemination of intellectual works should or should not correspond to an enhancement of the protection of private surplus.

4.2.4. The 'digital trade-off'

The advent of the Internet has given a revolutionary shake to the copyright world. Finding its origins in the aftermath of the invention of the letterpress printing and stumbling over landmark decisions and major reforms when new technologies have entered the stage,[757] copyright has an embedded tight connection with technological progress.[758] The advent of digital technologies and the Internet has had a dramatic impact on the creation and dissemination of creative content, hence on the benefits, costs and the own enforceability of copyright systems.[759] The focus of this analysis lies on the effects of the change of medium of circulation of content, thus referring to the broad phenomenon of shaping creative works in computer-supported files.[760] For this reason, the terms 'digitization' and 'digital transformation' are used interchangeably, jointly referring to the creation of digital works and the transformation of analogue works into digital formats.

From a copyright perspective, the core of the digital revolution is the easy transferability of computer files, which, with the capillary development of Internet and intranet networks, has elevated the possible dissemination of a work to global scale. By this token, the digital

[757] Wiseman and Sherman (n 34); Harvey (n 53).
[758] Emphasizing on the role of technology on the evolution of copyright throughout the centuries are, among others, Rose, *Authors and Owners* (n 35); see also Baldwin (n 27); Deazley, Kretschmer and Bently (n 21); Harvey (n 53).
[759] *Inter alia*, Jütte (n 230) 32 ff.
[760] Mireille Hildebrandt, *Law for Computer Scientists (Pre-Print)* (Oxford University Press 2019) ('[...] the transformation of the ICT-infrastructure from books and mass-media to a digital and computational ICT-infrastructure.').

dimension has accentuated the 'public good' nature of creative works: once in digital formats, not only the protected expressions of ideas, but also the mediums carrying the work are not rival and hard to exclude.[761] This occurs thanks to the sinking costs of copying[762] and the quality of the copies, which most often are perfect substitutes to the original work.[763] This evidently clashes with the enforcement of copyright entitlements, which, on the contrary, turn the protected works into toll goods by artificially excluding the access to them.[764] At the same time, the lower excludability of creative works leads to a facilitated access and, hence, to an expansion of the markets.[765] Since the advent of the Internet, digital markets have consolidated as global markets, maximizing the circulation of creative works far beyond the boundaries of the dissemination of analogue content.[766]

The consequences of this pivotal change in the copying and transferability of creative works are twofold: on the one side, the digital dimension increases the opportunities of profits;[767] on

[761] Handke, Stepan and Towse (n 683) 150 ('[…] the most fundamental impact of digitization on the creative economy is that goods and services that were previously rival and excludable, at least to some extent, have become in effect public goods for Internet users.'); Bracha and Syed (n 722) 1849; Litman, *Digital Copyright* (n 736) 166–170.

[762] The fixed costs of generating digital copies, in terms of time, equipment and investment, is lower than any analogue technology, while the marginal cost of reproduction of more copies out of one single copy is virtually zero. See Ku (n 683) 274; van Houweling (n 752) 1538.

[763] Considering the original work is already either created or transformed in digital format.

[764] See in this regard also Irini Stamatoudi (ed), *Copyright Enforcement and the Internet* (Wolters Kluwer 2010); Mark-Oliver Mackenrodt, 'Assessing the Effects of Intellectual Property Rights in Network Standards' in Josef Drexl (ed), *Research Handbook on Intellectual Property and Competition Law* (Edward Elgar 2008).

[765] An interesting parallel can be drawn with other technological developments prior to the Internet, starting from the letterpress printing, see Goldstein (n 44) 31 ('the printing press, and later improvements in printing technology, dramatically altered the economics of authorship. Cheaper copies meant larger audiences, and larger audiences brought the prospect of greater revenues overall. As the cost of printing declined, the relative value of each copy's literary content increased. For the first time, the value of the author's genius could outweigh the cost of the scrivener's labor.'). Nevertheless, the outstanding feature of the digital environment remains an unprecedented capability to stretch the markets to a global extent. See also Baldwin (n 27) 318 ff.; Ghidini, 'Exclusion and Access in Copyright Law: The Unbalanced Features of the InfoSoc Directive' (n 289).

[766] Wunsch-Vincent (n 678) 233.

[767] *ibid* 234; Eger and Scheufen (n 34) 48 ("Thanks to technological progress, the dissemination of works of literature, science and arts has increased dramatically and, in conjunction with increased legal protection for the creators, this has resulted in enormous gains for those who benefit directly or indirectly from the exploitation of copyright.").

the other side, it may exacerbate also the risk of free riding.[768] It is not by chance, in fact, that the discourse on copyright law in the digital world is characterized by divisive and highly polarized standpoints. As Baldwin points out, in the digital era '[…] we are once again caught in the crossfire between right owners – and assignees – and the audience.'[769]

The economic analysis helps identifying three main specific changes in the costs and benefits of the copyright actors in the digital dimension. The first and perhaps most intuitive change is a depression of tracing costs and transaction costs. As Tyerman anticipated[770] and Goldstein epitomized in the notion of 'celestial jukebox',[771] the Internet has the potential to make creative works easy to find and transactions between creator and/or distributor and user smooth and remarkably less costly. This change plays out in favor of both users and creators, as not only directly increases the benefits of both categories – in the forms, respectively, of access and profits –, but also lowers the costs of expression of creators.[772]

Second, the costs of reproduction and distribution of creative works are also significantly reduced. In the analogue worlds these burdens are a combination of fixed and marginal costs growing with the number of copies produced,[773] while in the digital environment they solely consist of fixed costs, which are majorly borne by users, who purchase the necessary equipment to access the work.[774] As the costs of copying and distributing sink, the possibility

[768] Interestingly, the scholarship is assessing this risk, at both regional and global level, not without surprising results showing a less significant impact of piracy than what generally portayed to the public opinion. See João Quintais and Joost Poort, 'The Decline of Online Piracy: How Markets – Not Enforcement – Drive Down Copyright Infringement' (2019) 34 American University International Law Review 807.
[769] Baldwin (n 27) 318.
[770] Tyerman (n 677) 31 ("any transaction costs involved in granting permissions could be minimized by creating a computerized clearing house for copyright permissions").
[771] Goldstein (n 44).
[772] Eger and Scheufen (n 34) 38.
[773] Landes and Posner, 'An Economic Analysis of Copyright Law' (n 674) 327.
[774] Ku (n 683) 268–272, 301 ("From the perspective of intellectual property theory, this is revolutionary because content can now be disseminated to consumers without the need for anyone other than consumers to invest in distribution."); Handke, Stepan and Towse (n 683) 152.

of a steep rise in competition gains centrality,[775] casting a gloom of uncertainty upon the so-called 'lead time factor' and the amount of revenues to expect.[776]

Third, the costs of copyright enforcement are the only costs dramatically rising in the digital environment. Protecting the copyright holder's revenues from the risk of free riding has its own costs, both in terms of *ex post* enforcement and *ex ante* protection of digital content (e.g. lock-ups mechanisms, technological protection measures, market restrictions).[777]

What do these changes imply for the *optimum* of copyright protection? As a premise, it ought to be noted that the digital environment does not call into question the assumptions underlying the copyright justification: it is still to be presumed that the society needs creative works, which do not exist in nature, and human desires orbit around profit.[778]

The most glaring implication of the digital environment on the copyright trade-off between incentive and access is that the facilitated proliferation of copies remarkably promotes *access* to content, thus reducing deadweight losses and mitigating the problem of underuse. This, from an economic perspective, is a good development: as highlighted above, the economic

[775] Landes and Posner, 'An Economic Analysis of Copyright Law' (n 674) 330.
[776] Eger and Scheufen (n 34) 51 ("On the one hand, copying has become cheaper and easier, reducing the creators' incentives. On the other hand, the digital age has at the same time reduced the cost for producing and distributing digital content for the suppliers of copyrighted works […]. So far neither theoretical nor empirical assessments have provided a thorough answer to the net outcome of those countervailing effects."); Wunsch-Vincent (n 678) 240–241 ('Artists today may prefer to give away their music for free on their social media page […], while subsequently generating concert-based revenues.'); Tyerman (n 677) 11–16 ('[...] any lead time advantage that might still exist will vanish completely with future advances in book publishing technology.').
[777] For a detailed analysis of the costs and impact of access restrictions set by the copyright holder in the digital environment, see Mark Stefik, 'Shifting the Possible: How Trusted Systems and Digital Property Rights Challenge Us to Rethink Digital Publishing' (1997) 12 Berkeley Tech Law Journal 138 ff.
[778] In this regard, a new perspective is emerging in the literature, seeking confirmation of the need of an incentive to create in the digital environment and shedding light on empirical exceptions to the incentive mechanism, encompassed under the notion of 'IP negative space'. The empirical evidence collected and the arguments arising are, though, at premature stage and highly sectorial. See, inter alia, Elizabeth L Rosenblatt, 'A Theory of IP's Negative Space' (2011) 34 Columbia Journal of Law & the Arts (investigating the digital typeface industry); Kal Raustiala and Christopher Sprigman, *The Knockoff Economy: How Imitation Sparks Innovation* (Oxford University Press 2012) 151 ff.

theory proves that it is efficient to have many individuals enjoying low-rival goods, as the use by one does not imply any cost to other people to enjoy them.

The easy transferability of digital copies also supports authors in accessing others' works[779] and producers by lowering the costs of distribution. This means that the digital dimension not only mitigates the problem of underuse but has also a positive impact on the problem of underproduction, as both costs of expression and distribution decrease.[780]

Nevertheless, the digital transformation does not fully solve the conundrum between underproduction and underuse of intellectual works. Although harder to quantify, the risks of free riding and subsequent demise of the incentive mechanism are likely to persist. Yet, the 'digital' configuration of the copyright trade-off sheds light on two peculiar elements, which are highly relevant to what copyright protection aims to maximize, that is its social benefits.

First, a growing divide emerges between the incentive to create and the incentive to distribute. The lower costs of expression and the expansion of digital markets jointly help reducing the risk of losses borne by the creator. Compared to the analogue environment, in the digital world it does not cost more to create a new work and the potential profits are sensibly higher. This has a positive impact on the incentive to create. From the side of the production and distribution, the costs are also lower, yet the high risk of digital free riding hangs over producers and publishers. Depending on the contractual relationships between author and producer, the economic loss potentially deriving from the fact that the consumer is less willing

[779] The creative process in the digital era has acquired a remarkably collaborative connotation. The idea of the romantic author has faded away and creators are themselves users of the vast repertoires of content available online. See, in this regard, Eger and Scheufen (n 34) 38 ('Especially in an environment of cumulative knowledge production, the dissemination of new ideas is the basis of future creativity.').
[780] Ku (n 683) 65.

to pay for a work, which is cheaper, if not freely, available online may not be borne by the latter at all.[781]

The second characteristic of the 'digital trade-off' is the enhanced inefficiency of copyright overprotection. The enforcement of copyright in the digital environment generates extremely high costs, both in terms of costs of enforcement *stricto sensu* (i.e. protection measures and litigation costs), which inevitably restrict the margin of profit, and of disproportionate deadweight losses.[782] The most exemplary case is the *ex ante* protection of exclusive rights by way of technological protection measures, which limit the access to content to all members of society, regardless of the limited scope of copyright protection.[783]

These two aspects of the 'digital trade-off' shed new light on the pillars of the economic analysis of copyright, i.e. *remuneration* and *access*. The former acquires a new focus on the specificities of the actors involved, creators and distributors in particular, and on their reciprocal contractual obligations; while the latter remarks the warning against preventive measures of copyright enforcement, which lead to the inefficient scenario of overprotection.

In this vein, the traditional trade-off between underproduction and underuse turns its focus on *how* the incentive and the access are distributed in society. What emerges from the separation between the incentives to create and to distribute as well as from the disproportionate social costs generated by overprotection is, indeed, the call for a better

[781] Landes and Posner, 'An Economic Analysis of Copyright Law' (n 674) 343; Lunney (n 721) 495–497; Relevant to this point is also the rise of online intermediaries, acting as distributors and and on the rare occurrence of direct exchanges between creator and users. See Wunsch-Vincent (n 678) 233–235 ("[...] copyright markets and institutions such as [copyright management organisations] are needed to create more efficient markets, to mediate between creators, licensors and licensees, and hence to reduce the transactions costs related to the search, bargaining, and other licensing processes" in the digital era this statement is ever more true. Internet has not brought about disintermediation in the demand and supply of creative goods.").
[782] It is due mentioning the 'tragedy of property' conceptualized by Collins, whose analysis pivots on the rise of litigation costs and subsequent social costs. Collins (n 739).
[783] See on the point Wunsch-Vincent (n 678) 235; Koelman (n 686).

understanding of 'who[m] is extracting most value from commercial digital content transactions and where the bargaining power lies'.[784] Against this outcome, what the economic analysis suggests moves towards the adoption of a distributive justice perspective, which is neither alien to copyright in general nor, as the analysis demonstrates below, unfamiliar to EU copyright law.

4.3. The distributive rationale and copyright law

The notion of distributive justice can be traced across the disciplines of moral philosophy, political and economic theory all the way back to Plato and Aristotle.[785] The concept refers to the quest for a just distribution of benefits and burdens in the society, be it at a global scale, intergenerational level or simply among individual members of the society.[786] This dissertation has no ambition to enter the realms of moral and political philosophy, thus refrains from exploring the numerous conceptualizations of distributive justice developed across social sciences. The intention is to extract the quintessence of the notion and explore the suitability of its underlying logic to serve as an analytical framework in the context of EU copyright law.[787]

[784] Wunsch-Vincent (n 678) 235.
[785] See Izhak Englard, *Corrective and Distributive Justice: From Aristotle to Modern Times* (Oxford University Press 2009); Ronald L Cohen, 'Distributive Justice: Theory and Practice' (1987) 1 Social Justice Research 19, 20.
[786] For an overview, see Julian Lamont and Christi Favor, 'Distributive Justice' in Edward Zalta (ed), *Stanford Encyclopedia of Philosophy* (Winter 2017 Edition) <https://plato.stanford.edu/archives/win2017/entries/justice-distributive/>.
[787] An exercise that has been deemed useful and utterly necessary in the scholarship, targeting IP law as one of the fitting discipline for such endeavour. See, inter alia, Drahos (n 9) 253; Bracha and Syed (n 696); Ramello (n 686); Morando (n 688); Jeffrey L Harrison, 'Rationalising the Allocative/Distributive Relationship in Copyright' (2004) 32 Hofstra Law Review 853.

4.3.1. Compatibility of perspectives

Among the most well-known elaboration on the notion is John Rawls' theory of justice.[788] The theory is particularly suited to extrapolate the logic of distributive justice, as it posits two fundamental pillars defining the notion. The first is the so-called 'equal basic liberties principle', which asserts the need for equal distribution of primary rights and liberties among all members of the society.[789] The second is the 'difference principle', which acknowledges the existence of inequalities in the society (of social and economic character) and makes the case for their legitimation upon two conditions, i.e. accepting such inequalities only up to the extent they benefit the less advantaged members of the society and provided that equal opportunities are granted to all.[790]

It has been observed how Rawls' theory of justice shows a significant compatibility with the theoretical foundations of IP rights, in general, and of copyright, in particular.[791] The explanation is twofold. On the one side, from a Rawlsian perspective, copyright can be deemed a specific conception of justice, which the society has set up because it desires and values creative content.[792] On the other side, the configuration of copyright as a limited

[788] John Rawls, *A Theory of Justice (Revised Edition)* (The Belknap Press of Harvard University Press).
[789] *ibid* 53 ('The frst statement of the two principles reads as follows. First: each person is to have an equal right to the most extensive scheme of equal basic liberties compatible with a similar scheme of liberties for others.').
[790] *ibid* ('Second: social and economic inequalities are to be arranged so that they are both [a] reasonably expected to be to everyone's advantage, and [b] attached to positions and offices open to all.').
[791] Justin Hughes and Robert P Merges, 'Copyright and Distributive Justice' (2017) 92 Notre Dame Law Review 513, 517–518, 524–525 addressing potential criticisms pertaining both the lack of references to intellectual property by Rawls, and the suitability of his highly abstract theory to draw meaningful conclusions on 'one small social institution sitting in a very imperfect society'. ; See also Drahos (n 9) 201 ff.; Barczewski and Pyc (n 430) 208; Robert P Merges, *Justifying Intellectual Property* (Harvard University Press 2011) 102–138; van Houweling (n 752).
[792] Rawls defines the conception of justice as follows: 'Among individuals with disparate aims and purposes a shared conception of justice establishes the bonds of civic friendship; the general desire for justice limits the pursuit of other ends, One may think of a public conception ofjustice as constituting the fundamental charter of a well-ordered human association.' Rawls (n 788) 5; See also Merges (n 791) 109 positing that 'IP rights emerge out of deliberations in the "original position".' This means that, according to Merges, members of a society, in

property right presents a significant compatibility with the embedded logic of the difference principle, as it does not only confers advantages to some and burdens to others, but also it limits the former for the purpose of protection of the interests of entire society, including the less advantaged ones.[793]

Another strong link between the distributive justice logic and copyright law, which is particularly evident within the EU copyright scenario, is represented by the central role played by the notion of *fairness*. Key to his theory of justice, Rawls based on this notion not only his two core principles, but also the hope for a just democratic society, which lies at the basis of most of the distributive justice theories.[794]

Two manifestations of the concept of fairness are particularly interesting for the purpose of this study: the fair distribution of revenues generated by the exploitation of copyrights and the fair distribution of information, knowledge and cultural goods in the society.[795] A thorough analysis of the Rawlsian principles may lead to add to the copyright-relevant aspects of fairness also the distribution of opportunities and professional aspirations in society, thus including professions related to the intellectual, cultural and creative sectors.[796] Lying outside the scope of this dissertation is instead the question, as to whether copyright is a fair institution

a situation of ignorance about their own role in such society – what is usually called "the veil of ignorance" - would choose to set up intellectual property rights.

[793] van Houweling (n 752).

[794] Rawls (n 162) xi ('[...] a conception I call 'Justice a fairness.' The central ideas and aims of this conception I see as those of a philosophical conception for a constitutional democracy. My hope is that justice as fairess will seem reasonable and useful, even if not fully convincing, to a wide range of thoughtful political opinions and thereby express an essential part of the common core of the democratic tradition.").

[795] The profile, which has been called of 'informational justice'. See Drahos (n 9) 199 ff.

[796] This implies a broad interpretation of Rawls' principle of fair opportunity, not limited to positions of political authority in society. With regards to the effect of copyright on the distribution of creative opportunities, see van Houweling (n 115) 1538; Particularly interesting is also Dumitru's take on Rawlsian principles *vis-à-vis* talented people, such as inventors, and relevant also to creators. See Dumitru (n 168) 57 ff.

per se or, in Rawlsian terms, whether the inequalities it generates can be justified at all.[797] Such query points at the very existence of copyright law and question the need for it and its potential to generate benefits to society, thus leading to theoretical hypotheses on its abolition.[798] In contrast, this study analyzes copyright law starting from the observation of its perdurance and evolution in Europe and investigating the legislator's intentions behind the remarkable reliance on this legal institution, thus excluding the possibility of its abolition.

Copyright shows affinity not only with the Rawlsian theory, but with the core normative questions tackled by distributive justice theories *latu senso*. Distributive arguments addressing copyright rules may relate to concerns regarding the distribution of economic, technological and cultural resources between countries and societies, hence to a 'macro' perspective on the impact of copyright laws *vis-à-vis* the objective of a sustainable development at global level.[799] Such distributive dimension leads to an attentive analysis of the international copyright scenario, which exceeds the scope of this dissertation.[800] Nevertheless, there is also a 'micro' dimension, through which the distributive logic can analyze copyright law by focusing on the distribution of benefits and burdens among the individual members of society. This approach

[797] See on this question Hughes and Merges (n 791) 527–528; Axel Gosseries, 'How (Un)Fair Is Intellectual Property?' in Axel Gosseries, Alain Marciano and Alain Strowel (eds), *Intellectual Property and Theories of Justice* (Palgrave 2008); Following this line of argument, the analysis would easily move beyond the substantive provisions in the legislation, towards external factors influencing its formation. See, for instance, the study of the law-making process behind the modernization of EU copyright law by Farrand (n 18).

[798] See, *inter alia*, Glynn SJr Lunney, 'Abolish Copyright Now!', *ATRIP 38th Annual Congress* (2019); Michele Boldrin and David Levine, 'The Case Against Intellectual Property' (2002) 92 American Economic Review 209; Ku (n 683); Paul A David, 'The End of Copyright History?' (2008) 1 Review of Economic Research on Copyright Issues.

[799] Barczewski and Pyc (n 430); Keith Aoki, 'Distributive and Syncretic Motives in Intellectual Property Law (with Special Reference to Coercion, Agency, and Development)' (2007) 40 UC Davis Law Review 717, 735 ff.; Margaret Chon, 'Intellectual Property and the Development Divide' (2006) 27 Cardozo Law Review 2821.

[800] To note is that Rawls' theory of justice does not go beyond the societal dimension into the supranational or international spheres. For an explanation of the implications of a global informational justice, see Drahos (n 9) 212 ff.

inquires the effects of copyright rules and the distribution of benefits and burdens resulting from their application, thus representing a fundamentally consequentialist perspective.[801]

The potential of a distributive justice analysis of copyright law has been explored to a limited extent with regards to the European copyright scenario.[802] Yet, the functional analysis of EU copyright law shows several points of convergence with the notion. First and foremost, the distributive logic reflects an economic perspective of allocation of resources in society, which matches with the predominant economic nature of EU copyright functions.[803] Moreover, the State and, in particular, the legislator play a crucial role in the determination and improvement of such allocation. Contrary to libertarian arguments,[804] the idea of distributive justice conceals a distrust in *laissez-faire* policies and envisages the legislative intervention to guarantee justice and welfare in society.[805] This is in line with the detected need for constant regulation at EU level addressing copyright-related market failures.[806] Lastly, the individual and social dimensions are deeply intertwined in both the distributive logic and the functions of EU copyright law: the former, in its 'micro' approach, focuses on the individuals[807] and combines it with a collective and rather pragmatic dimension of justice in society;[808] similarly,

[801] Arguing for the need for an effects-based analysis of copyright law, Bechtold (n 23) 71–73; Ohly (n 23); Hughes and Merges (n 791) 514.
[802] The literature on distributive justice and US copyright law results highly articulated. See, inter alia, Hughes and Merges (n 791); Bracha and Syed (n 696); Merges (n 791) 102–138; van Houweling (n 752); Harrison (n 787); Randal C Picker, 'Copyright as Entry Policy: The Case of Digital Distribution' (University of Chicago 2002) John M Olin Law & Economics Working Paper 147 <http://www.law.uchicago.edu/Lawecon/index.html>.
[803] See *supra* Section 4.1.1.
[804] See, *inter alia*, Robert Nozick, *Anarchy, State and Utopia* (Basic Books 1974).
[805] In this regards also Hughes and Merges (n 791) 525; Merges (n 791) 102 ('[...] [R]edistribution requires state redirection of economic resources.'); A peculiar, significative analysis drawing parallels between the State intervention on copyright, on one side, and private property, on the other, in the US scenario has been developed by Linda Lacey, 'Of Bread and Roses and Copyrights' (1989) 38 Duke Law Journal 1532.
[806] See *supra* Section 4.1.2.
[807] In the case of Rawls' theory, on the Kantian theory of individual rights. See Rawls (n 788) 156–157.
[808] Hughes and Merges (n 791) 518–519; See also Merges (n 791) 121–123 ('The two-part conception of IP rights preserves the centrality of individual contributions and individual control of assets. The social contribution that

it has been demonstrated how the functions of EU copyright law reckon with both the individual nature of copyright entitlements and their social impact.

The convergence of perspectives between the outcomes of the functional analysis and the distributive approach is also supported by the flexibility of the latter: there are no strict limitations to what can be subjected to the scrutiny of fair distribution in society, from physical goods to property rights up to the fundamental freedoms.[809] This fits particularly well the multi-functional approach of EU copyright law, which does not aim to maximize one particular resource in society, but rather multiple benefits to multiple addressees.

4.3.2. The subject matter and actors of distribution

The core of the distributive logic lies in the guidance it provides towards a fair allocation of resources in the society. Defining *which* resources the distributive analysis of copyright specifically addresses becomes, therefore, essential. As highlighted above, the notion of distributive justice is flexible and suited for a wide array of resources. Suffice it to observe that Rawls' interpretation of primary goods encompasses 'rights, liberties, opportunities, income and wealth',[810] and that subsequent theories have stretched the category of primary goods up to the notion of 'quality of life'.[811]

enters into the right is mixed and intertwined with the individual initiative required to make a protected work. Likewise, the social claim that emerges when the state grants a property right is attached to an inviolable private right.').

[809] Drahos (n 127) 209 ("Rawlsian designer would use property rights as a tool to preserve political liberties and maximise access to, and the distribution of, primary goods such as information.").

[810] Rawls (n 788) 54; See also Merges (n 791) 105; Samuel Fleischacker, *A Short History of Distributive Justice* (Harvard University Press 2009) 116–119.

[811] Martha Nussbaum and Amartya Sen (eds), *The Quality of Life* (Oxford University Press 1993).

Nevertheless, it is worth noting that most distributive justice theories focus on the distribution of wealth.[812] This view has led to highly pragmatic categorizations of the world and of society, which emphasize the rich-poor dynamics in relations and transactions.[813] With particular regards to copyright, the main resources involved are income and knowledge. The former encompasses all types of revenue stemming from the exercise of copyright entitlements.[814] As previously demonstrated, the remunerative function is key in the EU copyright legal framework in multiple ways, e.g. to provide adequate income for creators to live from their jobs, to incentivize them, to guarantee their independence. Similarly to what has been pinpointed concerning wealth, setting the focus of the analysis on the distribution of copyright-generated income between the individual actors may easily leads to a categorization between high-income and low-income players on the copyright scene.[815]

Information is an equally key component of copyright. Intended *lato sensu* as the contribution to knowledge and culture that the creation embeds, information is often identified as the real *value* attached to a created work, due to the critical role it plays in society.[816] Regarding the nature of information as a resource, a clarification is required. It has been pointed out that

[812] E.g. Rawls (n 788) 91 ('There exists a marked disparity between the upper and lower ciasses in both means of life and the rights and privileges of organizational authority. The culture of the poorer strata is impoverished while that of the governing and technocratic elite is securely based on the service of the national ends of power and wealth.').
[813] Inter alia, Fleischacker (n 810); Chon (n 799).
[814] Hughes and Merges (n 791) 516 ('The level and distribution of wealth flowing to creative individuals is our central concern. [...] we focus less on the creative works that copyright induces and more on the money earned as a result of these works. We inquire into whether the pattern of earnings from copyright can be called fair.').
[815] *ibid* 540–543 ('Our concern is [...] whenever wealth moves from "lower" to "higher" deciles after a purchase. [...] [P]rograms that subsidize low-income purchasers of copyright-protected works are far more effective ways to address the needs of the poorest members of society.'); Interesting also the take by Molly Shaffer van Houweling, who analyzed the distributive aspects of copyright law adopting the perspective of poorly financed creators. See van Houweling (n 104).
[816] Drahos (n 9) 203–206, 249–250 ('Just as individuals can be assumed to want rights, liberties, income, wealth, self-respect and so on, we are suggesting that they want and need information. [...] Intellectual property rights regulate access to knowledge and other kinds of capital which are foundational to the development of the capabilities of the individuals.').

theories of distributive justice, among which Rawls' principles, exclusively refer to scarce resources.[817] It may be therefore objected that the distributive rationale as such can apply only to highly rival and excludable goods, hence not to information.[818] In plain terms, why bothering with the distribution of information if it is free to share? To respond to this crucial question, it ought to be recalled that, in today's digital world more than ever, information has no unitary structure. As highlighted by Ramello, it rather has an 'idiosyncratic nature', serving as input, output and productive technology in the creative processes.[819] In addition, as demonstrated above, copyright has the potential to make information artificially scarce.[820] A distributive discourse on information is justified on the ground that information *per se* is not scarce, but copyrighted contents are and their distribution may be problematic.

Setting the focus on the distribution of income and information supports the analysis of the sustainability of EU copyright law mainly in three ways. First, it takes the two main impact factors of the digital environment into account, i.e. the expansion of market revenues and the facilitation of access to content.[821] This implies that the approach has a tight bond with the real and contemporary copyright scene, as studies on unfair distribution of income[822] and

[817] Dumitru (n 796) 63 ("Rawls' theory of justice seems to be tailored for goods of private, rival consumption. The theory is built on the fundamental assumption that scarcity of resources and competing interests are the two features explaining why questions of justice arise.").
[818] Reasoning in this line, Dumitru highlights that expressions of ideas "are not scarce in the sense that they need to be distributed." *ibid* 64.
[819] Ramello (n 686) 7–12.
[820] See *supra* Section 4.2.1.
[821] See *supra* Section 4.2.3.
[822] Eger and Scheufen (n 34) 48 ("Thanks to technological progress, the dissemination of works of literature, science and arts has increased dramatically and, in conjunction with increased legal protection for the creators, this has resulted in enormous gains for those who benefit directly or indirectly from the exploitation of copyright. Those gains are, however, by no means distributed equally among the relevant actors."); Kretschmer (n 679); Martin Kretschmer and others, 'Copyright Contracts and Earnings of Visual Creators: A Survey of 5,800 British Designers, Fine Artists, Illustrators and Photographers' (2011) SSRN Scholarly Paper <https://papers.ssrn.com/abstract=1780206>; Martin Kretschmer and Philip Hardwick, 'Authors' Earnings from Copyright and Non-Copyright Sources: A Survey of 25,000 British and German Writers' (Bournemouth University, UK; Centre for Intellectual Property Policy & Management (CIPPM) 2007) SSRN Scholarly Paper.

excessive obstacles to fundamental rights and freedoms of expression and information[823] demonstrate.

Second, the twofold focus on the distribution of income and information overcomes the risk of falling under a unilateral purposive approach.[824] More precisely, it prevents that the utilitarian approach, to which the distributive logic is often juxtaposed,[825] takes over in the analysis and leads to a criterion of maximization of one of the two resources.

Lastly, such approach bypasses also the dilemma encountered by the neoclassical economic analysis of law of opposing welfare standards between copyright holder and user, by setting the focus on social costs. More precisely, the distributive rationale helps not only detecting social costs, but also investigating ways to minimize them, as it turns evident both in the case of unfair distribution of income and of unfair distribution of information. In the former scenario, the distributive logic sheds light on the possibility that an unfair distribution of income may turn into a disincentive for creators, hence into a social cost. Loosening the grip of the natural law justification of copyright,[826] the distributive approach looks also at the obligations, not only at the protection, of the copyright holder.[827] From the viewpoint of a

[823] Hughes and Merges (n 791) 515; Lateff Mtima, 'Copyright and Social Justice in the Digital Information Society: "Three Steps" Towards Intellectual Property Social Justice' (2015) 53 Houston Law Review 459.
[824] Interesting in this regards is the insight by Vivant, who portrays the continental *droit d'auteur* and the Anglo-Saxon copyright traditions as "one-dimensional" answers to the question, as to what copyright seeks to achieve. Vivant (n 13) 48–49.
[825] Hughes and Merges (n 791) 514–515.
[826] Rawls, positing the principle of fairness, stated that no individual is allowed "(…) to gain from the cooperative labour of others without doing [her] fair share." Rawls (n 788) 96; See also Dumitru (n 796) 66–67 ("The problem the principle of fairness raises for Rawlsians is the moral connection it establishes between one's own labour and others' obligations arising from that labour. [...] "According to Rawls, one deserves neither one's abilities, nor the willingness to make an effort: they are owed to natural lottery and social circumstances. Since labour depends on morally arbitrary characteristics, no one can claim to deserve its fruits either. Would, then, 'labour' be more able to impose obligations on others than to entitle one to its benefits?").
[827] A parallel could be here drawn with the critique moved by Breyer: "[The] fact that the book is the author's creation [does not] seem a sufficient reason for making it his property. We do not ordinarily create or modify property rights, nor even award compensation, solely on the basis of labor expended." Breyer (n 40) 289.

traditional observer of copyright laws (and IP in general), these obligations may look remarkably limited compared to the kernel of copyright protection, i.e. its exclusive rights. Merges helps understanding the presence of distributive obligations by depicting the creative endeavor as consisting of a 'core' and a 'periphery', the former being the creative effort of a single individual or a team, who puts energy in creating something, and the latter being the ensemble of social factors, without which the content could not be created that particular way.[828] Borrowing this visualization, one can locate the copyright holder's exclusive rights in the core and the related obligations in the periphery.[829] The analytical effort to identify distributive obligations involved within the copyright system is particularly relevant in light of the expanded negotiated power raised by corporate copyright holders *vis-à-vis* individual creators.[830]

In the case of unfair distribution of information and knowledge, substantial social costs arise, among which the violations of fundamental rights and freedoms.[831] In this vein, deadweight losses due to excessive costs of access in terms of waiting time before copyright expiration and license fees turn not only into social costs,[832] but also, in turn, into violations of fundamental rights enshrined in the CFREU (e.g. of the freedom of expression and information, right to education), violations that the EU legislator intends to avoid.

[828] Merges (n 791) 121 ff.
[829] Merges claims that it is within the periphery that the distribution takes place, since "the idea that there is some portion of every work that is not within the core justifies redistributing some of the proceeds from the work." *ibid* 128.
[830] A phenomenon, which is at times referred as "corporate copyright trope". See Jessica Litman, 'Real Copyright Reform' (2010) 96 Iowa Law Review 28; The phenomenon starts being discussed also in light of the possibilities of disintermediation and self-publication offered by the digital environment. E.g. van Houweling (n 752) 1564 ('New technology enables upstart amateurs to become large-scale producers and distributors of creative works.').
[831] Drahos (n 9) 208.
[832] *ibid*.

Under the traditional utilitarian justification of copyright, the fact that someone in society may not access created content at these over-competitive prices is accepted as a matter of fact. Nevertheless, as Hughes and Merges explain, the pragmatic approach of accepting this as a factual and hardly avoidable circumstance takes also for granted that the created content exists.[833] This argument stems from the view as to 'creative works are in essence primarily collective works',[834] the substratum of created contents available in society being considered the primary source of inspiration and further creation. The distributive logic is suited to lead the analysis 'outside the box' of the limited property rule paradigm, towards liability rules,[835] price differentiation[836] and product substitutes.[837]

Having identified the resources that fall under the focus of a distributive analysis of copyright, it is necessary to move to the question on *how* income and information should be distributed in society. For this purpose, the analysis looks at EU copyright law searching for both confirmation of the detected compatibility of the distributive rationale and guidance on its normative application.

4.4. Distributive fairness in EU copyright law

It is well known that the evolution that copyright has experienced at international, supranational and national levels, especially since the advent of the digital environment, has

[833] Hughes and Merges (n 791) 540.
[834] Merges (n 791) 213.
[835] See, with regards to liability rules, the seminal work by Calabresi and Melamed (n 720); See also on liability rules and copyright in the digital age Eger and Scheufen (n 34) 40; Lemley and Weiser (n 683).
[836] Inter alia, Bracha and Syed (n 722); Wendy J Gordon, 'Intellectual Property as Price Discrimination: Implications for Contract' (1998) 73 Chicago-Kent Law Review 1367.
[837] Hughes and Merges (n 791) 542–543.

been of expansion of its scope and duration. This has inevitably generated a growing interest in the boundaries of copyright. As Vivant highlights, the 'fencing off of the copyright protection and the drawing of the 'demarcation line' between exclusive rights and public interest is an essential aspect of the discipline and, at the same time, becoming an ever more challenging task.[838] With particular regards to EU copyright law, reflections along these lines have mostly focused on the effectiveness of the EU's closed list of exceptions and limitations[839] and the balancing techniques deployed by the CJEU in its interpretation.[840]

It is crucial to note how the notion of fairness has increasingly gained relevance, following, among others, social justice criteria.[841] A first connection between copyright regulation and social justice can be found in EU primary law, from which EU copyright law stems and it is limited. With the Treaty of Lisbon,[842] the notion of social justice, indeed, has entered the Treaties.[843]

[838] Vivant (n 13) 50–51.
[839] See, *inter alia*, Christophe Geiger and Elena Izyumenko, 'Towards a European "Fair Use" Grounded in Freedom of Expression' (University of Strasbourg 2019) Center for International Intellectual Property Studies Research Paper No. 2019-02; Dreier (n 19); Lucie Guibault, 'Why Cherry-Picking Never Leads to Harmonisation: The Case of the Limitations on Copyright under Directive 2001/29/EC' (2010) 1 Journal of Intellectual Property, Information Technology and E-Commerce Law 55; Martin Senftleben, 'The International Three-Step Test: A Model Provision for EC Fair Use Legislation' (2010) 1 Journal of Intellectual Property, Information Technology and E-Commerce Law 67.
[840] Sganga, 'A Decade of Fair Balance Doctrine, and How to Fix It: Copyright versus Fundamental Rights Before the CJEU from Promusicae to Funke Medien, Pelham and Spiegel Online' (n 319); Griffiths (n 319); Substantial research has been done also at national Courts level, see *inter alia* Reto Hilty and Sylvie Nérysson, 'Overview of National Reports about "Balancing Copyright"' (Max Planck Institute for Intellectual Property and Competition Law 2012) Max Planck Institute for Intellectual Property and Competition Law Research Paper 12–05.
[841] Sganga, 'Towards a More Socially Oriented EU Copyright Law: A Soft Paradigm Shift after Lisbon?' (n 253); Ohly (n 23); Ananay Aguilar, '"We Want Artists to Be Fully and Fairly Paid for Their Work": Discourses on Fairness in the Neoliberal European Copyright Reform' (2018) 9 Journal of Intellectual Property, Information Technology and E-Commerce Law 160; Ana Ramalho, 'Intellectual Property and Social Justice' in Augustus Kakanowski and Marijus Narusevich (eds), *Handbook of Social Justice* (Nova Science Publisher 2011); Anne Flanagan and Maria Lillà Montagnani (eds), *Intellectual Property Law. Economic and Social Justice Perspectives* (Edward Elgar 2010); Morando (n 688); Axel Gosseries, Alain Marciano and Alain Strowel (eds), *Intellectual Property and Theories of Justice* (Palgrave 2008).
[842] Treaty of Lisbon art 1(4).
[843] TEU art 3(3). See Chapter 2 Section 2.2.2.

Analyzing the concept of social justice in light of the copyright context leads to two main observations. The first pivots on EU primary law and, more precisely, on Article 11 CFREU: the provision, of constitutional significance and binding nature for EU secondary legislation, protects the freedom of expression and of information of every individual.[844] Such recognition of fundamental freedoms may well recall what Rawls has called a primary liberty, which every individual in society should enjoy equally.[845]

Moreover, Article 11 CFREU affirms the principle of media pluralism[846] and in conjunction with Article 22 CFREU, which stipulates the respect for cultural, religious and linguistic diversity within the Union,[847] sets the basis for the protection of the public interest through a pillar democratic maxim, i.e. cultural pluralism.[848]

In light of the understanding of social justice as a combination of individual's freedom of expression and information and cultural pluralism in the society, the economic explanation of the regulatory choice of a limited property rule for copyright finds solid consolidation. If the State solved the problem of underproduction of public goods by providing creative works

[844] Art.11(1) CFREU art 11(1); TFEU artt 167, 169.
[845] Such interpretation recalls the role played by the First Amendment in the US legal system. See, *inter alia*, Rebecca Tushnet, 'Copyright as a Model for Free Speech Law: What Copyright Has in Common with Anti-Pornography Laws, Campaign Finance Reform, and Telecommunications Regulation' 42 Boston College Law Review (2000) 47; Yochai Benkler, 'Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain' 74 New York University Law Review (1999) 354.
[846] CFREU art 11(2) ('The freedom and pluralism of the media shall be respected.'); see also TFEU Protocol no 29 ('[…] the need to preserve media pluralism.').
[847] CFREU art 22 ('The Union shall respect cultural, religious and linguistic diversity.'); see also CFRUE Preamble ('The Union contributes to the preservation and to the development of these common values while respecting the diversity of the cultures and traditions of the peoples of Europe […]').
[848] Merges (n 791) 107, 110–112, 118–120; A particularly well-put phrasing on the value of pluralist expressions of ideas has been provided, within her analysis of the US copyright scenario, by van Houweling (n 752) 1562 ('[...] speech has value independent of the speaker or recipient's ability to pay for it; we should therefore attempt to distribute speech opportunities more broadly than the market otherwise would.').

by itself or directly outsourced it, both the freedom of expression of each (not directly authorized) individual and, above all, the cultural pluralism would be violated.

That said, the analysis specifically looks at social justice from the angle of distributive justice, thus intends to investigate in depth the *acquis* in search for relevant arguments, which move from the 'traditional balance sought by copyright law between protection and access'[849] into a more pragmatic intent to fairly distribute income and information in society. To do so, the gaze necessarily moves to EU secondary law and, in particular, again to the functions of EU copyright.

4.4.1. Mode of distribution

A just distribution of resources in society does not necessarily mean an equal distribution. Such a distributive pattern is pursued when the distributive rationale is interpreted through the lens of egalitarianism and the egalitarian argument becomes the moral guidance of rules in society.[850] Generally, the policy decisions apt to improve the allocation of resources in society are inspired by varying distributive arguments, from libertarianism to welfare-based principles. Examples are countless; suffice it to think of systems of taxation, governmental subsidies or merit-based scholarships. Determining the normative criteria to define what a *just* distribution is and how to achieve it is core to any discourse related to the distributive logic.

[849] Daniel Gervais, 'Making Copyright Whole: A Principled Approach to Copyright Exceptions and Limitations' (2008) 5 University of Ottawa Law & Technology Journal 1, 2.
[850] For more on egalitarianism, see Richard Arneson, 'Egalitarianism' in Edward Zalta (ed), *Stanford Encyclopedia of Philosophy* (Summer 2013 Edition, 2013) <<https://plato.stanford.edu/archives/sum2013/entries/egalitarianism/>>.

Besides the constitutional recognition of the freedom of expression and information of individuals and the principle of cultural pluralism, the EU copyright legal framework does not explicitly set an egalitarian criterion of distribution of copyright-generated income and information in society. This can be correlated with two main observations. First, it cannot be ignored that the justification of EU copyright taps into the civil law copyright tradition, which aims at the protection of the author and his or her personal bond with the work. Such approach legitimizes the right of the author over revenues and control over the work regardless of the other members of the society. Second, an egalitarian allocation of resources would be in breach of the equally fundamental right to property and freedom of private initiative and contract, as enshrined respectively in Articles 17 and 16 CFREU.[851]

The focus is necessarily to be set on the inequalities generated by copyright law, and in particular on the unequal distribution of income and of information, a focus that recalls Rawls' approach in the difference principle. The analysis of the functions of EU copyright law has already shed light on the intent of the EU legislator to address some inequalities, especially by way of limiting copyright protection and moving the application of the law towards a 'fair balance of rights and interests'.

4.4.2. The limits of EU copyright protection

The EU legislator does not intend to establish a system of unlimited copyright protection.[852] The setting of limits is core to the economic justification of such a protection as well as

[851] CFREU artt 16, 17(1).
[852] See, in this specific regard, *Scarlet Extended* para 43; *UPC Telekabel* para 61; *Pelham* para 33 ('The Court has thus previously held that there is nothing whatsoever in the wording of Article 17(2) of the Charter or in the

emerging from the functional analysis of EU copyright legislation.[853] The underlying intent of this limitation can be read as the aim to cap the unequal distribution of income and information that copyright generates.

The limits of copyright protection should not be confused with the limits of copyright harmonization. On the one hand, the limits of EU copyright harmonization stem from the division of legislative competences and the fundamental principles of law.[854] Objectives do play an important role also in the harmonization, as it shall comply with fundamental principles of law[855] and with the principle of proportionality,[856] which obliges the EU legislator to adopt measures 'appropriate for attaining their objective and must not go beyond what is necessary to achieve it.'[857] The expressed objectives of EU copyright law have been vastly explored; what has not been highlighted so far is the possibility of underlying, more implicit, goals, which may influence the assessment of proportionality and necessity. The intention to curb the unequal distribution of copyright-generated income and distribution falls under this profile.

The limitations of copyright protection, on the other hand, are mainly represented by the limited duration of copyright entitlements and the exceptions and limitations. As Merges pinpoints, the distributive logic enters the scene at a first level in correspondence with the

Court's case-law to suggest that the intellectual property rights enshrined in that article are inviolable and must for that reason be protected as absolute rights.').

[853] E.g. European Commission, 'Copyright in the Knowledge Economy' (Green Papen) (n 271) 4 ('The confines of copyright should be defined by the legislator.').

[854] See Chapter 2 Sections 2.2, 2.3, 2.4; Chapter 3 Section 3.1.

[855] E.g. InfoSoc Directive recital 3.

[856] TEU art 5(3).

[857] See Funke Medien, para 49; Spiegel Online, para 34; Painer paras 105-106. For an analysis of the functioning of the principle of proportionality, see Jan H Jans, 'Proportionality Revisited' (2000) 27 Legal Issues of Economic Integration 239.

moment of granting IP rights through the limitation of their term of protection.[858] Once elapsed, the protected content becomes part of the so-called public domain. From an income-related perspective, this means that only for a certain period of time private profits of the copyright holder can rise unlimited, in compliance with the fundamental right to IP. From an information-related perspective, instead, the emphasis lies on the fact that, during the copyright term, the access to content by society members is discriminated based on license fees and, once it expires, the content becomes freely available to everyone.

Merges also highlights than the distributive logic can be detected also at a second stage, i.e. during the exercise of IP rights, which can be limited by statutory exemptions. In the case of the EU copyright legal framework, such scenario is represented by the closed list of exceptions and limitations provided for in Article 5 InfoSoc Directive, to which add Articles 3 to 7 CDSM Directive.

Exceptions and limitations impact the distribution of income and information following the same pattern described above, which nevertheless occurs before the expiration of the copyright duration. It could be described, in extreme synthesis, as a pattern of capping of the individual profits in favor of the public information. Nevertheless, one additional element adds to the picture, that is the introduced institution of compensation to the copyright holder.[859] This new regulatory element intends to avoid the opposite scenario, i.e.

[858] Merges (n 791) 128–129.

[859] The institution of compensation emerges in EU copyright law in the provisions of InfoSoc Directive art 5, which are characterized by their optional nature. See InfoSoc Directive art 5(2)(a),(b),(e). Important to note is that the non-mandatory nature refers to the exceptions themselves, while, if a Member State opts for introducing any of the exceptions enshrined in the mentioned provisions, fair compensation to the copyright holders results obligatory. Particularly insightful is the choice behind the introduction of such obligation in some exceptions (i.e. for the reproduction via photographic techniques, private use reproduction and reproduction of broadcasts by social institutions) and not in others (e.g. reproduction by public libraries, museums, archives and educational institutions, use for the purpose of teaching illustration and scientific research, uses to the benefit of people with

disproportionate economic loss that translates into an excessive burden to the copyright holder as a consequence of a significant rise in information in society.

An additional form of limitation seems to emerge from the study of the functions of EU copyright law, in particular from the interpretation of the CJEU. It interests exclusively the distribution of copyright-generated income and stems from the need for distribution between copyright holders, thus leading to a limitation over one's profit to the benefit of a peer holder of copyright entitlements over the same work. Such a limitation, which carries significant distributive implications and has remained for long time unspoken within the matrix of functions expressed in the legislation,[860] fundamentally pivots on the notion of fairness, which deserves great attention and is analyzed below.

4.4.3. The centrality of the notion of fair balance

The analysis has already touched upon the centrality of the notion of fairness in the structure and interpretation of copyright in the EU.[861] In a broader context, it can be noted that IP generally refers to the task of promoting the flourishment of the society through fair entitlements.[862] The EU copyright legal framework is studded with references to the notion of

disabilities, use for the purpose of reporting current news, quotation, parody). In addition, the institute of compensation plays a role also in the more recent CDSM Directive, where it is excluded for the exception of text and data mining and, instead, introduced *ex novo*, although in an optional way, for the purpose of teaching illustration in digital and cross-border teaching activities. See, respectively, CDSM Directive art 5(4), recitals 17, 24.

[860] The CDSM Directive in this regard can be considered an exceptional sparkle. See, in particular, Chapter 5 Section 5.3.1.

[861] See Chapter 3 Section 3.5.

[862] Hugenholtz, 'Is Harmonization a Good Thing? The Case of the Copyright *Acquis*' (n 226) 66 ("The effectiveness, in economic and social terms, and credibility, in terms of democratic support, of any system of intellectual property depends largely on finding that legendary 'delicate balance' between the interests of right holders in maximizing protection, and the public at large, in having access to products of creativity and knowledge.").

fairness.[863] In the vast majority of cases, it translates into the notion of fair balance of rights and interests. It is interesting to note that this notion can be found also at international level in the preambles to the WIPO Internet Treaties of 1996.[864] The most exemplary and insightful use of the notion of fair balance within the EU copyright legislation is made in Recital 31 of the InfoSoc Directive, which reads:

> A fair balance of rights and interests between the different categories of rightholders, as well as between the different categories of rightholders and users of protected subject-matter must be safeguarded.[865]

This prompts to the main conundrum of copyright, represented by the question: How can conflicting interests be simultaneously protected? From a strictly functional perspective, this question translates into: How can conflicting objectives be pursued at the same time? In this respect, Dusollier raises a highly relevant point, noting how the goal to strike a balance of interests may clash with the objective of a high level of protection of the copyright holder.[866]

The answer has to do with balance: the intent to strike a fair balance among the rights and interests involved in the copyright paradigm not only is a confirmation of the multi-functional nature of EU copyright law, but also plays a crucial role in the development of the discipline. What has evidently turned the spotlight on the act of balancing rights and interests has been

[863] *Inter alia*, CDSM Directive artt 17(10), 18(2), recitals 6, 21, 70, 75; InfoSoc Directive recital 31; Resale Directive recital 3; CRM Directive recital 19; Marrakesh Directive recital 1. See also European Commission, 'A Single Market for Intellectual Property Rights' (Communication) (n 227) 7; European Commission, 'Impact Assessment on the Cross-border Online Access to Orphan Works' (Staff Working Document) (n 353) 13; European Commission, 'Impact Assessment on the Legal and Economic Situation of Performers and Record Producers' (Staff Working Document) (n 345) 23.

[864] The preambles of the WIPO Copyright Treaty and the WIPO Performance and Phonogram Treaty recite: "Recognizing the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention (...)". See also in this regard Dinwoodie (n 222) 754.

[865] InfoSoc Directive recital 31.

[866] Séverine Dusollier, 'Pruning the European Intellectual Property Tree: In Search for Common Principles and Roots' in Christophe Geiger (ed), *Constructing European Intellectual Property: Achievements and New Perspectives* (Edward Elgar 2013) 24.

the Treaty of Lisbon, due to its constitutional recognition of fundamental rights and freedoms, which has repeatedly stressed in the analysis.[867] The potential conflict between, among others, the right to property and IP, the freedom of expression and information, the freedom of private initiative and contract, has prompted the need for guidance on how to make these fundamental rights dovetail. The attempt carried out by the CJEU, as seen previously, emphasizes the notion of fair balance attempting to consolidate and uniformize its application across the Union.[868]

Nevertheless, the notion proves particularly volatile, as it faces rapid changes in the technological and economic environments.[869] The questions of what the EU legislation really means by *fair* and how the *balance* meant to be achieved find no uniform answer. Scholars have called for clarifications and further efforts 'to completely reflect and balance the rights and interests of all stakeholders in copyright law', thus requiring a 'thorough assessment of the parties' interests'.[870]

[867] See, in particular, Chapter 2 Section 2.1.1. On the notion of balance and its growing relevance, see also, *inter alia*, Ramalho (n 18) 121 ff.

[868] See Chapter 3 Section 3.5. For further thorough analysis on the application of balancing tests by the CJEU, see Sganga, 'A Decade of Fair Balance Doctrine, and How to Fix It: Copyright versus Fundamental Rights Before the CJEU from Promusicae to Funke Medien, Pelham and Spiegel Online' (n 319); Griffiths (n 319); Griffiths and McDonagh (n 319).

[869] European Commission, 'Copyright in the Knowledge Economy' (Green Paper) (n 271) 20: 'A forward looking analysis requires consideration of whether the balance provided by the [InfoSoc] Directive is still in line with the rapidly changing environment. Technologies and social and cultural practices are constantly challenging the balance achieved in the law, while new market players, such as search engines, seek to apply these changes to new business models. Such developments also have the potential to shift value between the different entities active in the online environment and affect the balance between those who own rights in digital content and those who provide technologies to navigate the Internet.'

[870] Leistner (n 431) 599; Susy Frankel and Daniel Gervais (eds), 'Evolution and Equilibrium: An Introduction', *The Evolution and Equilibrium of Copyright in the Digital Age* (Cambridge University Press 2014) 3 ('We often hear that copyright needs to achieve a balance of interests. Balance is not enough. Equilibrium captures more than a simple balance between two opponents; it is about balancing multiple competing interests from multiple players and recognising that equilibrium in copyright is complex and dynamic, not static.').

Focusing and better defining the players at stake,[871] their rights and legitimate interests seems the most adequate way forward, from a functional perspective. In fact, the shift of focus from the literal interpretation on fair balance of *rights* to a teleological and pragmatic focus on their *effects* finds support in the growing number of references translating the concept of fair balance into more specific notions of fair marketplace for copyright,[872] fair licensing,[873] fair distribution of value[874] and into the legal institutions of fair remuneration[875] and fair compensation.[876]

This development hints at a connection between the principle of fairness and the distribution of the two core resources of copyright regulation, i.e. income and information. The legislator, although wary of talking about distribution, unveils at times that the attention is focused on these two resources:

> Existing copyright laws have traditionally attempted to strike a balance between ensuring a *reward* for past creation and investment and the future dissemination of

[871] The analysis has previosuly illustrated how the legislation leaves the copyright actors ill-defined. See, in particular, Chapter 2 Section 2.6. Rare indications by the EU legislator on specific categories of players can be found more often in the documentation accompanying the legislation than in the Directives. See, for instance, European Commission, 'Report on the implemenation and effects of Directive 91/250/EEC on the legal protection of computer programs' (Report) [2000] 5 ('The proposal for a Directive of April 1989 was (…) formulated as a balance between the interests of rightholders, of their competitors and of users of computer programs.'); European Commission, 'Report on the question of authorship of cinematographic or audiovisual works in the Community' (Report) [2002] 4 ('A balance has to be struck between rights and interests of the natural persons who contributed to the intellectual creation of the film on the one side and the need to ensure the optimal exploitation of cinematographic or audiovisual works on the other.').

[872] CDSM Directive recital 3.

[873] CRM Directive recital 31 ("Fair and non-discriminatory commercial terms in licensing are particularly important to ensure that users can obtain licences for works and other subject-matter in respect of which a collective management organization represents rights, and to ensure the appropriate remuneration of rightholders."); CDSM Directive recital 61 ('[…] licensing agreements should be fair and keep a reasonable balance between both parties.').

[874] European Commission, 'Towards a modern, more European copyright framework' (Communication) (n 346) 9 ('Apart from its significance for the fair distribution of value in the online market place, lack of clarity on the definition of these rights can also generate uncertainty for ordinary internet users […]').

[875] Chapter 3 CDSM Directive is entitled "Fair remuneration in exploitation contracts of authors and performers"; CDSM Directive art 20.

[876] Cornestone of this notion is the InfoSoc Directive art 5, recital 35 ('In certain cases of exceptions or limitations, rightholders should receive fair compensation to compensate them adequately for the use made of their protected works or other subject-matter […]'); Orphan Works Directive art 6(5); CRM Directive art 13; Recital 18 Orphan Works Directive; Term Directive of 2011 recitals 6, 13; CDSM Directive artt 5(4), 16, recital 24.

> *knowledge* products by introducing a list of exceptions and limitations to allow for certain, specific activities that pertain to scientific research, the activities of libraries and to disabled people. In this respect, the Directive has introduced an exhaustive list of exceptions and limitations.[877]

4.4.4. A calibration of functions for a fair distribution of copyright resources

In light of the above, the fair balance of rights embeds the intent to optimize the incentives to creators and investors and minimize the burden imposed on users and follow-on creators.[878] In fact, the EU legislator aims to curb the inequalities generated by copyright not only by setting limitations to the copyright protection, as analyzed above, but also carving out flexibility to calibrate the prevailing function of copyright in a sector-based, if not case-by-case, manner. This calibration is tightly connected to the flexibility sought and promoted by the CJEU by emphasizing on the notion of fair balance and not relying on an 'essential function doctrine' instead.[879]

The image usually linked to copyright is the double-pan scale, having on the one side the protection of the author and, on the other, the right to access content by the user. Nevertheless, *de facto* there is a substantial overlap between creators and users[880] and growing difficulties in classifying some new actors in the copyright scenario in one of these two

[877] European Commission, 'Copyright in the Knowledge Economy' (Green Paper) (n 271) 4 (emphasis added).
[878] Landes and Posner, *The Economic Structure of Intellectual Property Law* (n 710) 69 ff.
[879] See Chapter 3 Sections 3.1.2 and 3.5.
[880] The intersection between these two categories is highly intuitive, based on the same definition of the creator as user of others' works for the purpose of inspiration, follow-up creation, transformation. Landes and Posner build their study of the copyright model emphasizing the convergence of incentives and burdens over the same cateogory of players. Landes and Posner, *The Economic Structure of Intellectual Property Law* (n 710) 69.

categories.[881] This means that the benefits and burdens of creators directly influence, hence flow into or, indeed, 'communicate' with those of the users, and *vice versa*.

The underlying intent of the EU copyright legal framework is to preserve this interrelation unhindered. The analysis in the previous chapters has demonstrated how not only the categories of copyright players are highly connected and often overlapping, but also the functions of EU copyright law. If, on the one side, copyright aims to remunerate the creator and the investor, on the other it purports to boost the dissemination of content; if promises the rise of economic benefits in one vessel and guarantees social and cultural benefits in the other.[882] Even from the perspective of the functions of copyright harmonization, the connection is evident between the goal of establishing a high competitiveness of the EU creative industries, for which investments need to be strongly protected, and the intent to promote technological progress, without stifling it through law.

Thinking of a basic model of communicating vessels helps visualizing the different roles played by the limitations of copyright protection and by the notion of fair balance. The distribution of income and the distribution of information serve as the 'vessels'. The limitations analyzed above – the limited duration and the closed list of exceptions and limitations – aim to avoid the extreme situation of a disproportionate increase of income and a drained 'information vessel'. The reversed scenario, with specific regards to the galloping

[881] For an insightful analysis on the role and status of online intermediaries, see Martin Husovec, *Injunctions Against Intermediaries in the European Union* (Cambridge University Press 2017) 9–15.

[882] In addition to the functional analysis carried out in the previous chapters, it is worth noting in this specific regard the wording in the European Commission, 'Impact Assessment on the modernization of copyright rules' (Staff Working Document) (n 396) 200 lists among the operational objectives of the CDSM Directive ('Ensure that the increase in the consumption of publications is reflected in a return on the required investments.').

risk of illegal distribution of content in the digital environment, is averted by way of Recital 22 of the InfoSoc Directive, which states:

> The objective of proper support for the dissemination of culture must not be achieved by sacrificing strict protection of rights or by tolerating illegal forms of distribution of counterfeited or pirated works.[883]

Within the boundaries set by these limitations, the fair balance performs the different task of injecting flexibility in the determination of the prevailing function so to equal the relation between the vessels to a more moderate extent. The functional analysis has, indeed, demonstrated that EU copyright law lacks a hierarchy of functions in its legislation and the CJEU has not developed an essential function doctrine. Hence, the multi-functional approach of the EU legislator and the CJEU towards copyright leaves open the possibility to calibrate the objectives in a sector-specific, if not case-by-case manner. In some occasions and, more structurally, in the most recent CDSM Directive, the intent of the EU legislator to achieve a fair system of copyright, under the twofold interpretation of fair remuneration and fair balance of rights, is openly expressed.[884]

This leads to two final considerations. First, the multi-functional and sectorial nature of the EU copyright legislation may not be an end in itself, but rather a structural choice apt to enable a margin of corrective intervention on the unequal distribution of income and information generated by copyright. Second, as highlighted by Bechtold, embracing this

[883] InfoSoc Directive recital 22.
[884] CDSM Directive recital 3; see also European Commission, 'Towards a modern, more European copyright framework' (Communication) (n 346) 2; European Commission, 'Impact Assessment on the modernization of copyright rules' (Staff Working Document) (n 396) 200.

perspective, the act of connecting EU copyright rules to their purposes and intervening on inequalities is expected to be carried out predominantly by the CJEU.[885]

4.5. Conclusion

The predominant economic nature of the EU copyright functions and the recurrent emphasis on market failures have called for an economic analytical perspective on EU copyright law. Such approach relies on a consolidated neoclassical perspective, which translates the social welfare of copyright law into a normative push towards the maximization of both the content produced and its dissemination in society. In light of this standard, the fact that copyright generates social costs in the forms of costs of access and deadweight losses acquires utmost relevance.

Social costs lead to set boundaries of copyright protection and, within these limits, to calibrate its scope in order to avoid scenarios of both underproduction and underuse of creative content. The resulting trade-off between incentive and access to content is significantly affected by the rise of the digital environment. On the one hand, the need to distinguish between the incentive to create and the incentive to distribute is accentuated; on the other, scenarios of copyright overprotection lead to exacerbated inefficiencies. The intent to minimize social costs in the so-called 'digital trade-off' sets the focus on the pragmatic aspects of remuneration of right holders and opportunities of access content by the public. By this token, the analysis suggests embracing the logic of distributive justice to assess the effectiveness of EU copyright rules in maximizing social benefits.

[885] Bechtold (n 23) 66–68.

Generally speaking, the distributive rationale and copyright law show a significant affinity. Within the EU context, the distributive logic proves particularly compatible, since it avoids unilateral purposive approaches, focuses on social costs and is centered on the notion of fairness. Retracing the analysis of the functions of EU copyright law, a distributive rationale can be identified, which remains mostly unspoken, but emerges from a peculiar balancing system, which enables specific functions to prevail in a specific sector-based or case-by-case way in order to avoid excessive unequal distribution of copyright-generated income and information and knowledge in society. This approach proves fitting for the purpose of building an analytical framework for the assessment of EU copyright rules. This attempt will be carried out in Chapter 5.

Chapter 5 - A distributive framework for EU copyright rules

The study of the EU copyright functions has unveiled a distributive rationale, which, although remains mostly implicit, fundamentally underlies the process of harmonization. The distributive perspective becomes, therefore, a key element in the assessment of EU copyright rules and, more precisely, a tool for decrypting the multi-functional approach and the centrality of the notion of fair balance emerging from its teleological interpretation. This final Chapter suggests how the distributive perspective can gain space in the analysis of EU copyright law by building a consistent framework and testing it on selected provisions. Its effectiveness will be measured against the ability of identifying convergences and divergences between the objectives pursued by the legislation and the outcomes of its application.

The Chapter illustrates how the distributive rationale can take the shape of a proper functions- and effects-based analytical framework (Section 5.1) and why this represents a new and useful perspective for the study of EU copyright law (Section 5.2). The distributive framework pivots on three main testing fields, represented by the fair distribution of copyright income among right holders, the fair distribution of copyright income between right holder and the public and the fair distribution of information between right holders and the public. The selection of cases to test the framework fulfils the criterion of relevance regarding these specific scenarios and focuses on the EU copyright provisions concerning fair remuneration, co-authorship and teaching exception (Sections 5.3 and 5.4). Final considerations will be drawn assessing the expected benefits and pitfalls of a wider application of the framework to the EU copyright legal system (Section 5.5).

5.1. From a distributive rationale to a distributive framework of analysis

The transformation of the distributive rationale identified in the background of the functions of EU copyright law into a proper, self-standing analytical framework finds solid ground in the case built in favor of a tighter connection between copyright legislation and its objectives. It has been illustrated previously in this study how the CJEU makes extensive use of teleological references, yet without developing a consistent functional doctrine of copyright.[886] Together with this deficit in the interpretation of EU copyright rules, what sounds an alarm bell is the substantial evolution of copyright protection. The significant expansion of its scope and duration, in the EU and beyond, has been promoted mostly evoking the need to enhance the protection of right holders and remedy their economic losses caused by the digital environment.[887] Nevertheless, this argument has been questioned from several angles. Among others, it has been observed how the creative production in certain sectors does not show any correlation with the incentive engineered by copyright.[888] Classic examples in this regard vary from open software[889] to the fashion industry,[890] from scientific publications[891] to cooking

[886] See Chapter 3.
[887] See Landes and Posner, *The Economic Structure of Intellectual Property Law* (n 710) 330.
[888] See in this regard Diane L Zimmerman, 'Copyrights as Incentives: Did We Just Imagine That?' (2009) 12 Theoretical Inquiries in Law 29 ff.; Rochelle C Dreyfuss, 'Does IP Need IP? Accommodating Intellectual Production Outside the Intellectual Property Paradigm' (2010) 31 Cardozo Law Review; Raustiala and Sprigman (n 778); Jessica Silbey, *The Eureka Myth: Creators, Innovators, and Everyday Intellectual Property* (Stanford University Press 2014).
[889] See Raustiala and Sprigman (n 778) 52–56; Josh Lerner and Jean Tirole, 'Some Simple Economics of Open Source' (2002) 50 The Journal of Industrial Economics 197; Yochai Benkler, 'Coase's Penguin, or, Linux and "The Nature of the Firm"' (2002) 112 Yale Law Journal 369.
[890] See Kal Raustiala and Christopher Sprigman, 'The Piracy Paradox: Innovation and Intellectual Property in Fashion Design' (2006) 92 Virginia Law Review 1687; Stefan Bechtold, 'The Fashion of TV Show Formats' [2013] Michigan State Law Review 451.
[891] See Eger and Scheufen (n 692).

recipes,[892] up to urban art.[893] Moreover, it has been highlighted how the expanded protection not only has led to questionable changes in the incentive mechanisms, but has generated new significant imbalances, such as a widening economic gap between corporate and individual right holders.[894]

In this vein, the call for a connection – or, rather, reconnection – of copyright to its own declared functions represents an attempt to tame the risk of overprotection. The literature offers several viewpoints on how this reconnection should take place.[895] According to Vivant's principle of strict necessity, 'the fence must be drawn along lines which are strictly necessary',[896] thus meaning that the designed scope of protection should always find correspondence to a specific need of the democratic society addressed by the legislation.[897] A more pragmatic proposal comes from Dusollier's suggestion of a function-based doctrine of exploitation.[898] Identifying the core function of copyright law in the 'grant[ing] to authors control over the public circulation of their work',[899] Dusollier envisions a modernization of

[892] See Emmanuelle Fauchart and Eric A von Hippel, 'Norms-Based Intellectual Property Systems: The Case of French Chefs' (2008) 19 Organization Science 187 ff.; Christopher Buccafusco, 'On the Legal Consequences of Sauces: Should Thomas Keller's Recipes Be *Per Se* Copyrightable?' (2007) 24 Cardozo Arts & Entertainment Law Journal 1121.

[893] See Marta Iljadica, *Copyright Beyond Law: Regulating Creativity in the Graffiti Subculture* (Hart Publishing 2016); A criticism that has been raised is that conceptualizing a "beneficial absence of copyright protection" has been proved so far by selecting highly sectorial case studies and specific examples. See, in this regard, Robert P Merges, 'Economics of Intellectual Property Law' in Francesco Parisi (ed), *The Oxford Handbook of Law and Economics* (Oxford University Press 2017).

[894] See Ghidini, *Rethinking Intellectual Property* (n 19) 159 ('The reconstruction of the positive salient features of copyright law highlights the progressive establishment of a net imbalance in favour of the means [exclusive rights of the holders] over the end [development and dissemination of the culture and information].') ; See also empirical studies on the profits generated by copyright by Kretschmer (n 679); Kretschmer and others (n 822); Kretschmer and Hardwick (n 822); see also Aguilar (n 841); Daniela Simone, *Copyright and Collective Authorship. Locating the Authors of Collaborative Works* (Cambridge University Press 2019) 5–6.

[895] See, among others, Bechtold, who optimistically affirms that the process of reconnection may be actually already occurring. Bechtold (n 23) 73.

[896] Vivant (n 13) 50–51.

[897] *ibid* 51 ('[...] the "reservation" or enclosure must be limited to what is strictly necessary in view of the raison d'être of the intellectual property right in question.'); see also *ibid* 63–64.

[898] Dusollier, 'Realigning Economic Rights with Exploitation of Works' (n 23).

[899] *ibid* 164, 172–176.

the structure of copyright protection, which overcomes the technical and insidious notions of reproduction and communication to the public, pivoting instead on a more comprehensive right of exploitation of the work in the public sphere.[900]

In addition to a renewed focus on its functions, the concerns and controversial evidence surrounding the expansion of copyright protection has also prompted the need for a consequence-sensitive assessment.[901] It has been pinpointed how copyright law, and EU copyright law in particular, has displayed an increasing formalist character, which should be contrasted by a market-sensitive approach.[902] In this light, Ohly proposes a fairness-based theory of copyright, which would lead the legislator to define the requirements for infringement rather than the exclusive rights constituting the protection, while giving prominent relevance to the economic impact of the use of a work.[903] Also in this regard, the interpretations of the CJEU do not offer a reliable basis to build the connection between EU copyright rules and their own expected outcomes.[904]

The highlighted disconnects in the structure and interpretation of EU copyright protection and the related efforts by the scholarship to suggest ways to move towards a more consistent

[900] The notion of exploitation being distinguished from other uses, such as the 'individual and specific acts of use that could constitute the many steps of a process'. *ibid* 164; In this line, see also Gervais, *(Re)Structuring Copyright. A Comprehensive Path to International Copyright Reform* (n 157) 211 ('A teleological approach to define a "use" right has the advantage of being technologically neutral.').

[901] Among the most articulated call in this direction, see Ian Hargreaves, 'Digital Opportunity. A Review of Intellectual Property and Growth' (2011); Bechtold (n 23); Poort (n 686); Simone (n 894) 6–7.

[902] Bechtold (n 23) 60, 65; Ohly (n 23) 97–99, 107 ('In particular, the economic rights [...] are defined in abstract terms as categories of acts which only the owner is allowed to performs or to authorize. Whenever a person carries out any of the acts allocated to the owner without being able to invoke a statutory exception, he or she infringes. This approach is formalist. It does not consider the economic consequences of individual acts, but judges them o the basis of a formal classification. [...] There seems to be growing uneasiness with copyright formalism on both sides of the Atlantic.')].

[903] An emphasis, which easily reminds the fourth aspect of the fair use test in US copyright law. See Ohly (n 23) 112–118.

[904] In the vast case law, the arguments based on a fully-fledged consequentialist approach are extremely rare. See, for instance, *GS Media*; *FAPL*, paras 107-108.

and effective body of rules strongly support the need for a comprehensive framework of analysis. The distributive rationale promises to serve well this purpose, reconciling the objectives of EU copyright law with a consequentialist approach to its assessment.

5.1.1. The focus on social costs

This analysis has built on an idea of sustainability of the EU copyright system as the ability of the legal framework to hold together in a coherent way.[905] This requires not only a uniform application of EU copyright rules across the Union, but also a fundamental consistency between expressed functions and outcomes of the legislation. Key to this consistency are considerations about the social costs generated by copyright. In his seminal contribution on the philosophy of IP, Drahos defines IPRs as 'a distinctive form of privilege that rely on the *creation of a common disadvantage.*'[906] Closely coupled with the suggestion to rethink IP entitlements from a privilege, rather than from a rights perspective,[907] it is interesting to note that the author emphasizes on the 'common disadvantage' that IP engenders to society.[908] Not far from Drahos' viewpoint, the analysis has highlighted two main reasons why the attention fundamentally needs to be set on social costs.

First and foremost, the justification of copyright at EU level significantly relies on the economic incentive-based rationale, which pivots on the purpose to create the maximum benefit to society at large and, hence, minimize social costs. This intention refers to the

[905] See Introduction.
[906] Drahos (n 9) 250 (emphasis added).
[907] See, in particular, *ibid* 259.
[908] *ibid* 252 ('The instrumental attitude to property also draws on economic approaches to law. It endorss an approach that calculates the social costs of intellectual property protection.').

peculiar economic impact of copyright regulation in generating private costs (i.e. costs of expression and costs of distribution) as well as social costs (i.e. costs of access and deadweight losses).[909] In a concise manner, it can be stated that the former represent the reason why copyright entitlements exist, while the latter indicate the reason why they are limited. Nevertheless, these two typologies of costs do not stand on an equal footing. Copyright protect intangible works of the intellect, which are non-rival resources for which, as all public goods, there is a demand and, at the same time, exists the risk of insufficient supply.[910] According to the economic analysis, the ultimate goal of copyright protection is to provide these goods to society. In this light, concerns over social costs, in the forms of expensive or lack of access to creative content, should prevail over issues related to private costs. This has been demonstrated by analyzing the logic underlying the inefficiency of copyright overprotection and underprotection. Both scenarios, indeed, rely on the intent to avoid the underproduction of creative content, thus underlining how copyright aims to maximize, first, the social benefits, and only in an instrumental manner the private benefits of copyright holders.[911]

The second reason justifying the focus on social costs is that the EU legislator is embedded within the notion of fair balance. This recurrent ploy not only hints at a mature sensitivity of the EU legislator towards the problem of social costs generated by copyright, but also paves the way for potential solutions on how to minimize them. Even though the balancing of rights

[909] See Chapter 4 Section 4.2.
[910] Poort (n 686) 292.
[911] The following considerations are worth recalling: "Copyright underprotection is not efficient *because* it leads to lower profits of the right holder, hence to a lower incentive to create and, in turn, to less works accessible to the public. Copyright overprotection is not efficient *even though* it leads to an increase in the profits of the right holder, but it lowers the consumer surplus by rising the costs of access to works. It can be therefore concluded that the social benefits, which copyright protection aims to maximize, predominantly consist in the ability of the public to access a flourishing amount of creative works." See Chapter 4 Section 4.2.2.

and interests remains quite an obscure and potentially uncertain mechanism,[912] the economic analysis has helped grasping the underpinnings of the legislation in this regard. The recourse to the notion of fair balance hints at the quest for an *optimum* between the aim to maximize the number of works produced and their dissemination, i.e. the well-known and paradoxical trade-off between incentive and access.[913] The approach adopted by the EU legislator is peculiar and two-tiered. First of all, it displays the strict intent to avoid excessive inefficiencies and, second, leaves room for a calibration of the benefits and burdens generated by way of copyright, within its boundaries of legitimation.[914] The extremes to be strictly avoided are the excessive maximization of the incentive and the consequential loss in the opportunities of access below the minimum required by the protection of fundamental rights, thus capping the incentive granted to the copyright holder in favor of the whole society. It turns evident that, within this rationale, the focus is set on avoiding an excessive rise of social costs.

By and large, as scenarios of unfair distribution of resources regarding other sectors (suffice it to think of the high costs of compensation, litigation and law enforcement in labor law or criminal law),[915] copyright law reckons with distributive implications and significant social costs, both in the traditional form of costs of access and deadweight losses, but also taking stock of the potential emergence of disincentives to creation and, in turn, lower production.[916]

[912] Strowel and Kim (n 448) 122.
[913] Recalling Landes and Posner, 'Indefinitely Renewable Copyright' (n 682) 5,9 ('Viewed as an institution for promoting economic efficiency, the copyright system seeks to balance the incentive gains from pricing expressive works above marginal cost against the deadweight and other costs.'); Besen and Raskind (n 674) 5; Eger and Scheufen (n 34) 39.
[914] See Chapter 4 Section 4.4.
[915] See Melvin J Lerner and Sally C Lerner, *The Justice Motive in Social Behavior: Adapting to Times of Scarcity and Change* (Springer 2013) 415 ff.; On the core relevance of litigation costs and the related effects on intellectual property rights, in particular patent rights, see Collins (n 739).
[916] See, for a detailed explanation, Chapter 4 Section 4.3.

The assessment of its effectiveness in society ought, therefore, to reflect this consideration, both looking at the ways the legislator intends to tackle this and the resulting effects.[917]

5.1.2. The distributive matrix

According to the main features of the distributive rationale identified in the background of EU copyright law, the framework focuses on the distribution of copyright-generated income and of information and knowledge in society. By this token, its structure results based on two axes. On the first axis lie the relevant resources, while the second axis displays the parties involved in the distribution.

[Distribution of]	Copyright income	Information & knowledge
Among right holders		
Between right holder and the public		

Table 1 - The distributive matrix

The matrix well accommodates the multi-functional nature of EU copyright law. First of all, it avoids the adoption of unilateral purposive standards and does not require to establish a predominant function over the others. Moreover, it shows particular affinity with the EU

[917] This is in line with Hughes and Merges' application of the Rawlsian theoretical framework for the purpose of assessing rules in the society. Hughes and Merges (n 791) 526.

conception of copyright as a tool to strike a fair balance, depicting, in the left column, the objectives related to the remuneration of the right holder and, in the right column, the goals that orbit around social and cultural progress.[918]

A criticism that this matrix may encounter is that the distribution of resources occurs outside and independently from the scope of copyright protection. This criticism is based on a rather narrow conception of copyright law, which sees other fields of law (e.g. competition law, taxation law) or specific social institutions deployed to address the effects of copyright rules.[919] The core of this conception lies in the separation between copyright law from its *alter ego*, i.e. copyright contract law. It is, indeed, of essential relevance to determine whether copyright's reliance on contract law should be deemed an external aspect to the legal institution of copyright itself, thus placing *de facto* any consequentialist analysis outside the boundaries of copyright law. It should be therefore recalled that this analysis embraces a broader conception of copyright, inclusive of its contractual 'life' and practice, as conceived at EU level starting

[918] This binary structure may be interpreted also as reflecting what Goldstein and Hugenholtz hold as the global view of copyright: '[T]here is worldwide consensus that copyright and author's right advance the important goals of authorial autonomy and cultural diversity. The grant to creators of exclusive rights in their works of authorship opens the door not only to reaping revenues from the work but in many cases to earning a livelihood. The universal rule that copyright protects expression but not ideas opens a second door, stimulating the production and dissemination of diverse cultural expression by enabling successive generations of authors to draw freely on the advances wrought by their predecessors.' Copyright's limited term and pervasive exceptions also promote cultural diversity [...]" Goldstein and Hugenholtz (n 219) 6.

[919] See, in this regard, and in particular on relevant mechanisms of unfair competition law, Maria Mercedes Frabboni, 'The Changing Market for Music Licenses: A Redefnition of Collective Interests and Competitive Dynamics' in Anne Flanagan and Maria Lillà Montagnani (eds), *Intellectual Property Law. Economic and Social Justice Perspectives* (Edward Elgar 2010); Mariateresa Maggiolino, 'Social Justice, Innovation and Antitrust Law' in Anne Flanagan and Maria Lillà Montagnani (eds), *Intellectual Property Law. Economic and Social Justice Perspectives* (Edward Elgar 2010); Gustavo Ghidini and Valeria Falce, 'Antitrust and Consumer Protection: The New Regime on Unfair Commercial Practices' in Anne Flanagan and Maria Lillà Montagnani (eds), *Intellectual Property Law. Economic and Social Justice Perspectives* (Edward Elgar 2010).

from the 'existence-exercise' dichotomy, hence fundamentally drawing considerations from its legal design, application and engendered effects in society.[920]

The matrix can be turned into a framework of analysis investigating the effects of copyright rules and providing meaningful insights on the degree of detachment from the stated functions. The interpretative criterion guiding the framework would be represented by the EU legislator's intent to avoid excessively unequal distributions of income and information, which, as demonstrated, signal inefficient regimes of overprotection or underprotection of copyright.[921]

5.2. Applying the distributive framework to EU copyright law

The application of the distributive matrix to the EU copyright legal framework necessarily leaves the *vision d'ensemble* and delves into the merits of specific provisions. A thorough scrutiny of all provisions and legal institutions constituting the EU copyright legal framework would exceed the limits of this dissertation. Nonetheless, a first application of the distributive framework on selected provisions will suffice to test its effectiveness. The matrix sketched above helps identifying, in a rather intuitive manner, some categories of rules and provisions, which stand out, showing a marked relevance from the distributive point of view.

[920] This comprehensive approach to copyright law has been particularly emphasized by Morando, who opposes to the intent to move "beyond copyright" the suggestion of contractual solutions to structural problems of the copyright paradigm. See Morando (n 688).
[921] See Chapter 4 Section 4.4.2.

[Distribution of]	Copyright income	Information & knowledge
Among right holders	Fair remuneration	Exceptions & limitations
Between right holder and the public	Fair compensation	

Table 2 - Distributive framework applied to EU copyright law

Starting from the upper-left quadrant, fitting the box on the distribution of income among right holders, is the notion of fair remuneration, which finds application on multiple provisions across EU copyright law and has attracted substantial attention by the CJEU.[922]

Moving to the bottom, at the intersection between the distribution of information and the relation between right holders and the public, lies the institution of fair compensation and, more generally, the establishment of liability rules replacing the exclusive effect of copyright entitlements.[923] Worth noting is the resulting neat distinction between the notions of fair remuneration and fair compensation. Despite jointly relating to the core of remunerative

[922] See Chapter 3 Section 3.5.2.
[923] Calabresi and Melamed point out that "the choice of a liability rule is often made because it facilitates a combination of efficiency and distributive results which would be difficult to achieve under a property rule." Calabresi and Melamed (n 720) 1110.

function, these two concepts do present different features,[924] methods of quantification,[925] degree of harmonization[926] and effects, thus making the overlap most often misleading.[927]

As far as the distribution of information is concerned, the main role is played by the copyright exceptions and limitations.[928] As illustrated in the previous Chapter,[929] these provisions, together with the limited duration of the protection as well as the originality requirement,[930] have a major impact on the opportunity to access the content by the public. An attentive look may notice how also sector-specific provisions protecting the lawful acquirer's right to access and use a certain technology[931] may fit in the quadrant. The reason why the quadrant presents no division between the distribution among right holders and between right holder and user has to do with the fact that the boundaries between right holders and users, when it comes to access and use, are very blurred in the EU copyright legal framework. As this analysis has already emphasized, the fact that a user can become a creator is of crucial relevance to the application of copyright rules and the framework reflects this overlap.

[924] See Chapter 3 Section 3.3.1.
[925] While the fair compensation most often results in a lump sum payment, the objective of fairly remunerating the right holder should follow a method of quantification that more closely account for the market value of the work. See Recital 73 of the CDSM Directive. Regarding the differences in quantification, see also Hilty and Moscon (n 230) 19.
[926] See *ibid* 19–20.
[927] An example supporting the need for a neater distinction between the two is offered by CDSM Directive art 16, which provides Member States with the possibility to grant publishers a share of the authors' fair compensations, hence looking at an author-to-producer distributive effect, which is the exact opposite of the producer-to-author distribution underlying the principle of fair remuneration set in art 18.
[928] Exceptions and limitations as distributive "mitigation mechanisms (…) to benefit certain classes of users or consumers." Merges (n 791) 120.
[929] Chapter 4 Section 4.4.
[930] See Drahos (n 9) 243 ('The purpose of the originality requirement in copyright is clear enough. It obliges the author to engage in some independent creative effort before he or she can claim the benefits of copyright protection. This creative effort eventually finds its way into the intellectual commons, because copyrigth is limited in duration. One way to understand the originality requirement is to sayt hat it helps to constitute the intellectual commons. It helps to keep certain information out of the reach of copyright ownership.').
[931] Computer Programs Directive recitals 10, 13; Database Directive recitals 49, 50.

5.3. A fair distribution of copyright income among right holders?

The distributive framework promises to highlight both convergences and divergences of the legislation with the intent to achieve a fair distribution of copyright income and information. The selection of EU copyright provisions analyzed through this lens is motivated by their significance with regards to the three identified main testing areas. The testing of the framework starts with the provisions on fair remuneration among right holders.

5.3.1. The evolving role of fair remuneration

The study has highlighted in several occasions the crucial role of the remunerative function of EU copyright law, based both on *ex ante* and *ex post* justificatory grounds, thus envisioning the remuneration to the copyright holder both as an incentive and a just reward for intellectual work.[932] This twofold argument is expressed with difference nuances and with a moving emphasis from the function to ensure authors and performers an adequate income to live from their jobs[933] to the goal of stimulating creativity[934] up to the intent to help financing new talents for the purpose of cultural diversity.[935] These interpretations highlight an essential component of the remunerative function, that is the fact that *all* copyright holders over a specific work should be properly remunerated.

[932] Respectively described as so-called "backward-looking" and "forward-looking" approaches to copyright by Strowel (n 27) 235–238 See, in particular, Chapter 1 Section 1.5.
[933] E.g. InfoSoc Directive recital 11; Resale Directive recital 3; Orphan Works Directive recital 5.
[934] E.g. InfoSoc Directive recitals 9, 10; Rental Directive recital 5; Term Directive recital 11; Orphan Works Directive recital 5; CRM Directive recital 1; Marrakesh Directive recital 1; CDSM Directive recital 2.
[935] E.g. European Commission, 'Impact Assessment On The Legal And Economic Situation Of Performers And Record Producers' (Staff Working Document) (n 345) 2, 19, 22, 45.

This consideration draws the attention on two main problems of the EU copyright legal framework. First, the category of right holders is ill-defined: no clear line is drawn between, on the one side, the author as a natural person and, on the other, the distributor as a legal entity.[936] The notion of right holder stands out as the most recurrent epithet used, jointly, for both categories of actors. Indeed, only rarely does the EU legislator show interest towards the specific characteristics of a given right holder. Clarifications on the notion occur solely either in highly technical settings (e.g. computer programs and database maker)[937] or when an imbalance in negotiating power among right holders is acknowledged, which is the case for authors and performers *vis-à-vis* producers and distributors.[938]

Second, the EU legislator has been wary of harmonizing copyright contract law provisions. This represents a problem within the EU copyright system, as national copyright systems protect individual creators *vis-à-vis* publishers and producers in extremely varying ways.[939] As

[936] Nérysson (n 628) 129–130.
[937] E.g. Database Directive art 4 ('The author of a database shall be the natural person or group of natural persons who created the base or, where the legislation of the Member States so permits, the legal person designated as the rightholder by that legislation.'); Computer Programs Directive art 2 ('The author of a computer program shall be the natural person or group of natural persons who has created the program or, where the legislation of the Member State permits, the legal person designated as the rightholder by that legislation.').
[938] See InfoSoc Directive recitals 10, 11 ('If authors or performers are to continue their creative and artistic work, they have to receive an appropriate reward for the use of their work […] A rigorous, effective system for the protection of copyright and related rights is one of the main ways of ensuring that European cultural creativity and production receive the necessary resources and of safeguarding the independence and dignity of artistic creators and performers.'); Term Directive of 2011 recitals 4, 5 ('The socially recognized importance of the creative contribution of performers should be reflected in a level of protection that acknowledges their creative and artistic contribution. Performers generally start their careers young and the current term of protection of 50 years applicable to fixations of performances often does not protect their performances for their entire lifetime. Therefore, some performers face an income gap at the end of their lifetime. In addition, performers are often unable to rely on their rights to prevent or restrict an objectionable use of their performances that may occur during their lifetime.'); CDSM Directive recital 3 ('[…] there should also be rules on […] the transparency of authors' and performers' contracts, on authors' and performers' remuneration, as well as a mechanism for the revocation of rights that authors and performers have transferred on an exclusive basis.'), recital 72 ('Authors and performers tend to be in the weaker contractual position when they grant a licence or transfer their rights, including through their own companies, for the purposes of exploitation in return for remuneration, and those natural persons need the protection provided for by this Directive to be able to fully benefit from the rights harmonised under Union law.').
[939] Lionel Bently and others, 'Strengthening the Position of Press Publishers and Authors and Performers in the Copyright Directive' (2017) Study commissioned by the European Parliament PE 596.810 43 ("Typical

seen in Chapter 3, also in this regard the CJEU has proactively pushed towards more harmonization of copyright contract rules,[940] touching upon the balance of rights among copyright holders and following a consistent reasoning of protection of authors and performers in their copyright contractual relationships. It is worth recalling a few examples. In *Luksan*, the Court asserted that the original ownership of copyright vests in the movie director, whose statutory rights of remuneration cannot be waived to the producer;[941] in *SENA*, the reasoning pivoted on the importance of a fair remuneration between performers and producers and the same notion of equitable remuneration acquired the status of an EU autonomous concept of law.[942] Moreover, in *Fundacion Salvador Dalì*, the CJEU interpreted the interaction between copyrights and succession laws under the rationale of 'ensur[ing] a certain level of remuneration for artists'.[943]

From these examples, it can be already observed how the Court, while attributing to the remunerative function a dominant role to ensure a 'high level of protection',[944] voices a categorical rejection of 'any system that would transfer [the remuneration] to publishers without obliging them to ensure that authors benefit from it, even if only indirectly'.[945] In other words, the CJEU recognizes that, if, on the one hand, the right to profit from the

examples of such regulation include rules requiring remuneration to be specified for each mode of exploitation licensed [or transferred], rules prohibiting the transfer of rights to exploit by way of unforeseen technological means, rules on termination, rules on construction [contra proferentem, purpose-limited etc], rules on duties to provide accounts, rules on equitable remuneration and so-called 'best-seller' clauses.").

[940] *ibid* 44.

[941] Luksan para 53, 80, 87-95, 100-108; see also related AG opinion para 133 ("[…] the principal director's authorship, which is protected by fundamental rights, risks being undermined by the allocation of the exclusive exploitation rights to the film producer"). See also Leistner (n 431) 578–579.

[942] *SENA* paras 23-24 and related AG opinion para 32.

[943] *Fundacion Salvador Dalì* paras 28-29, 32-33.

[944] See, *inter alia*, *Infopaq* para 40; *Luksan* para 77; *Metronome* para 22; *Scarlet Extended* para 14; *SGAE* para 36; *Dimensione Direct Sales* para 34; *Phil Collins* paras 12, 21 *Coditel*, para 14.

[945] Luksan para 108. See also Sganga, *Propertizing European Copyright* (n 26) 142.

exploitation of copyrights is key to the protection, on the other hand, it is not unlimited. This is particularly well conveyed in the Court's reasoning in *FAPL*, which reads as follows:

> [T]he specific subject-matter of the intellectual property does not guarantee the right holders concerned the opportunity to demand the highest possible remuneration […] only appropriate remuneration for each use of the protected subject-matter.[946]

The quantification of the 'fairness' and 'appropriateness' of the remuneration becomes a crucial aspect in the Court's interpretation, with varying standards applied, from the number of occurred uses of the work, [947] to the prevention of the unjust enrichment by the unauthorized user.[948]

As the CJEU case law suggests, the core of the problem lies in the imbalanced distribution of copyright-generated income. The EU copyright legislation contains few, yet unequivocal indications of the intent to establish a fair distribution of income among right holders, in particular in the Term Directive Amendment of 2011, the Resale Directive and the Rental Directive. The 2011 amendment to the Term Directive, besides extending the duration of their related rights, aims to ensure that performers receive a fair remuneration from the transfer of their rights to phonogram producers.[949] For this purpose, the Directive introduces a mandatory and unwaivable right to a supplementary remuneration, which applies if the performer receives a non-recurring (i.e. a lump sum) remuneration in exchange for her

[946] *FAPL* paras 107-108 (emphasis added).
[947] See *Coditel I* paras 12,14; *Warner Bros* para 15; *FAPL* para 109.
[948] This emerges, for instance, in *SGAE* and *FAPL*, the Court arguing that the enhanced financial results of hotels and public houses providing access to protected content was violating the right to equitable remuneration of the copyright holder. See *SGAE* para 44; *FAPL* para 205. See also *FAPL* para 108 ('[…] the specific subject-matter of the intellectual property does not guarantee the right holders concerned the opportunity to demand the highest possible remuneration […] only appropriate remuneration for each use of the protected subject-matter'). See Chapter 3 Section 3.3.1.
[949] Term Directive of 2011 recitals 9-14.

rights.[950] Interestingly, the EU legislator sets concrete parameters for the calculation of this supplementary payment.[951] The Resale Directive, harmonizing the so-called *droit de suite*,[952] specifically addresses authors of graphic and plastic works of art and ensures they receive an adequate share in the economic success of their works.[953] The underlying intent is to allow the author of the artwork, which can potentially acquire significant value alongside with time and sales, 'a second bite of the apple', hence a fair share in the growing profits.[954]Also in this case, while introducing a mandatory and unwaivable right of the artists to a royalty for any resale of the original artwork,[955] the EU legislator sets detailed benchmarks to determine the due amount of royalties.[956] Interestingly, the Directive also expresses the intention to 'promote the interests of new artists' enabling Member States to provide for the *droit de suite* also for works under the set threshold sale price.[957] Lastly, the Rental Directive presents a broader scope, granting an unwaivable right to equitable remuneration to any author and performer of a song or movie, who transferred her exclusive rental right to the producer.[958] No further indication is provided regarding the quantification of the due remuneration, except from Recital 13

[950] *ibid* art 1(2).
[951] *ibid* ('[…] The overall amount to be set aside by a phonogram producer for payment of the annual supplementary remuneration referred to in paragraph 2b shall correspond to 20 % of the revenue which the phonogram producer has derived, during the year preceding that for which the said remuneration is paid, from the reproduction, distribution and making available of the phonogram in question, following the 50th year after it was lawfully published or, failing such publication, the 50th year after it was lawfully communicated to the public.').
[952] The droit de suite, or resale right, may seem an atypical entitlement on the copyright scene, as it regulates the transfer of the physical object, in which the artistic work is embedded. Nevertheless, as highlighted in the literature, it is fully in line with the copyright's utilitarian logic to support creativity and creative expression, in the field of fine arts. See Melville B Nimmer and David Nimmer, *Nimmer on Copyright: A Treatise on the Law of Literary, Musical and Artistic Property, and the Protection of Ideas* (M Bender 2008) §8C.04: "(…) the droit de suite may be conceived of as an attempt to equalize the copyright status of fine artists with that of literary and other authors."
[953] Resale Directive recital 3.
[954] Hughes and Merges (n 791) 571.
[955] Resale Directive art 1.
[956] *ibid* artt 3(2), 4, 5.
[957] Resale Directive recital 22.
[958] Rental Directive art 5.

stating that it may be paid 'on the basis of one or several payments at any time (…) [i]t should take account of the importance of the contribution of the authors and performers concerned to the phonogram or film.'[959]

The CDSM Directive has significantly consolidated the distributive connotation of the remunerative function, in the attempt of setting up virtuous national systems of fair distribution of copyright commercial revenues among right holders.[960] This intention emerges from the ambitious project of modernizing EU copyright rules to accommodate the evolution of digital technology,[961] which the Directive builds on the notion of well-functioning and *fair* marketplace for copyright.[962] Of particular interest for the purpose of this analysis is the reference to the fairness criterion, which acquires a twofold meaning. On the one side, it refers to the fair balance between the objectives of high level of protection of the copyright holder and easier access to content for the user.[963] On the other side, the Directive strongly

[959] *ibid* recital 13.

[960] See the declarations of the European Commission at the release of the draft proposal of the CDSM Directive in occasion of the State of the Union on 14 September 2016, in the person of the European Commission President Jean-Claude Jucker ('I want journalists, publishers and authors to be paid fairly for their work, whether it is made in studios or living rooms, whether it is disseminated offline or online, whether it is published via a copying machine or commercially hyperlinked on the web'), available at European Union (2019) <http://europa.eu/rapid/press-release_IP-16-3010_en.htm>. The use of the term 'copyright commercial revenues' excludes payments deriving from statutory or judicial compensations calculated on the basis of suffered harm.

[961] CDSM Directive recital 83. See also European Commission, 'Towards a modern, more European copyright framework' (Communication) (n 346). Interesting to note than the modernization of EU copyright law does not refer to a, more or less regular, introduction of new rules, addressing new technological uses, but it rather is –or, at least aims to be - a process of adaptation of the existing provisions, as the InfoSoc Directive recital 5 posits: '[…] no new concepts for the protection of intellectual property are needed, the current law on copyright and related rights should be adapted and supplemented to respond adequately to economic realities such as new forms of exploitation.'.

[962] CDSM Directive recital 3.

[963] *ibid* ('[…] with a view to ensuring wider access to content. It also contains rules to facilitate the use of content in the public domain.'). See analysis in *sub* Section 5.2.2.

emphasizes the need of appropriate *remuneration* of all copyright holders and, in particular, of authors and performers.[964]

Acknowledging the weaker contractual position of authors and performers at the moment of the stipulation of the assignment contract as well as during the exploitation of the transferred rights,[965] the Directive introduces mandatory provisions addressing the imbalance between the contracting parties. Article 18 CDSM Directive sets a principle of fair remuneration, which is meant to be an 'umbrella provision' inspiring the following articles introducing transparency obligations and a contract adjustment mechanism.[966] Article 18 enjoins Member States to ensure that any author or performer receives an appropriate and proportionate remuneration whenever she transfers or licenses her copyrights to a publisher or producer.[967] Emphasizing on the crucial role of symmetric information in enabling contractual parties to assess the economic value of what they are exchanging,[968] Article 19 imposes transparency

[964] *ibid* artt 15(5), 18, 20, recitals 3, 59, 61, 73. See also European Commission, 'Impact Assessment on the modernization of copyright rules' (Staff Working Document) (n 396) 173-174 ('Creators should be able to license or transfer their rights *in return for payment of appropriate remuneration* which is a prerequisite for a sustainable and functioning marketplace of content creation, exploitation and consumption') (emphasis added).

[965] *ibid* recitals 72, 75. See also European Commission, 'Impact Assessment on the modernization of copyright rules' (Staff Working Document) (n 396) 175 ('The main underlying cause of this problem is related to a market failure: there is a natural imbalance in bargaining power in the contractual relationships, favouring the counterparty of the creator, partly due to the existing information asymmetry.').

[966] CDSM Directive artt 19, 20, 22. This interpretation emerges from the JURI Committee Tabled Amendments of 19 March 2018 as reported by Bently and others (n 939).

[967] CDSM Directive art 18(1) ("Member States shall ensure that where authors and performers license or transfer their exclusive rights for the exploitation of their works or other subject matter, they are entitled to receive appropriate and proportionate remuneration."). The provision applies whenever the author or performer transfers or licenses her exclusive rights for the purpose of exploitation to any contractual counterparty, unless the latter is an end-user or is not the ultimate exploiter of the rights e.g. employer. See Recital 72 CDSM Directive. It is worth noting that the provision was not included in the European Commission, 'Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market' COM(2016) 593 final and that, following the amendments of the Directive during its negotiation process, Art.18 was first entitled "[u]nwaivable right to remuneration". See JURI Committee Tabled Amendments as reported by *ibid* 80–81 In the consolidated version, the unwaivable right becomes a principle of the fair remuneration, thus loosening its grip and allowing for wider discretion of the national legislators. .

[968] "Transparency is also affected by the increasing complexity of new modes of online distribution, the variety of intermediaries and the difficulties for the individual creator to measure the actual online exploitation (…) Online distribution is expected to become the main form of exploitation in many content sectors. Transparency is, therefore, even more essential in the online environment to enable creators to assess and better exploit these

obligations to the assignees or licensees, who shall regularly provide updated information to contracting authors and performers about the exploitation of their copyrights.[969] Lastly, Article 20 provides for a corrective mechanism, on which the author or performer can rely to claim additional, appropriate and fair remuneration whenever, after having transferred or licensed their exclusive rights, the remuneration received turns out to be disproportionately low compared to the revenues deriving from the exploitation of the work.[970] On an additional note, it is also worth mentioning that Article 15, famously known as the press publishers' right, in its fifth paragraph enjoins Member States to ensure that authors of works incorporated in press publications – thus addressing mainly journalists, photo and video reporters – receive an appropriate share of the revenues deriving from the digital uses of the press content.[971]

Two specific critiques may be raised against the increasing attention of the EU legislator towards the fair distribution of copyright-generated income among copyright holders. From

new opportunities." European Commission, 'Impact Assessment on the modernization of copyright rules' (Staff Working Document) (n 396) 174-175.

[969] CDSM Directive art 19(1) ('Member States shall ensure that authors and performers receive on a regular basis, at least once a year, and taking into account the specificities of each sector, up to date, relevant and comprehensive information on the exploitation of their works and performances from the parties to whom they have licensed or transferred their rights, or their successors in title, in particular as regards modes of exploitation, all revenues generated and remuneration due.').

[970] CDSM Directive art 20(1) ('Member States shall ensure that, in the absence of an applicable collective bargaining agreement providing for a mechanism comparable to that set out in this Article, authors and performers or their representatives are entitled to claim additional, appropriate and fair remuneration from the party with whom they entered into a contract for the exploitation of their rights, or from the successors in title of such party, when the remuneration originally agreed turns out to be disproportionately low compared to all the subsequent relevant revenues derived from the exploitation of the works or performances.'). This should not be confused with the so-called best seller clauses, which apply only to the works that reach the top of the sales lists. According to the provision, *any* 'significant disproportion between the agreed remuneration and the actual revenues which can happen to any kind of work, even of low/medium success'. See European Commission, 'Impact Assessment on the modernization of copyright rules' (Staff Working Document) (n 396) 180. The notion of actual revenue is meant in a broad sense and includes all relevant sources of revenues (e.g. sale of merchandising). See CDSM Directive recital 78.

[971] CDSM Directive art 15(5), recital 59. The paragraph aims to strike an 'internal balance' within the provision, to prevent that the empowerment of press publishers vis-à-vis digital commercial users occurs to the detriment of journalists and photographers. See Bently and others (n 939) 22.

a libertarian perspective, this may be deemed a paternalistic approach, which may set obstacles to a sustainable allocation of resources in society, assuming that the market alone will achieve such a goal.[972] Moreover, from a more pragmatic viewpoint, the case may be built for a more empirical take on distribution, thus meaning strengthening the claim for its necessity[973] and building a more detailed regulation to address it.[974]

The argument advanced in this analysis is that of a convergence between the consolidating harmonization of the institution of fair remuneration and the functions of EU copyright law. This is proven not only by the markedly teleological interpretation provided by the CJEU in cases related to fair remuneration.[975] By taking into consideration the different typologies of right holder and treating their high level of protection on an equal footing,[976] the EU legislator intent to avoid excessively unfair distributions of revenues, thus reducing the risk of a

[972] See, in this vein, the comment by Oliver and Stothers (n 582) 544.

[973] Although a substantial body of relevant empirical evidence has been already collected. See European Commission, 'Impact Assessment on the modernization of copyright rules' (Staff Working Document) (n 396) 173-176 reporting statistics, outcomes of the public consultations and declarations by representative groups of authors and performers. See also Lucie Guibault and Bernt Hugenholtz, 'Study in the Conditions Applicable to Contracts Relating to Intellectual Property in the EU' (Study commissioned by the European Commission) [2002] ETD/2000/B5-3001/e/69, 154 ff.; Séverine Dusollier et al, 'Contractual Arrangements Applicable to Creators: Law and Practice of Selected Member States' (Study commissioned by the European Parliament) [2014] PE.493.041; Europe Creative, 'Remuneration of Authors and Performers for the Use of Their Works and the Fixations of Their Performances' (Study commissioned by the European Commission) [2015] MARKT/2013/080/D.

[974] The CDSM Directive Proposal of 2016 raised skepticism regarding the real impact of the provisions on fair remuneration. See European Copyright Society, 'General Opinion on the EU Copyright Reform Package' (2017) 8 <https://europeancopyrightsociety.org/how-the-ecs-works/ecs-opinions/>; Max Planck Institute for Innovation and Competition, 'Position Statement on the Modernisation of European Copyright Rules' (2017) <https://www.ip.mpg.de/en/projects/details/modernisation-of-european-copyright-rules.html>. In light of the consolidated version, the room left to the discretion of national legislators is still significant. The judicial interpretations of 'appropriate and proportionate remuneration' as well as of 'disproportionately low remuneration' are expected to weigh heavily on the impact of the harmonizing provisions. See CDSM Directive recital 78; European Commission, 'Impact Assessment on the modernization of copyright rules' (Staff Working Document) (n 396) 174.

[975] *Inter alia*, in *Luksan,* the Court evokes the objectives of the Rental Directive in protecting, first, the adequate income of the authors and performers, and, second, the producer's investment striking a balance between their interests. See *Luksan* paras 77-78; in *Fundacion Salvador Dalì*, the teleological interpretation strongly emphasizes the intention to protect the individual artist. See *Fundacion Salvador Dalì* paras 25-33.

[976] E.g. Rental Directive recital 13 ('[…] the importance of the contribution of the authors and performers concerned to the phonogram or film').

disincentive to create. The maximization of the remuneration of the producer to the detriment of the author or performer proves inefficient from the distributive, natural law and utilitarian perspectives. The latter, predominant in the EU copyright legal framework, illustrates how to the reduced remuneration of one player corresponds to her reduced incentive to create, thus characterizing as a scenario of copyright underprotection, which the EU legislator averts in the most absolute manner. By the same token, the fair distribution of copyright-generated income among right holders converges, in turn, with another function of EU copyright law, that is the protection of cultural pluralism.[977] The risk of an excessive economic imbalance is borne in particular by players in the copyright system, who have less contractual power. Among them, *niche* artists across the cultural sectors are significantly less reached by investments for production and distribution and their protection is essential to the preservation of a wide variety of creative works available in the society.[978]

5.3.2. The blind eye on co-authorship

The analysis of EU copyright law through the distributive framework, with particular regard to the distribution of income among right holders, shows also a divergence between copyright functions and provisions. The divergence emerges from a lack of substantial harmonization of rules on co-authorship. Starting from the same premises, that the remunerative function requires that all copyright holders should be protected and no excessive imbalances of remuneration should be generated among them, the EU legislator does not address the

[977] E.g. CDSM Directive recital 54 stating that aim to secure a sustainable, free and pluralistic press.
[978] See Nérysson (n 628) 43–45; Aguilar (n 841); Lacey (n 805).

problems of the varying definition of co-author across national copyright laws and of the potential weaker contracting power of co-authors.

Focusing on the co-creation of content as a test-bed for this analysis may seem a counterintuitive choice, at best, or be even deemed a scenario of minor relevance, at worst. Even though the figure of the author is a constitutional pillar of any copyright system,[979] the regulation of the creation by multiple authors is generally overshadowed, as international sources showcase. Due to the remarkable diversity in national copyright rules on co-authorship,[980] the Berne Convention stipulates only one related rule on the duration of the copyright protection of a co-created work.[981] Later international copyright treaties show the same reticence towards setting uniform substantive rules, the Rome Convention leaves national legislators regulate the exercise of the rights of performers acting jointly,[982] while the TRIPs Agreement[983] and the WIPO Internet Treaties[984] are silent on the matter.

Nevertheless, the relevance of the phenomenon of co-creation of original content is growing exponentially.[985] Not only collaborative practices are anything but new in the history of arts, literature, music and cinematography[986] and the institution of co-authorship has been included

[979] The label of 'constitutional subject of copyright' is to be attributed to Jane C Ginsburg, 'The Concept of Authorship in Comparative Copyright Law' (2002) 52 DePaul L. Rev. 1063, 1063.
[980] "The Convention does not define 'works of joint authorship' since the various laws of the Union countries differ widely on the question of how much collaboration there must be to make the contribution of one author indistinguishable from that of the others. The inclusion of definitions, although cutting down ambiguity, is a controversial exercise. The courts can always rule on the point." WIPO, 'Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971)' (Report) [1978[52.
[981] The so-called last surviving author rule in Berne Convention art 7bis.
[982] Rome Convention art 8.
[983] TRIPs Agreement.
[984] WCT; WPPT.
[985] For a thorough analysis of the growth and relevance of the phenomenon, see Simone (n 894).
[986] Arthur Waldenberger, *Die Miturheberschaft Im Rechtsvergleich. Zugleich Ein Beitrag Zur Lehre von Der Miturheberschaft Nach Deutschem Recht* (Verlag V. Florentz, Munich 1991) 2-3.

in the copyright paradigm since its very origins in the early 18th century Europe.[987] In recent times, the digital environment has remarkably expanded the vastity of collaborative practices, supporting the rise of the so-called network society, a concept that encompasses particularly well the most salient aspects of the evolving features of our social and economic relations.[988] The notion of information society, on which the EU legislator relies, inevitably has to do with the network-shaped dimension that most of the human activities have acquired, with no exception of the creative sectors. Since the early developments of the creative industries, joint creation has been a known scenario in the production of movies, songs, newspapers, encyclopedias and other works, which similarly require the expertise and efforts of multiple contributors.[989] The recent weaving of digital networks majorly favors collaborations in and across the various industrial sectors, from the rise of notions such as co-design, to the internationalization of work-teams, the interoperability of created content on several physical supports, up to the co-writing of scientific articles.[990]

Alongside with the consolidation of collaborative trends, though, the rules on co-authorship do not seem to evolve in a consistent manner. The EU legislator has been wary of regulating co-authorship. One of the few provisions in this regard can be found in the Term Directive,

[987] First mentioning of the possibility of multiple authors can be found in the Bill for the Further Encouragement of Learning in the United Kingdom of Great Britain and Ireland of 1801 ('Be it therefore further enacted, that the said College [College of the Holy Trinity of Dublin] shall have forever the sole Liberty of printing and reprinting all such books as shall at any Time heretofore have been […] given or assigned by the Author or Authors by the same respectively, or the Representatives of such Author or Authors […]'); in the US Copyright Act of 1831 ('And be it further enacted, That if, at the expiration of the aforesaid term of years, such author, inventor, designer, engraver, or any of them, where the work had been originally composed and made by more than one person […]'); in the Austrian Copyright Law of 1846, §8 ('Where a dramatic work has several joint authors, in case of doubt each one is considered to be entitled to grant permission for its performance'), all available at Bently and Kretschmer (n 35) (emphasis added).
[988] Manuel Castells, *The Rise of the Network Society*, vol 1 (Blackwell 2010) 70–72.
[989] Marjut Salokannel, 'Film Authorship in the Changing Audio-Visual Environment' in Brad Sherman and Alain Strowel (eds), *Of Authors and Origins. Essays on Copyright Law* (Clarendon Press 1994) 57–59.
[990] Caroline S Wagner and Loet Leydesdorff, 'Network Structure, Self-Organization, and the Growth of International Collaboration in Science' (2005) 34 Research Policy 1608.

which, complying with the Berne Convention, sets the duration of copyright protection of jointly created works to seventy years from the death of the last surviving author.[991] The Amendment to the Term Directive in 2011 has added on the implementation of this principle by introducing a specific provision on music works, which grants equal status of copyright holder to both the author of the lyrics and the music composer.[992] The impact of this harmonizing provision can be described as twofold: on the one hand, it enhances legal certainty when it comes to the commercialization of songs across the Union, on the other hand it stretches the protection by granting a *de facto* extension of the duration of copyrights. The provision, indeed, postpones the entry of the song into the public domain, moving it forwards to the seventieth year after the last surviving co-author.[993]

Two crucial aspects are worth noting. First, the rule applies exclusively to music works. The rationale behind such a restrictive choice is enshrined in Recital 18, which states:

> In some Member States, musical compositions with words are given a single term of protection, calculated from the death of the last surviving author, while in other Member States separate terms of protection apply for music and lyrics. Musical compositions with words are *overwhelmingly co-written*. For example, an opera is often the work of a librettist and a composer. Moreover, in musical genres such as jazz, rock and pop music, the creative process is often *collaborative in nature*.[994]

[991] Term Directive art 1(2).
[992] Term Directive of 2011 art 1(1).
[993] A useful example is provided by Christina Angelopoulos, from the standpoint of national regulations of co-authorship in EU Member States before the 2011 Amendment to the Term Directive. Said Amendment, indeed, gives as a result the first listed option of unitary, longer copyright protection: "A classic example is offered by the Gershwin brothers, who collaborated in the production of numerous vocal and theatrical works. In countries where their partnership qualifies as joint authorship, their works will enjoy a *single* term of protection calculated from the death of Ira, the *longest* living of the two, in 1983. Otherwise, Ira's works alone will benefit of his longevity, while George's works will be protected as of his own death, giving them a term of protection of 47 years shorter." Christina Angelopoulos, 'The Myth of European Term Harmonisation: 27 Public Domains for the 27 Member States' (2012) 43 International Review of Intellectual Property and Competition Law 572 (emphasis added).
[994] Term Directive of 2011 recital 18 (emphasis added).

Second, the scenario addressed by the EU legislator involves a low number of co-authors, in all likelihood two individuals. Differently, in the case of works jointly created by higher numbers of contributors, such as movies, EU copyright law leaves national lawmakers free to decide whether the directors shall enjoy alone the status of author or rather share the ownership of copyrights with other artists.[995] In other words, in order to prevent fragmented durations of rights over movies, which are *prima facie* collaborative works created by multiple skilled contributors, the EU legislator imposes the term of seventy years of protection starting from the death of the last survivor of a determined list of persons (i.e. director, screenplay author, dialogue author and soundtrack composer),[996] thus 'disentangling the term of protection from the determination of authorship.'[997]

The different approach adopted by the EU legislator with regards to, one the one side, music works and, on the other, movies may be interpreted in light of a particular cautiousness involved when regulating the circumstance of a potentially high number of individuals co-creating a work. This cautious attitude presents, though, an exception. Both the Database and the Software Directives, indeed, provide for joint copyright ownership for, respectively, database and computer programs collectively created by groups of natural persons,[998] where the number of potential contributors is often indefinite.

Despite its broad scope, EU copyright law does not provide any further reference to co-authorship matter. As a regulatory frame, it is far from substantial: the principle of the last surviving author and the statutory imposition of the status of co-authors upon music

[995] Term Directive art 2(1); Rental Directive art 2(2).
[996] Term Directive art 2(2).
[997] Angelopoulos (n 993) 572.
[998] Database Directive art 4(3); Computer Programs Directive art 2(2).

composers, lyricists and co-creators of database and software does not say much, in fact, about who else is entitled to be co-author and how copyrights can be exercised jointly. Nevertheless, there are two relevant elements of warning concealed between the few harmonized provisions on co-authorship. With the principle of the last surviving author, the international legislation tries to fix the main problem, which lies in the fragmentation of duration of copyright entitlements over one single work; with a more cautious approach and, *de facto*, without providing any guidance in the merits, the EU hints at a second problem, that is the potentially arduous exercise of copyrights jointly held by a high number of individuals.

This leads one to presume that along with difficulties also imbalances in negotiating power are likely to occur.[999] This consideration is in line with the call for more attention to *who* the author is, why and how content is created.[1000] As highlighted by Peukert, in the application and interpretation of copyright rules 'most statements deal with exclusivity as a kind of monolithic block. No distinction is made depending on whether one or several owners are involved.'[1001] The distributive framework helps identifying the lack of substantial harmonization of rules on co-authorship as problematic, as it highlights a gap in the protection of all copyright holders, above all co-authors in a weaker position, in light of the remuneration and incentive functions. The EU copyright legislation limits itself to conceive the possibility of co-authorship and leave national legislators free to regulate its definition and core aspects, with a rare highly specific exceptions. This lack of uniform regulation can be explained in a similar fashion as the drafters of the Berne Convention felt doing, i.e. by the fact that national

[999] See for a detailed analysis of power imbalances among co-authors, Simone (n 894) 213–223.
[1000] See in this regard Ginsburg, 'The Concept of Authorship in Comparative Copyright Law' (n 979).
[1001] Alexander Peukert, 'Individual, Multiple and Collective Ownership of Intellectual Property Rights. Which Impact on Exclusivity?' in Annette Kur and Vytautas Mizaras (eds), *The Structure of Intellectual Property Law. Can One Size Fit All?* (Edward Elgar, Cheltenham 2011) 196.

regulations, with particular regard of the criteria of authorship, dramatically vary,[1002] thus making the legal field too delicate to be reformed. By no surprise, national legislators have indeed developed regulatory responses that do not fully converge.[1003]

5.4. A fair distribution of information in society?

Access to knowledge, together with the incentive and protection of the creator, represents a pillar of the copyright discourse.[1004] The first due consideration is that, in contrast with the aspects related to the distribution of copyright revenues, the perspective of informational justice presents a more rarified nature, which makes it harder to grasp and investigate. As highlighted by Ramello, even the economic analysis of law, which aims at a linear interpretation of regulatory choices based on objective and measurable terms, fails to fully embrace the complexity of knowledge production and knowledge dissemination.[1005]

Despite the possible analytical difficulties, this study cannot depart from investigating aspects related to the distribution of information in society. The reason why these necessarily have to be included in the assessment of copyright rules is twofold. To begin with, promoting the dissemination of creative content is an expressed objective of EU copyright law.[1006] Moreover, the intent of the EU legislator to avoid excessive imbalances as outcomes of copyright rules

[1002] Irini Stamatoudi and Paul Torremans, *EU Copyright Law. A Commentary* (Edward Elgar, Cheltenham 2014) 16; Ginsburg (n 10).
[1003] Detailed analyses on national models of regulation of co-authorship can be found in Simone (n 894); Giulia Priora, 'Copyright Law and the Promotion of Scientific Networks: Some Reflections on the Rules on Co-Authorship in the EU' (2019) 9 Queen Mary Journal of Intellectual Property 217.
[1004] For detailed analyses on copyright law from the perspective of the informational justice, see, among others, Gaia Bernstein, 'In the Shadow of Innovation' (2009) 31 Cardozo Law Review; Jessica Litman, 'Lawful Personal Use' (2007) 85 Texas Law Review; Mtima (n 823).
[1005] Ramello (n 686).
[1006] See, in particular, Chapter 2 Section 2.5.2, Chapter 3 Section 3.4.

does not encompass only the distribution of income, but also of information.[1007] As it will be further explored in this Section, the introduction of copyright exceptions and limitations for cultural and social purposes is the most glaring example of the 'demarcation line' set by the EU legislator in order to limit copyright protection in favor of a fair distribution of information in society.[1008]

Setting the focus on the access to information and knowledge entails giving utmost relevance to social costs. Costs of access and deadweight losses are the real obstacles to a smooth flowing of knowledge across society. In this vein, when it comes to information, '[…] it is not only a matter, as the utilitarian approach would maintain, of maximizing production regardless of the distributive effects that such maximization generates.'[1009] An insightful way to embrace the focus on social costs is by looking at the legislative approach towards the digital environment or, more precisely, towards the opportunities of broader access offered by digital technologies.[1010] The EU legislator combines a general enthusiasm in enhancing the economic benefits of the digital environment and an increasingly cautious take on specific market behaviors. Both these approaches emerge from the evolving digital policy agenda of the European Commission, which initially deemed the Internet as the leading input for structural changes in the EU economy, envisioning an inclusive economic growth and higher living standards for its citizens thanks to it.[1011] Soon enough, while online business models

[1007] See Chapter 4 Section 4.4.
[1008] Vivant (n 13) 51–52.
[1009] Flanagan and Montagnani (n 841) xiv.
[1010] This approach is inspired by Wiseman and Sherman's analysis on the pattern of response of British copyright laws to the evolution of technology, specifically from the perspective of the access to content. Wiseman and Sherman (n 34).
[1011] The idea of a so-called Digital Single Market, first introduced in 2009, was confidently seen as a major opportunity to boost the markets of creative content, and, in turn, the EU economy. European Commission, 'European Commission launches reflection on a Digital Single Market for Creative Content Online' (Press Release) (n 328) ('[…] a truly Single Market without borders for Creative Online Content could allow retail revenues of the creative content sector to quadruple if clear and consumer-friendly measures are taken by

started to flourish and grow exponentially, the optimism concealed behind the notions of 'smart work' and 'digital way of life'[1012] left space for a greater attention to the rights and obligations of the digital market actors.[1013]

EU copyright law has not been exempted from this ambivalent approach to digitization and digital markets. The Digital Single Market Strategy, which has guided the reform process culminating, among others, in the CDSM Directive, sets as its priority the smoothening of the internal market and enhancing the circulation of content in digital form.[1014] At the same time, the fight against online piracy and, more generally, the protection of the copyright holder remain absolutely pivotal to the policy agenda.[1015] In a nutshell, the approach of the EU legislator towards the digital environment *vis-à-vis* copyright reflects the quest for a specific calibration of the pursued functions, which is in constant need of adjustment:

> Technology, the fast evolving nature of digital business models and the growing autonomy of online consumers, all call for a constant assessment as to whether current copyright rules set the right incentives and enable right holders, users of rights and consumers to take advantage of the opportunities that modern technologies provide.[1016]

industry and public authorities.'); European Commission, 'Over 400% growth for creative content online, predicts Commission study' (Press Release) (n 328); European Commission, 'A Digital Single Market Strategy for Europe' (Communication) (n 328).

[1012] European Commission, 'A Digital Agenda for Europe' (Communication) (n 328) 5.

[1013] See, *inter alia*, European Commission, 'A European Agenda for the Collaborative Economy' (Communication) [2016] 356 final; European Commission, 'Towards a modern, more European copyright framework' (Communication) (n 346).

[1014] European Commission, 'A Digital Single Market Strategy for Europe' (Communication) (n 328).

[1015] See European Commission, 'Creative Content in a European Digital Single Market' (Report) (n 290) 14-20; European Commission, 'A Single Market for Intellectual Property Rights' (Communication) (n 227) 9-10.

[1016] *ibid* 9.

Lying on the background of this quest for a fair outcome of copyright regulation in the digital world are the references to the protection of the public interest and the intent to prevent a monopolization of information.

5.4.1. Reflecting on the notion of public interest

The notion of public interest is not as rare as one may expect within the EU copyright legal framework.[1017] Rooted in the international copyright context,[1018] the protection of the public interest is one of the fundamental principles of law, which the harmonization of copyright aims to comply with and promote.[1019] As emerges from the functional analysis, the protection of the public interest intersects the EU copyright legal framework in a peculiar manner, representing both an essential part of its justification (public interest as beneficiary of

[1017] Evidence of its relevance can be found in the literature. See, *inter alia*, P Bernt Hugenholtz, 'Copyright, Contract and Code: What Will Remain of the Public Domain' [2001] Brooklyn Journal of International Law 77; Natali Helberger and P Bernt Hugenholtz, 'No Place Like Home for Making a Copy: Private Copying in European Copyright Law and Consumer Law' [2007] Berkeley Technology Law Journal 1061; Mazziotti (n 334); André Lucas, 'L'intéret Général Dans l'évolution Du Droit d'auteur' in Mireille Buydens and Séverine Dusollier (eds) (Bruylant 2008).

[1018] See the Preambles to WCT and WPPT ('Recognizing the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention […]'); Preamble to UCC ('The Contracting States […] [c]onvinced that a system of copyright protection appropriate to all nations of the world and expressed in a universal convention […] will, ensure respect for the rights of the individual and encourage the development of literature, the sciences and the arts, persuaded that such a universal copyright system will facilitate a wider dissemination of works of the human mind and increase international understanding.').

[1019] See InfoSoc Directive recital 3 ('The proposed harmonisation will help to implement the four freedoms of the internal market and relates to compliance with the fundamental principles of law and especially of property, including intellectual property, and freedom of expression and the public interest.'); see also Marrakesh Directive recitals 1, 14 stating that the EU copyright legal framework 'aims to promote access to knowledge and culture by protecting works and other subject matter and by permitting exceptions or limitations that are in the public interest' and emphasizing on the "public interest objective' of the Directive; Orphan Works Directive art 1(1), recitals 18, 20, 21, 23; CDSM Directive art 2(1)(b), recital 12. Further detailed analysis on public interest institutions is developed by the legislator in European Commission, 'Impact Assessment on the Cross-border Online Access to Orphan Works' (Staff Working Document) (n 353); European Commission, 'Report on the Public Lending Right in the European Union' (Communication) [2002] 502 final.

copyright protection)[1020] and a reason to constrain exclusive rights (public interest as internal limit of copyright protection).[1021]

It can be therefore stated that, from a functional perspective, the EU copyright legal framework does not present an exclusively 'private' nature, but rather its multiple functions point also at a 'greater' benefit in society. This cannot depart from the identification of the addressees of such protection and, in particular, from the definition of who the *public* is.

Similarly to the considerations on the notion of right holder, also the notion of public is ill-defined in the EU copyright legislation. The references vary from general public[1022] or public at large,[1023] to users,[1024] up to citizens of the Union.[1025] The interpretation of the notion of public has been addressed with ever greater attention in the CJEU case law, the exclusive rights of communication, making available and distribution being fundamentally depending on its definition.[1026]

There are two exceptions to the elusive definition of 'public' in the EU copyright legislation. The first one is the specific attention paid to blind, visually impaired or otherwise print-disabled people, whom the international and the EU legislators specifically identify as

[1020] See, *inter alia*, InfoSoc Directive recitals 3, 9.
[1021] E.g. *Laserdisken* paras 64, 77; *Renckhoff* para 41; *Pelham* para 32. See also European Commission, 'Impact Assessment on the Cross-border Online Access to Orphan Works' (Staff Working Document) (n 353) 41 ('Libraries and academics state that certain exceptions are more important for the knowledge economy than others. They plead for a mandatory set of core "public interest" exceptions to facilitate 'access to knowledge.').
[1022] CRM Directive recital 3; CDSM Directive art 1(4)(b), recital 74.
[1023] InfoSoc Directive recital 9; Orphan Works Directive recital 16; CDSM Directive recitals 41, 62 referring, respectively, to 'wider public' and 'larger audience' with regards to the digital environment.
[1024] E.g. Database Directive recitals 33, 39, 42, 49; Computer Programs Directive recital 10; CDSM Directive recital 62. See also a reflective analysis on the notion of 'lawful user' by Bernt Hugenholtz, 'Directive 96/9/EC – on the Legal Protection of Databases (Database Directive)' in Thomas Dreier and Bernt Hugenholtz (eds), *Concise European Copyright Law* (Second Edition, Wolters Kluwer 2016).
[1025] Orphan Works Directive recital 23. Confirming the fuzzy definition of the notion of public, the Patent and Market Court of Sweden has recently filed a request for preliminary ruling to the CJEU specifically addressing the meaning of the word 'public' in InfoSoc Directive artt 3, 4. See Patent- och marknadsöverdomstolen Svea Hovrätt (2019) <http://www.patentochmarknadsoverdomstolen.se/Nyheter--pressmeddelanden/Jannika/>.
[1026] See Chapter 3 Section 3.5.2.

category of users in need for facilitated access to copyrighted content.[1027] The second exception is represented by the so-called cultural heritage institutions. Such entities have seen an increasing number of provisions and recitals evoking the importance of their role in society and, hence, the need for *ad hoc* copyright rules applying to them.[1028]

What adds to the picture of the protection of public interest is an ever more explicit connection between the notion of public interest and the purpose of learning. This link can be observed in two main regards. First, the specific reference to teachers, researchers, academics, educational and research institutes is very frequent in the legislation.[1029] Only with the most recent CDSM Directive, educational establishments[1030], universities and research organizations[1031] have acquired proper definition, thus moving the application of copyright exceptions from the identification of an 'educational or scientific *purpose*'[1032] to a specific qualification of the user.[1033] Second, whenever reference is made to the general public – not intended strictly as the educational and research environments –, the prevailing interest taken

[1027] See Marrakesh Regulation and Marrakesh Directive.
[1028] See, in particular, InfoSoc Directive art 5(1)(c), recitals 34, 40; Orphan Works Directive art 1, recitals 1, 9, 20, 22, 23; CDSM Directive artt 6, 8, recitals 13-15.
[1029] E.g. Orphan Works Directive recital 1 ('[…] Creating large online libraries facilitates electronic search and discovery tools which open up new sources of discovery for *researchers and academics* who would otherwise have to content themselves with more traditional and analogue search methods.') (emphasis added); CDSM Directive recital 8 ('[…] there is widespread acknowledgement that text and data mining can, in particular, benefit the *research community* and, in so doing, support innovation.'); Marrakesh Directive recital 9 ('[…] The permitted uses laid down in this Directive should include the making of accessible format copies by either beneficiary persons or authorised entities serving their needs, […] in particular libraries, *educational establishments* and other non-profit organisations.'); European Commission, 'Copyright in the Knowledge Economy' (Green Paper) (n 271) 4 ('The "public" addressed in this Green Paper comprises *scientists, researchers, students* and also disabled people […]') (emphasis added).
[1030] CDSM Directive recital 20.
[1031] *ibid* recitals 11, 12.
[1032] InfoSoc Directive art 5(3)(a), recitals 34, 42.
[1033] See CDSM Directive art 3 ('[…] for reproductions and extractions made by research organizations and cultural heritage institutions (…)'), art 5 ('[…] on the condition that such use a/ takes place under the responsibility of an educational establishment or at other venues, or through a secure electronic environment accessible only by the educational establishment's pupils or students and teaching staff.').

into account results being the one of receiving information and learning.[1034] Glaring example is the explanation provided in the Green Paper on Copyright in the Knowledge Economy of 2008:

> The 'public' addressed in this Green Paper comprises scientists, researchers, students and also disabled people or the general public who want to advance their knowledge and educational levels by using the Internet. Wider dissemination of knowledge contributes to more inclusive and cohesive societies, fostering equality of opportunities in line with the priorities of the forthcoming renewed Social Agenda.[1035]

In addition, confirming the importance that the EU legislator attributes to learning, it ought to be recalled that the aim to enhance the quality and quantity of scientific content production and, in turn, the competitiveness of European education and research is enlisted among the specific functions of EU copyright law.[1036] More precisely, the project of building a so-called European Research Area dovetail with the Digital Single Market Strategy plan, as both look at smoothening transactions of content across the Union, with an eye on the protection of authors and investors.[1037] Once again, what emerges from the explanatory documents regarding the undertaken policies is a twofold focus on, on the one hand, the enhancement of the production of content and, on the other hand, the promotion of dissemination and access, as the following statement emblematically illustrates:

> An effective European Research Area will contribute to a single market for knowledge in Europe. To this end, it is not sufficient to enhance the system –

[1034] E.g. InfoSoc Directive recital 14 ('This Directive should seek to promote learning and culture by protecting works and other subject-matter while permitting exceptions or limitations in the public interest for the purpose of education and teaching.'); Orphan Works Directive recital 20; *Laserdisken* para 64.
[1035] European Commission, 'Copyright in the Knowledge Economy' (Green Paper) (n 271) 4.
[1036] *ibid* ('The proper balance needs to be struck between ensuring an adequate level of protection of exclusive rights and at the same time enhancing the competitiveness of European education and research.').
[1037] See European Commission, 'Towards a European Research Area' (Communication) [2000] 6 final.

> research performers and users also need to be stimulated to take up the opportunities offered to them and use the system for collaborative knowledge production.[1038]

It is thus relevant to look more closely at the provisions addressing the educational and informatory uses of copyrighted material and further test the distributive framework, in order to verify the affinity between stated functions and expected outcomes of the legislation.

5.4.2. Pitfalls in the copyright exception for educational purpose

The impact of copyright law on the educational world and, more generally, on the access to information in society has been vastly explored in the literature, not only limited to the EU regulatory scenario.[1039] Without forgetting that the roots of the limitation of copyright can be found in the Berne Convention,[1040] the focus on the educational purpose within the EU copyright scenario leads in a straight-forward manner to Article 5 InfoSoc Directive. The provision allows Member States to stipulate certain exceptions to the exclusive rights of reproduction and communication to the public[1041] in favor of a wider access to information. Cornerstone of this intent to foster knowledge is the possibility granted to national legislators to exempt the reproduction of a protected work by an educational or cultural institution[1042]

[1038] European Commission, 'European Research Area Progress. Facts and Figures' (Report) [2013] EUR 26030 EN, 284-285.
[1039] See, *inter alia*, from an international copyright law perspective, Gervais, *(Re)Structuring Copyright. A Comprehensive Path to International Copyright Reform* (n 157) 224–231; Margaret Chon, 'Intellectual Property from Below: Copyright and Capability for Education' (2007) 40 UC Davis Law Review 803; From a EU perspective, Christophe Geiger, Giancarlo Frosio and Oleksandr Bulayenko, 'The EU Commission's Proposal to Reform Copyright Limitations: A Good but Far Too Timid Step in the Right Direction' (2018) 40 European Intellectual Property Review 4; Westkamp (n 289); Maria Daphne Papadopoulou, 'Copyright Limitations and Exceptions in an E-Education Environment' (2010) 1 European Journal of Law and Technology.
[1040] Of particular relevance in this analysis is Berne Convention art 10.
[1041] As harmonized by InfoSoc Directive artt 2, 3.
[1042] *ibid* art 5(2)(c).

and the reproduction and communication of a work for teaching and scientific research.[1043] This latter possibility is granted also with regards to the database *sui generis* right[1044] and the neighboring rights of performers, phonogram producers and broadcasting organizations.[1045] Highly relevant to the discourse is also the exception for private use,[1046] which, especially if read in conjunction with the specific exception for research and private study,[1047] shows to play an evident role in supporting the dissemination of information and knowledge in society. Lastly, the CDSM Directive significantly adds to the regulatory picture of EU copyright law *vis-à-vis* education. Article 5 of the Directive provides, in fact, for a further exception for the digital use of protected works in teaching activities, which is mandatory for Member States to implement.[1048]

This overview evokes several functions detected in the legislation in the previous Chapters of this dissertation, from the aim to boost the dissemination of content, to the promotion of culture, up to the support of technological innovation.[1049] Nevertheless, the CJEU's interpretation concerning these specific provisions is an emblematic example of a unreliable connection between the law and its objectives. If in *Ulmer*, the Court emphasized the aim 'to promote the public interest in promoting research and private study, through the dissemination of knowledge […] [and] maintain a fair balance between the rights and interests of right holders, on the one hand, and, on the other hand, users of protected works who wish to communicate them to the public for the purpose of research or private study undertaken by

[1043] *ibid* art.5(3)(a).
[1044] Database Directive art 6(2)(b).
[1045] Rental Directive art 10(1)(d).
[1046] InfoSoc Directive art 5(2)(b).
[1047] *ibid* art 5(3)(n).
[1048] CDSM Directive art 5.
[1049] See Chapter 2 Sections 2.5.2, 2.5.3, 2.5.4.

individual members of the public',[1050] the more recent CJEU's decision in *Renckhoff* represents a missed opportunity for the Court to provide a much needed clarification on such balance. Despite the exhortation by AG Campos Sánchez-Bordona towards a broader interpretation of copyright exceptions inspired by Article 14 CFREU,[1051] the Court limited its reasoning to the observations that the teaching exception is optional[1052] and that, in the specific case at stake – a student posting a protected photograph already available online on the school's website –,

> […] the findings […] are not based on whether the illustration used by the pupil for her school presentation is educational in nature, but on the fact that the posting of that work on the school website made it accessible to all the visitors to that website.[1053]

When, in particular, Article 5 InfoSoc Directive and the related modernizing provisions in the CDSM Directive are discussed, the most common problem being highlighted is the optional nature of the close list of exceptions and limitations, which leads to a 'weak' harmonization and has been only partially addressed in the CDSM Directive, but not fully solved.[1054] The distributive framework adds to this problem of fragmentation of the regulation

[1050] *Ulmer* paras 27, 31. See also AG Opinion in *Ulmer* para 24 ('A teleological interpretation also requires, in view of the general interest objective pursued by the Union legislature, namely to promote learning and culture, that the user is able to rely on that exception.').
[1051] AG Opinion in *Renckhoff* para 113 ('[T]his is the first time that the Court of Justice has to address the exception in Article 5(3)(a). Although its case-law requires the scope of exceptions and limitations to be interpreted restrictively, given that they could affect property rights in intellectual creations, it must not be forgotten that the right to education is also enshrined in Article 14(1) of the Charter. The interpretation must therefore observe a reasonable balance between the two rights.').
[1052] *Renckhoff* para 43.
[1053] *ibid* para 42.
[1054] See on the point Geiger, Frosio and Bulayenko (n 1039); Thomas Margoni and Martin Kretschmer, 'The Text and Data Mining Exception in the Proposal for a Directive on Copyright in the Digital Single Market: Why It Is Not What EU Copyright Law Needs' (2018) paper presented at EPIP Conference 2018 <http://www.create.ac.uk/blog/2018/04/25/why-tdm-exception-copyright-directive- digital-single-market-not-what-eu-copyright-needs>; Hilty and Moscon (n 230).

across the Union another fundamental consideration on the copyright exception for teaching purposes.

The distributive matrix built in the previous Chapter pivots on the underlying intent of the legislator of avoiding and preventing excessively unfair distribution of income and information in society. This calls the attention on the fact that from the educational use of a work no extra profit is generated by the user.[1055] All the mentioned provisions build, in fact, on the non-commercial nature of the educational uses of a work. This is a core aspect of copyright practice, which yet hardly finds a systematic placement in the legislation as well as in the case law.[1056] The problem arising is of strictly utilitarian character: how to incentivize the author, in the first place, to create the content, if he or she is not entitled to any profit from the non-commercial uses of the work?[1057] The crux of the analysis lies, therefore, in the interconnection of the fair distribution of copyright-generated revenue with the fair distribution of information in society.

Wearing the lenses of the EU legislator's intention to avoid excessive distributive imbalances and of its growing sensitivity towards the economic consequences of copyright law,[1058] two main aspects rise to the surface. Firstly, the exception of teaching and, more broadly intended,

[1055] This particular aspect is at times deemed a sufficient ground to single out educational uses from the plethora of possible exploitations of a copyrighted work. See, in this regard, Fisher (n 721).
[1056] The CJEU showing interest in the distinction between for-profit and non-profit users. See e.g. *Filmspieler* paras 34, 51; *Ziggo* paras 29; 46; *Airfield* para 80. An exception being the case of acts of hyperlinking, for which the CJEU case law has developed a clear-cut distinction between uses by for-profit and non-profit entities. See *GS Media*, para 51.
[1057] A problem that is notoriously addressed in the US copyright system by the so-called "market impact" criterion included in the fair use doctrine. On the importance of this specific factor, see, among others, Barton Beebe, 'An Empirical Study of US Copyright Fair Use Opinions, 1978-2005' (2007) 156 University of Pennsylvania Law Review 582–583.
[1058] E.g. CDSM Directive recital 17, related to the text and data mining exception ('In view of the nature and scope of the exception, which is limited to entities carrying out scientific research, *any potential harm created to rightholders through this exception would be minimal*. Member States should, therefore, not provide for compensation for rightholders as regards uses under the text and data mining exceptions introduced by this Directive.') (emphasis added).

educational non-profit uses of a work does neither interfere nor exclude commercial uses, the latter being able to generate an income, which will be shared with the copyright holder, thus preventing a disincentive and copyright underprotection to arise.

Secondly, a narrow exception for educational use is likely to signal a situation of overprotection, which carries a twofold impact. On the one hand, it causes a margin of increase of private profits of copyright holders, which is depending on the deadweight losses, since part of the public would not be willing to access the content at all – or would prefer substitutes or would infringe copyright protection –, thus not contribute to the increase in profits. On the other hand, it leads to a significant decrease of available information in society. In order to better grasp the social loss, the analysis should take stock of the current context where copyright operates, which is mostly turning digital. As highlighted previously in the analysis, the revolution brought by the digital environment lies in the widespread affordable access to content.[1059] Nevertheless, the EU copyright legislation results to be holding tight to the formalistic, so-called mechanical approach to copyright law,[1060] disregarding its objectives and the social and economic consequences of certain uses. A glaring example is the exception set in Art.5(3)(n) InfoSoc Directive aiming at promoting the research and private study, which exempts from copyright protection uses exclusively from dedicated terminals in schools, libraries and cultural institutions.[1061] In this vein, the distributive framework manages to spot a further ineffectiveness of the EU copyright regulatory framing of the exception for

[1059] Ohly (n 23) 99; Sari Depreeuw, *The Variable Scope of the Exclusive Economic Rights in Copyright* (Kluwer Law International 2014).
[1060] Ohly (n 23); Vivant (n 13).
[1061] InfoSoc Directive art 5(3)(n) ('[…] use by communication or making available, for the purpose of research or private study, to individual members of the public by dedicated terminals on the premises of establishments referred to in paragraph 2(c) of works and other subject-matter not subject to purchase or licensing terms which are contained in their collections.').

educational purposes, that is, besides its optional nature, its potential inadequacy to prevent excessive imbalances in the distribution of resources in society, allowing for rising private profits stemming from monopolization schemes of information and knowledge,[1062] losing track of the risk of a draining information in society.

5.5. Embracing the distributive justice perspective in EU copyright law: challenges and opportunities

In the selected cases of fair remuneration, co-authorship rules and teaching exception, the distributive matrix has proven effective in unearthing patterns of unfair distribution of copyright income or information in society, which clash with the policy intents of the EU legislator. There is no substantial obstacle hindering a more extended scrutiny of the EU copyright legal framework in light of the distributive framework conceptualized in this dissertation. The literature on the relation between the copyright paradigm and the notion of fairness is growing, calling for further research efforts in this direction.[1063]

Nevertheless, the distributive justice perspective in the EU copyright context presents also limits. First and foremost, it has to be recalled that the distributive rationale remains mostly implicit in the legislation. As Hughes and Merges describe it, what can be detected from the study of copyright law and its economic implications are distributive 'bells and whistles',[1064] which hardly concretize in a fully-fledged distributive theory of copyright law. EU copyright

[1062] A pattern, which has been associated with the 'proprietarian creed' widespreading across IP. See Drahos (n 9) 236–237.
[1063] E.g. Ramello (n 686); Richard Watt, 'Fair Remuneration for Copyright Holders and the Sharpley Value' in Richard Watt (ed), *Handbook on the Economics of Copyright. A Guide for Students and Teachers* (Edward Elgar 2014); Ohly (n 23); Aguilar (n 841).
[1064] Hughes and Merges (n 791) 561.

law reflects this potentially defective nature of the distributive approach. Truth is that distributive elements are embedded in the history of copyright since its very origins[1065] and in the EU copyright functions, with the EU legislator showing an increasing sensitivity towards unfair inequalities in the allocation of, in particular, copyright income. Nevertheless, the fact that the legislator does not assert upfront the intent of fairly distributing copyright-related resources symbolizes a potential obstacle for such analytical approach to evolve.[1066] The need for a more solid basis and specific guidance on what fair distribution means in highly diverse copyright sectors is of serious relevance for the success of an extensive distributive analysis of EU copyright law. In this light, the principle of fair remuneration introduced in the CDSM Directive represents a first move towards a better definition of the distributive rationale.

An additional problematic aspect of the adoption of the distributive justice perspective in EU copyright law is the potential collisions with the protection of the fundamental right of IP and fundamental principles of party autonomy and freedom of contract.[1067] It should not be forgotten, indeed, that the justification of copyright at EU level presents itself as hybrid and includes the continental legacy based on a personalistic view of copyright as a subjective right. In addition, also from an economic perspective, copyright does not only generate social costs,

[1065] Poort (n 686) 284 ("In addition to the moral rights, which primarily aim to protect the reputation of the author, and the economic rights, which can be closely linked to the incentives to create and exploit works, copyright contains elements primarily aimed at promoting distributive justice."); Madhavi Sunder, 'IP3' (2006) 59 Stanford Law Review 250 ('[...] [IP rights] today balance myriad values, from efficiency to personhood, health, dignity, and distributive justice.').

[1066] Such criticism may be expected to arise from views close to Benoliel's arguments, who rejects the affinity between distributive justice goals and copyright, also (but not only) highlighting the absence of explicit references to it in legislation. See Daniel Benoliel, 'Copyright Distributive Injustice' (2007) 45 Yale Journal of Law and Technology; See also Dumitru, who argues that Rawls' theory of justice is unfit to assess the justice of intellectual property rights, especially of patent rights. Dumitru (n 796) 57 ff.

[1067] CFREU artt 16, 17. Particularly interesting in this regard is the analysis of the various concepts of contractual freedom and contract law coexisting in the Union and corresponding to different degrees of legitimate statutory interference in the agreements between individuals. See Brigitta Lurger, 'The Future of European Contract Law between Freedom of Contract, Social Justice and Market Rationality' (2005) 4 European Review of Contract Law 442.

but also private benefits, which are equally fundamental to the institution as well as to society.[1068] The protection of these benefits due to the copyright holder inevitably clashes with the constraints endorsed by the distributive logic. Although this is no new deficit in the analysis of EU copyright law, and of copyright law in general, it is worth highlighting that it leads the normative byproducts of the distributive analysis to be more likely standards, rather than *per se* rules, thus triggering the rule-standard dilemma based on the trade-off between flexibility and legal certainty.[1069]

The acknowledgement of the challenges that a generous adoption of the distributive justice perspective would face should not overshadow the benefits of such analytical approach. In the opening of this Chapter it has been recalled how the case for a tighter connection of EU copyright law to its functions as well as effects has grown strong and become ever more urgent. This study stands on the premise that only an assessment reflective of both these trajectories can support the sustainability of the EU copyright harmonization process, reconciling its economic and social objectives.[1070] The distributive framework has proven to respond well to both needs. Stemming from the functions of EU copyright law and building on its economic character, it sets a consistent focus on the effects and social costs of the regulation.

The reconciliation between social and economic benefits implies a better definition of the limits of copyright protection.[1071] This has been explored in the scholarship in numerous ways,

[1068] Drahos (n 9) 257 ('Here the idea is that property is inseparably linked with freedom, with the protection of individual personality and privacy.').
[1069] Bechtold (n 23) 73–73; Ohly (n 23) 113.
[1070] See Introduction.
[1071] Ohly (n 23) 83.

from the introduction of the notion of duties to the copyright discourse,[1072] to the emphasis on the social function of (intellectual) property.[1073]

With specific regard to the economic and social dimensions depicted in the EU copyright legislation[1074] do not form a solid structure in defining the limits of copyright protection. As explained by Ohly, the EU copyright legal framework presents a formalistic structure:

> […] the economic rights […] are defined in abstract terms as categories of acts which only the owner is allowed to perform or authorize. Whenever a person carries out any of the acts allocated to the owner without being able to invoke a statutory exception, he or she infringes. This approach is formalist. It does not consider the economic consequences of individual acts, but judges them on the basis of a formal classification. […] But *per se* rules are only acceptable when economic experience permits a presumption to the effect that the proscribed acts have a negative impact on markets or in any other way interfere with the function of the right.[1075]

In this vein, by way of this structural connotation of EU copyright law, the risk of copyright overprotection outweighs the one of underprotection. The way to tame this risk is to seek consistency of the law with its own purposes.[1076] The distributive framework does so by

[1072] The notion of duty is thoroughly analyzed within Drahos' instrumentalist theory of IP law, the author binding it to the reconceptualization of IPRs into privileges. Drahos (n 9) 260–265 ('Intellectual property rights are liberty-inhibiting privileges. Our claim is that instrumentally based privileges are accompanied by duties that fall on the holder of the privilege. [...] [T]he duties would have the instrumental purpose of helping to bring about the goal that the privilege itself was designed to serve, the relevant duties would have to be strongly connected to that goal.').

[1073] Sganga, *Propertizing European Copyright* (n 26) 191 ff.; Shubha Ghosh, 'When Property Is Something Else: Understanding Intellectual Property through the Lens of Regulatory Justice' in Axel Gosseries, Alain Marciano and Alain Strowel (eds), *Intellectual Property and Theories of Justice* (Palgrave 2008) 114 ("Intellectual property as regulation situates intellectual property law beyond the domain of individual decision-making and control. Patents, copyrights, trade marks and the other species of intellectual property are understood to have a social dimension. They are the means to a social end beyond the protection of individual self-interest.").

[1074] This is in line with the findings of the scholarship, highlighting the prevalence of economic components in copyright, and IP rights in general, and, at the same time, the relevance of non-economic aspects. See, *inter alia*, Vivant (n 13) 49; Ramalho (n 18) 14.

[1075] Ohly (n 23) 98.

[1076] In similar terms, Drahos illustrates the development of trademark law, highlighting how '(...) so long as the protection of consumer interests remained a dominant purpose of trademark law, the private uses of a publicly

binding private profits to social benefits and valuing the fair allocation of resources, even when it translates into a lower level of copyright protection.[1077]

A concrete sense of this untapped potential of the distributive framework can be grasped through the concept of unjust enrichment, which represents a viable move towards a more explicit distributive structure of EU copyright law. Following the matrix sketched in this Chapter, the concept of unjust enrichment, indeed, addresses both the copyright holder, in his/her obligations to share the profits and in the absence of a right to demand the highest possible remuneration,[1078] and the user,[1079] thus calling for a consistent market-based interpretation, if not reordering, of copyright exceptions and limitations, hence of the same criteria for copyright infringement.

5.6. Conclusion

The Chapter has picked the threads of the functional and economic analysis of EU copyright law and has turned the identified distributive rationale underlying the regulation into an analytical framework, a new exegetic angle, from which EU copyright law can be observed. The shape of such framework has resulted a matrix, capable to effectively synthesizes the EU legislator's intent to achieve a fair distribution of copyright income and information both among right holders and between them and the public. Delving into the specific provisions, the framework has been tested, searching for convergences and divergences of the legislation

granted monopoly privilege had to remain consistent with that purpose. This places a constraint on the development of trademark law to resist the purposes of opportunistic actors.' Drahos (n 9) 241.

[1077] Ramello (n 686).

[1078] A formulation that has found recognition in the CJEU case law (e.g. *FAPL*, paras 108-109), but not direct expression in the legislation.

[1079] Ohly (n 23) 109.

from its own functions. The overall result, although limited to the selected cases, is to be considered fruitful.

Analyzing the EU copyright rules on fair remuneration, co-authorship and teaching exception, the distributive framework effectively highlights the points of consistency or, rather, mismatch between the intent pursued by the provisions and the expected outcomes. In particular, the analysis unearths a twofold scenario. If, on the one side, the legislator's increasing attention towards the weaker contractual right holder turns to be a convergence towards the function of fairly remunerating all copyright holders, on the other side, the lack of harmonized rules protecting co-authors and the anachronistic take on uses for teaching and private study show a loose connection with the objectives of incentivizing the creation and facilitate the dissemination of content for cultural and social flourishment. By and large, despite the challenges that an extensive application of the distributive framework to EU copyright law may face, such analytical approach proves to be a promising and viable analytical tool, apt to reconnect the assessment of EU copyright rules to their own functions and effects.

Conclusion

> *The system of copyright has great advantages, and great disadvantages, and it is our business to ascertain what these are, and then to make an arrangement under which the advantages may be as far as possible secured, and the disadvantages as far as possible excluded*.[1080]

The evolution of copyright in Europe is characterized by profound transformations, from the shift from *ad personam* printing privileges to the modern copyright paradigm up to the on-going EU harmonization of national copyright rules. Finding connections across these developments is less intuitive than one may expect. The *fil rouge* woven in this study focuses on the question: what is copyright conceived for?

The relevance of this question has increased over time and now possibly reached a peak. EU copyright law is, in fact, showing no signs of recovery from the severe crisis triggered by the rise of the digital environment. On the contrary, the rising number of referrals to the CJEU[1081] and empirical evidence on the questionable benefits of its application, once implemented by Member States,[1082] suggest that legal uncertainty and legal fragmentation remain current concerns.

Part of the problem lies in the unsystematic (dis)order of EU copyright rules and growing detachment between the stated objectives and the outcomes of their application, as copyright

[1080] Thomas Macaulay, 'First Speech to the House of Commons on Copyright' (1841) 346 available at Bently and Kretschmer (n 35).
[1081] See Favale, Kretschmer and Torremans (n 432) ('There has been a dramatic recent increase in references to the Court, with 6 cases filed in the 10 years following the Phil Collins case of 1992, 6 cases in the 5 years between 2002 and 2006, and 28 cases between 2007 and 2012.'); Leistner (n 431) 559–560.
[1082] Inter alia, Smita Kheria, 'Copyright in the Everyday Practice of Writers' in Janis Jefferies and Sarah Kember (eds), *Whose Book Is It Anyway?: A View from Elsewhere on Publishing, Copyright and Creativity* (Open Book Publishers 2019); Abbe EL Brown and Charlotte Waelde (eds), *Research Handbook on Intellectual Property and Creative Industries* (Edward Elgar 2018) 159 ff.; Kretschmer and others (n 822); Kretschmer and Hardwick (n 822).

rules seem to have fallen out of sync with the ways creative content is created, disseminated, accessed, used. These structural deficiencies threaten the sustainability of the entire EU copyright system in terms of both its own coherence and the sustainable and inclusive economic growth it intends to achieve.[1083]

This dissertation contributes to taming the risk of an 'unbridled' evolution of EU copyright law by suggesting the adoption of a distributive framework as a way towards an enhanced sustainability of the harmonization process. Such a framework stems from a two-tiered inquiry into EU copyright law.

The first tier consists of an accurate functional analysis. This approach is rooted in the idea of copyright as a legal institution operating *within* society and *for* the society.[1084] Bringing to the front the objectives of the law – its *raison d'être* –[1085] helps shedding light on the reasons of its structure, scope and application. The functional analysis starts with the origins of copyright in Europe, dated back to more than four centuries ago. By retracing the history of the institution in search for its original purposes, Chapter I unveils two main elements. First, underlying the shift from the system of printing privileges to the modern copyright paradigm is the intention to liberally regulate incentives and rewards to the intellectual work, thus avoiding monopolizations both of profits and knowledge. Second and directly related, modern copyright shows an interplay of purposes during its first statutory experiences and

[1083] See European Commission, 'A Digital Agenda for Europe' (Communication) (n 328) 3 ('The overall aim of the Digital Agenda is to deliver sustainable economic and social benefits from a digital single market [...]'). See also Jütte (n 230) 66.
[1084] Vivant (n 13) 62 ('[...] [W]hat can a right be without purpose or with a purpose without real social dimension, by considering one of the social actors – the author – as if he/she were alone, like Robinson Crusoe without Friday?'); Particularly evocative is also Buchanan's image of a TV relay on an island in his explanation of the public goods problem. James M Buchanan, 'Public Goods in Theory and Practice: A Note on the Minasian-Samuelson Discussion' (1967) 10 The Journal of Law & Economics 193, 193–194.
[1085] Vivant (n 13).

early reforms, which characterizes both the Anglo-Saxon and the continental traditions, the main ones being the pragmatic incentive to creativity, the just reward to intellectual work, the promotion of education, the protection of the public interest.

With the entry onto the scene of the European Union, the focus of the functional analysis moves to the declared aims of the new supranational level of copyright regulation. By this token, Chapters II and III carry out a comprehensive study, respectively, of the EU copyright legislation and related CJEU case law in light of the frequent references to the objectives of the law. What emerges is a blend of utilitarian and natural law justifications of copyright, with a significant prevalence of the former. Interestingly, the EU copyright legal framework shows a peculiar multi-functional approach, which encompasses the expected outcomes of the harmonization process as well as the functions attached to copyright *per se*. The relations between these functions remains undefined by both the legislator and the Court, thus leaving room for overlaps (e.g. between the objectives of establishing the EU internal market and of enhancing its global competitiveness) and clashes (e.g. the objectives of remunerating the copyright holder and of promoting culture). It turns therefore clear that the EU copyright law does not aim at a straight-forward one-directional protection, but rather to a versatile tool to address various scenarios in the most beneficial way for the society. But how concretely?

This question brings to the second tier of the analysis, developed in Chapter IV, which investigates the implicit functions of the law embracing an economic analytical perspective. The reason behind this methodological choice lies in the predominantly economic and market-oriented approach identified in the study of the functions. The economic analysis of EU copyright law highlights two fundamental features: on the one hand, the intent to avoid the effects of copyright overprotection and underprotection; on the other, the possibility of

'calibration' of the expressed functions to strike a 'fair balance of rights' on a sector-specific or even case-by-case basis. In this vein, the analysis unearths a distributive rationale in the background of EU copyright law. The notion of fair distribution shows not only to be familiar to the legislator, but also to be fundamentally embedded in the notion of 'fair balance'. More precisely, the distributive rationale pivots on the intent to achieve a fair distribution of copyright-generated income among right holders and of information across society, thus serving as common denominator in the conundrum of the unordered plurality of EU copyright functions.

The detected distributive rationale proves apt to measure the effectiveness of EU copyright rules against the criterion of sustainability of the whole legal framework. Turned into a distributive framework in Chapter V, it responds, in fact, both to the need for a functions-based assessment of EU copyright rules and to the call for solid effects-based evaluations.[1086] The 'fitness for purpose' of the distributive framework is further demonstrated by way of three testing examples of significant relevance to the copyright *acquis*, which show both convergences and divergences between the stated objectives and the resulting outcome of EU copyright rules. In particular, the regulation of fair remuneration results to be successful in ensuring fair distribution of copyright-generated income among right holders, hence fully complying with the remunerative function of the legislator. On the contrary, the lack of harmonized rules on co-authorship fails in this same task, thus signaling the need for effective legislation. Finally, even though the exceptions provided in the InfoSoc Directive (presuming their implementation at national level) and the CDSM Directive might seem to facilitate

[1086] On the need for a consequentialist, or effect-based, approach see Ohly (n 23); Bechtold (n 23); Dusollier, 'Realigning Economic Rights with Exploitation of Works' (n 23); Vivant (n 13).

didactic and non-profit private uses of protected content for study purposes, their effects do not show a fair distribution of knowledge in light of the available technologies, thus partially failing to fulfill the objective of cultural promotion.

The functional systematization[1087] and related interpretation of EU copyright law in light of its distributive rationale, as resulting from this study, opens a new window towards further positive as well as normative analysis of the discipline. In light of the fact that EU copyright law is *in fieri* and further relevant regulation and reforms are expected, the distributive perspective offers meaningful insights for future normative developments, setting the focus on how copyright revenues and information and knowledge *should* be distributed in society. Normative considerations in this direction are likely to support also the judicial reasoning embracing a *de iure condendo* approach, thus helping reconnecting not only the legislative design, but also the implementation and subsequent application of EU copyright rules to their own stated functions.[1088]

By contributing to the on-going doctrinal inquire into the notion of 'fairness' in EU copyright law, the suggested distributive framework sets also the ground for further research in, at least, three main directions. First, an extensive application of the distributive framework to EU copyright provisions would achieve a comprehensive assessment of the legal framework as well as help evaluating possible future proposals of reform. Second, the framework builds a

[1087] The functions-based systematization of rules is in line with the potential benefits of the instrumentalist theory of IP suggested by Drahos (n 9) 260 ('The practical import of the theory would be that the interpretation of intellectual property law would be driven in a systematic fashion by the purpose of that law rather than more diffuse moral notions about the need to protect pre-legal expectations based on the exercise of labour and the creation of value.'); on the classificatory potential of the functional analysis, see also Rosenberg (n 4) 148 ('[...] identifying socially signifcant matters must invoke their functions. The reason becomes clear when we consider the taxonomies, the typologies, the systems of classifcation, categorization, and identifcation of social, political, economic, anthropological, and cultural phenomena that are of interest to the social scientist.').

[1088] On the link between functional analysis and intent to ameliorate human affairs and institutions, see Rosenberg (n 4) 149–150.

case for further empirical research on the effects of EU copyright law and, in particular, on the 'real-world' distribution of copyright revenues and of information across society.[1089] Third, the functions-based and effects-based assessment of EU copyright rules is likely to open the analysis towards the study of existing or new regulatory alternatives to copyright protection, which might better serve the stated functions and lead to more efficient distributive results.[1090]

[1089] On the need for more empirical data on copyright law and EU copyright law, in partiuclar, see Drahos (n 9) 265 ('[...] [A]n instrumentalist theory of intellectual property would rest upon a naturalistic empiricism. Legislative experiments with these rights would be driven by information about their real-world costs and abuses.'); Bechtold (n 23) 63–64; Wunsch-Vincent (n 678) 240; Ivan PL Png, 'Copyright: A Plea for Empirical Research' (2006) 3 Review of Economic Research on Copyright Issues 3.

[1090] The study of equivalent institutions being conceived within the functional method of analysis. See Hempel (n 2) 359 ('[...] in any case of functional analysis, the question whether there are functional equivalents to a given item i has a definite meaning if the internal and external conditions c are clearly specified.'); Merton (n 7) 73; Input for substantial research efforts towards the study of alternative regulatory schemes to EU copyright law has recently been revived. See, inter alia, Quintais (n 680).

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