11

Multilevel Constitutionalism and the Propertisation of EU Copyright

An Even Higher Protection or a New Structural Limitation?

Caterina Sganga

1. Introduction

It is a common *topos* in contemporary scholarship that the propertisation of copyright has contributed to its constitutional hedging vis-à-vis other interests and rights, with distortive consequences for the fragile copyright balance. The entry into force of Art 17(2) of the Charter of Fundamental Rights of the European Union (CFREU), which supplements the Charter's general property clause with the statement that '[I]ntellectual property shall be protected' has reinforced this belief. Concern has been confirmed by subsequent decisions in which the European Court of Justice (ECJ) has applied the provision in a manner that increases the degree of protection conferred on copyright beyond the boundaries set by EU and national laws.

However, a closer look at the jurisprudence of the ECJ suggests that this narrative is too simplistic and even, in part at least, fallacious. In fact, the Court has never justified the specific degree of protection granted to copyright on the basis of its characterisation as a property right under Art 17(2) CFREU. In almost all instances when the provision has been mentioned, its function has purely been to support the inclusion of copyright within the list of fundamental rights amongst which a fair balance must be struck, with no distinctive consequence for the outcome of the balancing exercise to be attached to the constitutional propertisation of copyright. In this sense, the ultimate effect of Art 17(2) CFREU seems to have been 'merely' to elevate copyright to the rank of fundamental right, on an equal footing with other rights and freedoms protected by the Charter, as if the provision were an independent IP clause rather than an element of the Charter's property clause. Against this background, it remains to be determined whether the ECJ would grant the same degree of protection to copyright if it were to be treated as a property right, as Art 17(2) CFREU ostensibly requires.

There are three reasons to investigate this issue further. The first lies in the property case-law of the Court of Justice, which reveals principles and doctrines that differ from those in evidence in its copyright decisions. The second reason stems from the examples offered by several national experiences, where the constitutional propertisation of copyright has supported limitations on the scope of copyright and the functionalisation of the right for public interest goals. The third arises from the EU constitutional property model which, if correctly construed on the basis of the ECJ property case-law and the Praesidium's explanatory

Caterina Sganga, *Multilevel Constitutionalism and the Propertisation of EU Copyright* In: *Global Intellectual Property Protection and New Constitutionalism*. Edited by: Jonathan Griffiths and Tuomas Mylly, Oxford University Press. © Caterina Sganga 2021.
DOI: 10.1093/oso/9780198863168.003.0011

notes on Art 17 CFREU, demonstrates itself to be a similarly limited, functionalised entitlement. The elaboration of these hints may create a counter-narrative that would not only serve to dispel the myth of absolute protection that has arisen as a consequence of the misconceived property logic contaminating EU copyright, but could also provide reliable guidelines for the implementation of Art 17(2) CFREU, transforming it into a provision capable of shaping the development of EU copyright law.

To build such a counter-narrative, this chapter begins with an overview of the history of Art 17(2) CFREU, the interpretation offered by the Praesidium, and its effects on secondary law and ECJ decisions (Step 1). Step 2 illustrates the key features of ECJ property case-law and Step 3 highlights a number of selected national counterexamples, demonstrating the balancing effects of constitutional property doctrines on copyright rules. Step 4 follows the Praesidium's guidance to build the pillars of the EU constitutional property model. Step 5 defines the social function(s) of EU copyright, and Step 6 concludes by providing examples of the potential effects of the new constitutional propertisation of EU copyright on both the interpretation of existing rules and the evolution of the discipline.

2. Step 1—Background. What Do We Know about Art 17(2) CFREU and its Effects?

The insertion of an IP clause as part of the CFREU's property clause is noteworthy, given the silence of most Member State constitutions on intellectual property (IP)[1] and the specific protection for the interests of *authors* and *inventors* offered by some national charters and international human rights treaties.[2]

The inclusion of this clause was in line with the case-law of the European Court of Human Rights (ECtHR) and the now defunct European Commission of Human Rights which, back in the 1990s, had already granted protection to patents[3] and copyright[4] as property rights under Art 1 of the First Protocol (A1P1) of the European Convention on Human Rights (ECHR). In 2005, these early developments were followed with three decisions on trade marks (*Anheuser-Busch Inc v Portugal*[5]) and copyright (*Melnychuk v Ukraine*[6] and *Dima v Romania*[7]), in which the Strasbourg Court ruled that A1P1 is 'applicable to intellectual property as such',[8] and offered protection to right-holders against state interference with their intellectual property rights (IPRs).[9]

[1] With the exception of, inter alia, Portugal (Art 42(2)), Sweden (Ch 2 § 19), Slovakia (Art 43(1)), Slovenia (Art 60), Czechia (Art 34).

[2] See eg Art 27 of the Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR) and Art 15 of the International Covenant on Economic, Social and Cultural Rights (opened for signature 19 December 1966, entered into force 3 January 1976) 993 UNTS 14531 (ICESCR). On the matter, see Lea Shaver and Caterina Sganga, 'The Right to Take Part in Cultural Life: on Copyright and Human Rights' (2010) 27 Wisconsin International Law Journal 637.

[3] *Lenzing AG v United Kingdom*, App no 38817/97, 9 September 1998; *Smith Kline & French Lab Ltd v Netherlands*, App no 12633/87, 10 July 1991) (admissibility decision).

[4] *Aral v Turkey*, App no 24536/94, 14 January 1998 (admissibility decision).

[5] *Anheuser-Busch Inc v Portugal*, App no 73049/01, 11 January 2007 (hereafter *Anheuser-Busch*).

[6] *Melnychuk v Ukraine*, App 28743/03, 5 July 2005.

[7] *Dima v Romania*, App no 58472/00, 26 May 2005.

[8] *Anheuser-Busch* (n 5) 849–50.

[9] On the impact of the ECtHR's case-law on the degree of protection offered to IPRs, see Laurence R Helfer, 'The New Innovation Frontier? Intellectual Property and the European Court of Human Rights' (2008) 49 Harvard International Law Journal 1.

Since IP is only one of the intangible assets which the ECtHR has brought within the scope of Art 1 P1, and is certainly not the most revolutionary,[10] the Praesidium's decision only to mention IP specifically in Art 17 CFREU is puzzling. This is particularly so because Art 17 is otherwise an almost slavish copy of A1P1. Both the Praesidium's Explanations[11] and the comments by the Commission Network of Independent Experts on Fundamental Rights[12] explain the decision to do so by reference to '[the] economic weight' of IP and 'the activism of the Community legislator' in the field, offering a descriptive picture which does not adequately justify IP's classification as a fundamental right or shed light on the implications of the clause.[13] Instead, and in particular because of the use of the verb 'shall' and the silence on limitations in Art 17(2),[14] the provision has been read as introducing (i) a positive obligation of protection for the EU legislator, leading inevitably to the expansion of the list and scope of exclusive rights, and (ii) a negative institutional guarantee, producing a crystallisation of existing entitlements.[15]

The few legislative and judicial references to the new IP clause before the transformation of the Nice Charter into a binding source by the Lisbon Treaty (Art 6(1) TEU) seemed to support this view. Recital 23 of the Enforcement Directive (IPRED) linked the overall goal of achieving 'full respect for intellectual property' to Art 17(2) CFREU[16] and, without mentioning the Charter, Recital 9 of the Information Society Directive (InfoSoc) connected the requirement for a high level of protection to the proprietary nature of copyright. In *Laserdisken,* the ECJ held a restriction on the freedom to receive information as proportionate 'in the light of the need to protect intellectual property … which forms part of the right to property'.[17]

However, other elements pointed in a different direction. The Praesidium's Explanation specified that 'the guarantees laid down in paragraph 1 shall apply as appropriate to intellectual property',[18] depicting the IP clause as a specification of the property clause and not as an attribution of an absolute quality to IP rights. Similarly, the use of the neutral modal verb 'is' rather than 'shall' in some other translations of the Charter hints at a descriptive, rather than a normative, role for the provision.[19] Yet, at the same time, this argument had little traction against the opposite rhetorical perception of IPRs as absolute rights arising

[10] ibid 6.

[11] Praesidium, Explanations relating to the Charter of Fundamental Rights [2007] OJ C-303/17, 23 (hereafter Praesidium).

[12] EU Network of Independent Experts on Fundamental Rights, 'Commentary of the Charter of Fundamental Rights of the European Union' (2006) <https://sites.uclouvain.be/cridho/documents/Download.Rep/NetworkCommentaryFinal.pdf> 165 ff accessed 18 April 2021.

[13] As in Christophe Geiger, 'Intellectual Property Shall Be Protected!?—Article 17(2) of the Charter of Fundamental Rights of the European Union: A Mysterious Provision with an Unclear Scope' (2009) 31(3) European Intellectual Property Review 113, 117 (hereafter Geiger, 'Intellectual Property Shall Be Protected').

[14] See Alexander Peukert, 'Intellectual Property as an End in Itself' (2011) 33(2) European Intellectual Property Review 67, 69 (hereafter Peukert, 'Intellectual Property').

[15] In these terms Geiger, 'Intellectual Property Shall Be Protected' (n 13) 115. See also 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) 82 (hereafter Griffiths and McDonagh, 'Fundamental Rights and European IP Law').

[16] Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (IPR Enforcement Directive) [2004] OJ L157.

[17] *Laserdisken v Kulturministeriet* [2006] ECLI:EU:C:2006:549, para 65.

[18] Praesidium (n 11) 23.

[19] But see Griffiths and McDonagh, 'Fundamental Rights and European IP Law' (n 15) 80–81, noting the absence of descriptive provisions in the CFREU, along with Geiger, 'Intellectual Property Shall Be Protected' (n 13) 116.

as a consequence of the ambiguities of Art 17(2). The provision thus became the new flag bearer of the 'property logic' that had already emerged in secondary EU law and in some *travaux préparatoires*.[20] This tendency has led commentators to conclude that the constitutional hedging of IP as a property right in the CFREU has contributed to an increase in the degree of protection granted to copyright.[21] However, a closer look at ECJ case-law reveals a more complex, and rather different, scenario.

With the exception of *Laserdisken* and *Metronome Musik* (1998), in which the Court used the social function of property to support a rejection of the idea that the constitutional propertisation of copyright implied absolute protection,[22] none of the cases decided before the entry into force of the CFREU referred to common constitutional property doctrines or, later, to the Nice Charter. In this respect, the advent of the Lisbon Treaty did not trigger any substantial change. In the landmark case of *Promusicae* in 2008, Art 17 CFREU featured only in a cursory statement that had no decisive impact on the fair balance exercise.[23] Subsequent decisions have invoked the provision as one element in the overall balance of rights, with no distinguishing implication arising as a consequence of copyright's characterisation as a property right. In these decisions, the ECJ referred neither to Member States' common constitutional traditions and property doctrine, as it regularly does in traditional property cases, nor to ECtHR jurisprudence on A1P1. In fact, Art 17(2) CFREU seems merely to have had the effect of raising copyright to the status of a fundamental standing on an equal footing with other fundamental rights and freedoms protected by the Charter. This, however, does not imply that Art 17(2) CFREU has had no effect on ECJ case-law. On the contrary, the neutral connotation of the new provision, coupled with the problematic use of fundamental rights and proportionality in copyright cases,[24] has led to questionable results.

The case-law on remedies for infringements of IP rights stands as a telling case in point. In *Coty Germany*,[25] the ECJ ruled that a German provision allowing banks to refuse to disclose information on the holders of bank accounts linked to trade mark infringements was contrary to EU law, holding it to violate the essence of Arts 17(2) and 42 CFREU (which provides a right to an effective remedy). As a consequence, the Court presumed the absence of a fair balance, and thus skipped the proportionality assessment. The decision, broadly criticised for its irreconcilability with the balance struck between the right to privacy and the right to request information by Art 8(1) IPRED, resulted in the judicial introduction of a remedy that was not provided in national law, and in the use of Art 17 CFREU to increase the degree of protection granted to IP right-holders by EU secondary law.[26] Yet, once again,

[20] For a historical overview and critical analysis, see Peukert, 'Intellectual Property' (n 14) 67–69.

[21] ibid 68.

[22] *Metronome Musik GmbH v Music Point Hokamp GmbH* [1998] ECLI:EU:C:1998:172, para 21 (hereafter *Metronome Musik*). Similarly see *Sky Österreich GmbH v Österreichischer Rundfunk* [2013] ECLI:EU:C:2013:28, paras 23–24 (hereafter *Sky Österreich*).

[23] *Productores de Música de España v Telefónica de España SAU* [2008] ECLI:EU:C:2008:54, para 62.

[24] See also Tuomas Mylly's and Jonathan Griffiths's 'Introduction', Tuomas Mylly's 'The New Constitutional Architecture of Intellectual Property', and Aurora Plomer's 'A Market-Friendly Human Rights Paradigm for IP Rights in Europe?', all in this volume.

[25] *Coty Germany GmbH v Stadtsparkasse Magdeburg* [2015] ECLI:EU:C:2015:485.

[26] Tuomas Mylly, 'Regulating with Rights Proportionality? Copyright, Fundamental Rights and Internet in the Case-Law of the Court of Justice of the European Union' in Oreste Pollicino, Giovanni Maria Riccio, and Marco Bassini (eds), *Copyright versus (other) Fundamental Rights in the Digital Age. A Comparative Analysis in Search of a Common Constitutional Ground* (Edward Elgar 2019) (hereafter Mylly, 'Regulating with Rights Proportionality').

Art 17(2) CFREU was read simply as confirmation that IP was protected as a fundamental right equal to others, with no implications following from its characterisation as a property right. The same approach was in evidence in *New Wave*[27] and *Bastei Lübbe*.[28]

McFadden confirmed the *Coty* doctrine. In that case, the ECJ had to decide whether a shop owner offering free access to his wi-fi network could be subject to injunctions (i) to terminate the network or (ii) to examine all communications passing through the network, or (iii) to password-protect the wi-fi access. Since the first two options were excluded as entailing a disproportionately serious infringement of the ISP's freedom to conduct a business (Art 16 CFREU), the Court concluded that failure to require password protection would deprive the IP owner of an effective remedy,[29] implicitly suggesting an obligation for Member States to implement the measure, grounded on the need to preserve the essence of Art 17(2) CFREU.[30] Questionably, the Court refused to accept that such a measure would undermine the essence of the ISP's freedom to conduct a business and/or users' freedom of information, but failed to engage in any analysis of the nature of the essence of copyright as a property right under Art 17(2) CFREU, focusing only on the need to provide a remedy that might dissuade users from infringement.

Decisions defining the scope of the exclusive rights present similar features. A glaring example is provided by *GS Media*,[31] where the Court was called upon to draw the boundaries of the right of communication to the public (Art 3 InfoSoc) and justified the introduction of additional criteria to distinguish between legitimate and illegitimate conduct[32] by pointing to the necessity of striking a fair balance between freedom of expression (Art11 CFREU), on the one hand, and copyright,[33] protected under Art 17(2) CFREU and to be granted a high level of protection (Recital 9 InfoSoc), on the other.[34] However, the Court did not draw any specific consequence from the constitutional propertisation of copyright. Again, the reference to Art 17(2) CFREU simply confirmed the status of copyright as a fundamental right, to be balanced against other rights under Art 52 CFREU.

Only in *Scarlet Extended* and *Netlog* did the ECJ take an explicit stance on the specific effect of the provision, excluding any idea that its introduction granted absolute protection and inviolability to IPRs.[35] Similarly, an indirect reference to the non-absolute nature of the right to IP is apparent in *UPC Telekabel*,[36] where it justified a conclusion that the imperfect blocking of infringing conduct by an ISP was, nevertheless, in compliance with the ISP's duty to strike a proportionate balance between conflicting fundamental rights when selecting the means to implement an outcome injunction.[37] The principle that IPRs are not

[27] *New Wave CZ, as v Alltoys spolsro* [2017] ECLI:EU:C:2017:18.

[28] *Bastei Lübbe GmbH & Co KG v Michael Strotzer* [2018] ECLI:EU:C:2018:841.

[29] *Tobias McFadden v Sony Music Entertainment Germany GmbH* [2016] ECLI:EU:C.2016:689, para 80 and paras 98–99.

[30] ibid para 81. See Mylly, 'Regulating with Rights Proportionality' (n 26); for a different opinion see Martin Husovec, 'Holey Cap! CJEU Drills (yet) Another Hole in the e-Commerce Directive's Safe Harbours' (2017) 12(2) Journal of Intellectual Property Law & Practice 115.

[31] *GS Media BV v Sanoma Media Netherlands BV and Others* [2016] ECLI:EU:C:2016:644.

[32] ibid paras 49–51.

[33] ibid para 31.

[34] ibid para 30.

[35] *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)* [2011] ECLI:EU:C:2011:771, para 43; *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog NV* [2012] ECLI:EU:C:2012:85, para 41.

[36] *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft mbH* [2014] ECLI:EU:C:2014:192.

[37] ibid paras 62–63.

absolute rights was reiterated in the recent ECJ Grand Chamber trilogy of *Funke Medien*,[38] *Pelham*,[39] and *Spiegel Online*,[40] where the Court used the very same language to justify the need to strike a fair balance between copyright and other fundamental rights,[41] and to interpret the exceptions in Art 5 InfoSoc broadly when necessary to safeguard their effectiveness and observe their purpose, 'since such a requirement is of particular importance where those exceptions and limitations aim … to ensure observance of fundamental freedoms'.[42]

However, despite this step forward, the Court has never fully clarified the relationship between Art 17(2) and Art 17(1) CFREU, leaving unanswered the question of the implications of copyright propertisation; that is, the application to copyright of the guarantees and limitations provided for general property rights.

Against this background, the ECJ's interchangeable use of the two paragraphs set out in Art 17 when analysing copyright matters has only increased the degree of conceptual confusion. A paradigmatic decision is *Luksan*, where the ECJ invalidated an Austrian provision denying copyright in a cinematographic work to its director as violating EU law, and added that the measure constituted a deprivation of the director's property right, 'lawfully acquired' under EU law, thus violating Art 17(1) CFREU.[43] The Court asserted that any contrary interpretation 'would not be consistent with the requirements flowing from Article 17(2)', thus suggesting that Member States are compelled to recognise IP rights granted by EU law within their legal system under Art 17(2). This, then, creates an institutional guarantee for existing entitlements, regulatory departure from which will inevitably amount to an illegitimate deprivation under Art 17(1). In *Luksan*, however, the reference to the property guarantee was only secondary to the finding of infringement of an EU Directive, making its use 'cosmetic' rather than technical and binding.[44] Slightly different are the implications of *Sky Österreich*, where Art 17(1) CFREU was relied upon to challenge the validity of Art 15(6) of Directive 2010/13 (the Audiovisual Media Services Directive), under which broadcasters were required to authorise the use of short clips of their broadcasts by other broadcasters within the EU, without compensation, in news reports on events of high interest.[45] Although the Court held that Art 17 did not apply in such circumstances, since *Sky Österreich*'s exclusive broadcasting rights were acquired under contract,[46] the judgment seems to suggest that an uncompensated exception to an exclusive right provided by EU law might be challenged for disproportionate violation of Art 17(1) CFREU. Such

[38] *Funke Medien NRW GmbH v Bundesrepublik Deutschland* [2019] ECLI:EU:C:2019:623, para 72 (hereafter *Funke Medien*).

[39] *Pelham GmbH and Others v Ralf Hütter and Florian Schneider-Esleben* [2019] ECLI:EU:C:2019:624, para 33 (hereafter *Pelham*).

[40] *Spiegel Online GmbH v Volker Beck* [2019] ECLI:EU:C:2019:625, para 56 (hereafter *Spiegel Online*).

[41] *Pelham* (n 39) para 34; *Funke Medien* (n 38) para 70; *Spiegel Online* (n 40) para 54.

[42] *Funke Medien* (n 38) para 71.

[43] *Martin Luksan v Petrus van der Let* [2012] ECLI:EU:C:2012:65, paras 68–70.

[44] The reference to Art 17 CFREU in *Luksan* is strongly criticised by Jonathan Griffiths, 'Constitutionalising or Harmonizing? The Court of Justice, the Right to Property and European Copyright Law' (2013) 38 European Law Review 65, 75 (suggesting that it is a mere tool to advance the ECJ's harmonisation agenda) and Henning Grosse Ruse-Khan, 'Overlaps and Conflict Norms in Human Rights Law: Approaches of European Courts to Address Intersections with Intellectual Property Rights' in Christophe Geiger (ed), *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar 2015) 77–78 (downplaying its real impact on the outcome of the decision and questioning the presumption that IPRs are granted by EU and not by national law).

[45] *Sky Österreich* (n 22) para 30.

[46] ibid para 38.

suggestion implies that the Charter provision might indeed have introduced an absolute institutional guarantee for copyright and other IPRs.

The Court's recent decisions on the impact of fundamental rights on the interpretation of EU copyright law—namely *Funke Medien*,[47] *Pelham*,[48] and *Spiegel Online*[49]—have provided a number of useful clarifications, but have contributed only minimally to the construction of Art 17(2) CFREU. In *Pelham*, some forms of sampling were excluded from the scope of the right of reproduction (Art 2 InfoSoc) in order to safeguard a fair balance between copyright—which the Court reiterated is not an absolute right—and Arts 11 and 13 CFREU on freedom of expression and the arts. To support its conclusions, the ECJ stated that prohibition of the use of unrecognisable samples of a work could not be justified, since it would hinder the exercise of a fundamental right even where the use of the samples 'would not interfere with the opportunity which the producer has of realising satisfactory returns on … investment'.[50] Interestingly, this reasoning echoes the Court's essential function doctrine, adopted from the 1970s to balance copyright and fundamental freedoms, by taking the specific subject matter of the right as a benchmark for the balance, rather than a generic copyright entitlement, and thus shelves the blind reference to a 'high level of protection' and the related principle of broad interpretation of exclusive rights. However, the argument was left implicit, and was not causally connected to the particular content and structure of copyright as a property right under Art 17(2) CFREU.

These decisions rejected the idea that fundamental rights may allow the introduction of exceptions beyond the scope of Art 5 InfoSoc, because this would endanger harmonisation, legal certainty, and consistency in implementation of that Directive.[51] However, at the same time, the ECJ confirmed that Art 17(2) CFREU does not confer any absolute or inviolable status to copyright,[52] and that national courts should provide a broad interpretation of exceptions whenever necessary to safeguard their effectiveness, particularly when such exceptions are designed to protect fundamental rights and freedoms.[53] In particular, the Court offered a fundamental right-oriented interpretation of the news reporting exception (Art 5(3)(c) InfoSoc) along the lines of its treatment of the parody exception in *Deckmyn*.[54] With a remarkable step forward, the ECJ referred to ECtHR case-law to draw criteria for the balance between copyright and freedom of expression,[55] and identified the background and tools for interpreting Charter rights in the form of common constitutional traditions and international human rights instruments.[56] Three further elements would, however, have been necessary to complete the reordering and correct the distortions affecting ECJ case-law. These were: (i) clarification of the relationship between the first and second paragraphs of Art 17 CFREU, that is, of the implications of the constitutional propertisation of copyright; consequently, (ii) explicit identification of the sources to be used to define the content and structure of the rights protected under Art 17(2) CFREU; and, on that basis (iii)

[47] *Funke Medien* (n 38).
[48] *Pelham* (n 39).
[49] *Spiegel Online* (n 40).
[50] ibid para 38.
[51] *Funke Medien* (n 38) paras 56–63; *Pelham* (n 39) paras 58–64; *Spiegel Online* (n 40) paras 41–48.
[52] *Funke Medien* (n 38) para 72; *Pelham* (n 39) para 33; *Spiegel Online* (n 40) para 56.
[53] *Funke Medien* (n 38) para 71; *Spiegel Online* (n 40) para 55.
[54] *Spiegel Online* (n 40) paras 71–3.
[55] *Funke Medien* (n 38) para 70; *Spiegel Online* (n 40) para 54.
[56] *Funke Medien* (n 38) para 59; *Pelham* (n 39) para 61; *Spiegel Online* (n 40) para 44.

a definition of the essence of copyright and of clearer criteria for a fair balance/proportionality assessment.

The Court's predominantly functional and policy-oriented approach to the interpretation of EU sources give rise to compressed, fact-specific reasoning and a failure to pay attention to systematic arguments. As a consequence, national courts are left with a 'mute' Art 17(2) CFREU that offers no guidance on the copyright balance and has triggered contradictory interpretative outcomes, some of them resulting in a strong constitutional hedging of copyright. This phenomenon, coupled with the technical property logic contaminating EU copyright law, has led many to draw a causal link between the higher degree of protection granted to exclusive rights and the propertisation of copyright crystallised in the CFREU.

However, true constitutional propertisation of EU copyright has still not taken place. Indeed, a comparison between the principles in evidence in ECJ property case-law generally and the arguments used in its copyright decisions clearly shows that the Court has not applied its own constitutional property doctrines when ruling on copyright matters.

3. Step 2—Divergent Approaches: ECJ Copyright Case-Law v ECJ Property Case-Law

The first ECJ decisions on constitutional guarantees and limitations to property can be traced back to the 1970s, when the Court began to evaluate the legitimacy of limitations on national property rights arising from Community acts. In *Hauer*[57] and *Nold*[58] the ECJ recognised that the right to property 'is guaranteed in the Community legal order', on the basis of and in accordance with 'ideas common to the constitutions of the Member States, which are also reflected in the First Protocol to the European Convention for the Protection of Human Rights'.[59] The joint reference to the ECHR and the Member States' common constitutional tradition allowed the Court to complement the Convention's system of guarantees and limitations with the idea of the social function of property as a characterising trait of the EU property model. This combination provided a lens through which property rights, 'far from constituting unfettered prerogatives, must be viewed'.[60]

Provided that the essence of the right is preserved and the measure is proportionate, the doctrine of social function provides the justification for limitations on national property rights—even if uncompensated—in the general interest.[61] However, instead of being linked to common constitutional traditions, the concept has been connected to Treaty goals in EU law. Initially, this approach meant that property rights were construed in alignment with objectives, such as the construction of the internal market,[62] industrial development,

[57] *Hauer v Land Rheinland-Pfalz* [1979] ECLI:EU:C:1979:290 (hereafter *Hauer*).
[58] *Nold v Commission* [1974] ECLI:EU:C:1974:51 (hereafter *Nold*).
[59] *Hauer* (n 57) para 17.
[60] *Nold* (n 58) para 14.
[61] See, eg *Van den Bergh Foods Ltd v Commission* [2003] ECLI:EU:T:2003:281, para 23; *Germany v Council* [1994] ECLI:EU:C:1994:367, para 78 (hereafter *Germany v Council*); *Hubert Wachauf v Germany* [1989] ECLI:EU:C:1989:321 (hereafter *Wachauf*); and the Golden Shares cases: *Commission v Portugal* [2002] ECLI:EU:C:2002:326; *Commission v France* [2002] ECLI:EU:C:2002:327; *Commission v Belgium* [2002] ECLI:EU:C:2002:328.
[62] The notion of social function should be considered 'particularly in the context of a common organisation of the market' in case *Schräder v Hauptzollamt Gronau* [1989] ECLI:EU:C:1989:303, para 15; *Wachauf* (n 61) para 18; *Von Deetzen v Hauptzollamt Hamburg-Jonas* [1988] ECLI:EU:C:1988:214, para 28; *Kuhn* v *Landwirtschaftskammer*

competition, and the like, with further marginal reference to other objectives, such as protection of the right to health or of public security.[63] With the advent of the Lisbon Treaty and attribution of a mandatory value to the Charter of Fundamental Rights, the reference to social function has persisted, despite its absence from Art 17 CFREU.[64] However, in some instances, the concept has made way for Art 52 CFREU, in line with other rights protected under the Charter.[65] Nevertheless, this shift has not caused a substantial change in the test applied to distinguish between expropriation (which generally requires compensation) and legislative limitations (which do not necessarily require compensation) The test continues to be based on the degree of interference with the essence of the right, and on the necessity, appropriateness, and strict proportionality of the constraining measure.[66] Proportionality continues to be assessed in a highly detailed manner, with each step of the analysis considered separately and applied to the factual circumstances of the case. This framework provides both necessary case-by-case evaluation and generalised principles that can be applied in subsequent decisions, ensuring legal certainty and consistency.[67] The real shift after Lisbon is apparent in the Treaty goals that are linked to the notion of social function. Since 2009, an increasing number of cases have referred to non-market goals, such as protection of fundamental rights, the environment, and consumers and have thus brought ECJ jurisprudence closer to common constitutional traditions and judicial property doctrines.[68]

Weser-Ems [1992] ECLI:EU:C:1992:2, para 16; *Germany v Council* (n 61) paras 78–79; *SMW Winzersekt v Land Rheinland-Pfalz* [1994] ECLI:EU:C:1994:407, para 22; *Irish Farmers Association v Minister for Agriculture, Food and Forestry Ireland* [1997] ECLI:EU:C:1997:187, para 27; *Metronome Musik* (n 22) para 21; joined cases *Booker Aquaculture and Hydro Seafood Ltd v The Scottish Ministers* [2003] ECLI:EU:C:2003:397, para 71; joined cases *Alessandrini and Others v Commission* [2003] ECLI:EU:T:2003:110, para 86; joined cases *FIAMM and Others v Council and Commission* [2008] ECLI:EU:C:2008:476, para 183.

[63] See, eg on the right to health, *The Queen v Minister of Agriculture, Fisheries and Food, ex parte Standley and Others* [1999] ECLI:EU:C:1999:215; *The Queen v Secretary of State for Health, ex parte British American Tobacco Ltd and Imperial Tobacco Ltd* [2002] ECLI:EU:C:2002:741; *Unitymark Ltd, North Sea Fishermen's Organisation v Department for Environment, Food and Rural Affairs* [2006] ECLI:EU:C:2006:193; joined cases *Alliance for Natural Health and Others v Secretary of State for Health and National Assembly for Wales* [2005] ECLI:EU:C:2005:449; on work health and safety see joined cases *Kingdom of Spain and Republic of Finland v European Parliament and Council of the European Union* [2004] ECLI:EU:C:2004:497; on security see joined cases *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [2008] ECLI:EU:C:2008:461; on animal health and public health requirements see joined cases *ABNA Ltd and Others v Secretary of State for Health and Food Standards Agency, Fratelli Martini & C SpA and Cargill Srl v Ministero delle Politiche Agricole e Forestali and Others, Ferrari Mangimi Srl and Associazione nazionale tra i produttori di alimenti zootecnici (Assalzoo) v Ministero delle Politiche Agricole e Forestali and Others* and *Nederlandse Vereniging Diervoederindustrie (Nevedi) v Productschap Diervoeder* [2005] ECLI:EU:C:2005:741.

[64] As in case *Planta Tabak-Manufaktur Dr Manfred Obermann GmbH & Co KG v Land Berlin* [2019] ECLI:EU:C:2019:76, para 94, where the Court links the principle to Art 52 CFREU (hereafter *Planta Tabak*); *Commission v United Kingdom* [2014] ECLI:EU:C:2014:67, para 70; *McDonagh v Ryanair Ltd* [2013] ECLI:EU:C:2013:43, para 60 (hereafter *McDonagh*); *Deutsches Weintor v Land Rheinland-Pfalz* [2012] ECLI:EU:C:2012:526, para 54 (hereafter *Deutsches Weintor*); case *Jozef Križan and Others v Slovenská inšpekcia životného prostredia* [2013] ECLI:EU:C:2013:8, para 113 (hereafter *Križan and Others*); joined cases *Raffinerie Mediterranee (ERG) SpA, Polimeri Europa SpA and Syndial SpA v Ministero dello Sviluppo economico and ENI SpA v Ministero Ambiente e Tutela del Territorio e del Mare* [2010] ECR I-1919, para 80 (hereafter *ENI and Others*).

[65] See *Commission v Hungary* [2019] ECLI:EU:C:2019:432, para 72; *National Iranian Tanker Company v Council of the European Union* [2018] ECLI:EU:C:2018:966, para 83; *Eugenia Florescu and Others v Casa Județeană de Pensii Sibiu and Others* [2017] ECLI:EU:C:2017:448, para 49.

[66] Similarly see Ferdinand Wollenschläger, 'Article 17—Right to Property' in Steve Peers, Tamara Hervey, Jeff Kenner, and Angela Ward (eds), *The EU Charter of Fundamental Rights: a Commentary* (Hart 2014) 478–79.

[67] ibid.

[68] As in case *Commission v United Kingdom* [2014] ECLI:EU:C:2014:67, para 70 and case *Société Neptune Distribution v Ministre de l'Economie et des Finances* [2015] ECLI:EU:C:2015:823, paras 66–68. See also, with reference to the right to health, *Planta Tabak* (n 64) para 97 and *Deutsches Weintor* (n 64) para 55; on the protection of consumer see *McDonagh* (n 64) para 63; on environmental protection see *Križan and Others* (n 64) para 114 and *ENI and Others* (n 64) para 82.

Tellingly, the Court's copyright decisions do not feature any of these characteristic features of its property case-law. The notion of social function has never been referred to in the reasoning in these cases, before or after Lisbon. The proportionality assessment is much less detailed or even missing, though often substituted by concise factual statements leading abruptly to assertion of the presence or absence of a fair balance between copyright and conflicting fundamental rights.[69] Moreover, due to the particular focus of requests for a preliminary ruling submitted by national courts, the ECJ has not provided a rule of thumb to distinguish between deprivations and limitations of property, but has simply indicated that a fair balance is not achieved if the essence of the right is violated, without offering any further explanation. Apart from its confirmation that Art 17(2) CFREU does not confer absolute protection on copyright, a position that echoes principles underlying its property cases, the Court has not used any of its property doctrines to inspire or guide its decisions on copyright matters.

Against this background, it would appear to be misleading to argue that the degree of protection granted to copyright arises as a consequence of the fact that the ECJ has followed a property logic grounded on Art 17(2) CFREU. It would be improper to confuse the true implications of copyright propertisation with something that ought really to be understood only as the application of non-technical proprietary rhetoric.

In fact, if properly developed, the consequences of the constitutional propertisation of copyright could be remarkably distant from those generated so far by the judicial application of Art 17(2) CFREU. This can be seen very clearly in situations in which consolidated constitutional property doctrines have been applied to copyright in a number of Member States.

4. Step 3—Counterexamples. The Constitutional Propertisation of Copyright in Selected National Decisions

The most interesting examples come from Germany, where—in the light of its close link to dignity, individual self-realisation, and participation in the socio-cultural life of the community—copyright has been subject to constitutional propertisation (Art 14 Grundgesetz, GG) since 1971, with significant effects on the copyright balance. In the first, paradigmatic decision, *Schulbuchprivileg* (1971),[70] the Federal Constitutional Court (Bundesverfassungsgericht) followed its property jurisprudence and rejected the idea that authors' exclusive rights cover any form of exploitation, ruling instead that Art 14 GG requires the legislator to regulate copyright in a manner that 'guarantee[s] the compatibility of the exploitation of the work with the nature and social relevance of the right', since it 'is not only obliged to protect the interests of the individual, but also to limit [the author's] rights to the extent necessary to pursue the public good'.[71] The notion of social function

[69] On the challenges raised by the pitfalls of the proportionality assessment in copyright cases, see Mylly, 'Regulating with Rights Proportionality' (n 26); Christina Angelopoulos, 'Sketching the Outline of a Ghost: the Fair Balance Between Copyright and Fundamental Rights in Intermediary Third Party Liability' (2015) 17(6) Info—The Journal of Policy, Regulation and Strategy for Telecommunications, Information and Media 72 (hereafter Angelopoulos, 'Sketching the Outline of a Ghost'). More generally, see Filippo Fontanelli, 'The Mythology of Proportionality in Judgments of the Court of Justice of the European Union on Internet and Fundamental Rights' (2016) 36 Oxford Journal of Legal Studies 630.

[70] *Schulbuchprivileg,* 31 BVerfGE 229 (1971) para 28.

[71] ibid 247–48.

under Art 14 GG and the 'social character of intellectual property'[72] have also been used to support provisions allowing non-commercial school use of copies of protected works after the first licence (*Bibliotheksgroschen*),[73] and unauthorised performance of a protected musical piece at a non-profit event, on payment of equitable compensation (*Kirkenmusik*). Subsequently, in *Germania 3*, the Bundesverfassungsgericht reiterated that proprietary protection of copyright does not cover all forms of exploitation,[74] adding that authors must tolerate limitations to their right where necessary in order to allow the expression of others' artistic freedom (Art 5(3) GG),[75] since 'the more the work fulfils its social role, the more it may serve as the origin of another artistic endeavour'.[76] On similar grounds, in *Metall auf Metall*[77] (the case appearing before the ECJ as *Pelham*), the Bundesverfassungsgericht reversed two Supreme Court (Bundesgerichtshof, BGH) decisions,[78] which had characterised the unauthorised use of a two-second excerpt of a song in a hip-hop loop as an infringement, on the ground that those decisions disproportionately violated the sampling artist's artistic freedom, arguing that in the light of the social function(s) of copyright and the need to protect freedom of the arts and cultural development of the community, the limited interference with the exploitation of the work that had occurred in this case had to be considered to be proportionate and legitimate.[79]

The results are no different in France, despite that state's more property-friendly constitutional framework. In its first copyright case in 2006, the Conseil Constitutionnel classified an obligation imposed on right-holders to provide information on technological measures of protection applied to their works for interoperability purposes as an illegitimate uncompensated expropriation. Right-holders' power to control private copying of works was justified under the property clause of Art 17 of the Déclaration universelle des droits de l'homme (DUDH) with no reference to limitations.[80] While this judgment seemed to confirm fears arising from the constitutional propertisation of copyright,[81] three more recent judgments have taken a different direction.

In *HADOPI* (2009), the Conseil distinguished copyright from other property rights in the light of its *spécificité*, and refused to accept that the need to protect copyright could justify the grant of the power to penalise online infringement with the termination of an Internet connection (thus depriving users of their freedom of expression) to an administrative authority, without judicial review.[82] In *Soulier and Doke* (2013), ruling on the constitutionality of a law creating a non-voluntary collective management scheme for the digitisation of out-of-commerce books, the Conseil extended the three-step proportionality assessment used

[72] *Kirkenmusik*, 49 BVerfGE 382 (1978).
[73] *Biblioteksgroschenentscheidung*, 31 BVerfGE 248 (1971).
[74] *Germania 3*, 1 BvR 825/98 (2000) para 19.
[75] ibid.
[76] ibid para 23.
[77] *Metall auf Metall*, 1 BvR 1585/13 (2016).
[78] BGH 20 November 2008, I ZR 112/06 (*Metall auf Metall I*) and BGH 13 December 2012, I ZR 182/11 (*Metall auf Metall II*) in GRUR 2013, 614.
[79] *Metall auf Metall* (n 77) para 47.
[80] Conseil Constitutionnel, 27 July 2006, No 2006–540 DC. For a critical appraisal, see Valerie Laure Bénabou, 'Patatras! A propos de la décision du Conseil constitutionnel du 27 juillet 2006' (2006) 20 Propriétés intellectuelles 240 (hereafter Bénabou, 'Patatras'); Thierry Revet, 'Les droits de propriété intellectuelle sont des droits de propriété' (2006) Revue trimestrielle de droit civil 791; Michel Vivant, 'Et donc la propriété littéraire et artistique est une propriété …' (2007) 23 Propriétés intellectuelles 193 (hereafter Vivant, 'Et donc la propriété littéraire').
[81] As noted particularly by Bénabou, 'Patatras' (n 80) 241 and Vivant, 'Et donc la propriété littéraire' (n 80) 195.
[82] Conseil Constitutionnel, 10 June 2009, No 2009–580 DC, paras 14–17.

in other balancing exercises to copyright, upholding the measure as proportionate in the light of the general interest protected by law and the guarantees offered to right-holders.[83] The same principle was applied to uphold a provision presuming the joint transfer of a reproduction right in a work and ownership of the physical support for the work in the case of works of art, rejecting claims of violation of Art 17 DUDH in concluding that right-holders could freely contract around the presumption, which had the public interest goal of facilitating the market for such creations.[84]

A similarly interesting application of constitutional property doctrines to copyright comes from the Spanish Tribunal Supremo. In *Megakini* (2012), the Tribunal used the Civil Code's prohibition of abuse of rights and the doctrine of *ius usus inocui*, which are grounded on the social function of property rights (Art 35 of the Spanish Constitution) and permit third parties to use an asset when necessary to prevent abusive exercise of property rights, to interpret the three-step test enshrined in the Spanish Copyright Act. On that basis, the Tribunal rejected Megakini's claim of copyright infringement against Google, which had used snippets of works in search results on its website, finding the claim to be a misuse that was not justified by a legitimate interest or necessary to protect the market for the work, and prohibiting the exercise of exclusive rights which divert them from their function and disproportionately harm third parties.[85]

By contrast, and despite the great similarities between Italian and German constitutional traditions and property doctrines, the precedents of the Italian Corte Costituzionale may be adduced as evidence of the potentially negative effects of a superficial approach to the constitutional propertisation of copyright. The first attempt by the Corte to 'constitutionalize' copyright dates back to 1968, when it defined protection of authors' rights as a matter of public interest and social utility to justify interference with freedom of association and freedom to conduct business arising as a consequence of the monopoly over the collective management of authors' rights attributed to SIAE.[86] No reference was made to the property clause of Art 42 of the Italian Constitution (Cost), but only to the freedom to conduct a business (Art 41 Cost), in line with the private law classification of copyright as a monopoly, and with a focus only on its exercise but not on its structure and internal limitations.[87] Later, the Corte has often been called upon to assess whether regulation of copyright complies with the social function of property under Art 42(2) Cost. However, it has avoided having to respond substantively because the claims have been declared inadmissible.[88]

In only a handful of cases have Italian constitutional judges seen the value of considering copyright per se within a constitutional framework. The most relevant of these was judgment no 108/1995 on the constitutional legitimacy of the rental right, challenged for its incompatibility with the freedom to conduct business of rental companies (Art 41 Cost), the right to property of the owner of the tangible support for the work (Art 42 Cost), and

[83] Conseil Constitutionnel, 28 February 2014, No 2013–370 QPC. The legislation, challenged before the ECJ, was declared to violate EU law. See case *Marc Soulier and Sara Doke v Premier ministre and Ministre de la Culture et de la Communication* [2016] ECLI:EU:C:2016:878 (hereafter *Soulier and Doke*).

[84] Conseil Constitutionnel, 21 November 2014, No 2014–430 QPC, 4–7.

[85] Tribunal Supremo, 3 April 2012, no 172/2012, on which, see Raquel Xalabarder, 'Spanish Supreme Court Rules in Favour of Google Search Engine … and a Flexible Reading of Copyright Statutes?' (2012) 3 Journal of Intellectual Property, Information Technology and Electronic Commerce Law 162.

[86] Corte Costituzionale, 19 April 1972, n 65.

[87] Corte Costituzionale, 15 May 1990, n 241.

[88] Eg Corte Costituzionale, 9 July 1970, n 112; 12 April 1973, n 38.

the right to culture (Art 9 Cost).[89] The Corte rejected the claim, underlining the priority granted by law to authors' rights to stimulate creativity and thus to pursue the general interest in cultural development. It then characterised copyright as property under Art 42 Cost, and briefly evaluated the legislative balance between conflicting constitutional objectives. However, the Corte's reasoning was too concise and did not elaborate on the consequences of applying the social function of property in the specific case of copyright.[90] The superficiality of this precedent weakened its persuasiveness, and encouraged the return of conflicting classifications of IP rights, again swinging between Arts 41 and 42 Cost,[91] with no real implications attached to their constitutional status.

In contrast to the case-law of the ECJ, it can be seen that, when properly done, the constitutional propertisation of copyright at a national level has relevant implications for the copyright balance. To understand how a similarly valuable outcome might be achieved in EU copyright law if the constitutional propertisation of copyright is taken seriously, the first necessary step is to identify the features of the EU constitutional property model.

5. Step 4—Towards an EU Constitutional Property Model

In its Explanatory Notes to the Charter, the Praesidium explained that the meaning and scope of the right to property under Art 17 CFREU 'are the same as those of the right guaranteed by the ECHR'.[92] A1P1, ECHR, and related ECtHR case-law are thus the main reference sources for the interpretation of this provision. However, the Notes also add that property is a 'fundamental right common to all national constitutions',[93] and therefore, under Art 6(3) TEU and Art 52(4) CFREU, Member States' common constitutional traditions must be taken into account when the EU constitutional property model is constructed, in line with a practice followed by the ECJ since the very early days of its operation.

Reconciliation of these three systems presupposes the establishment of a minimum common denominator between them. However, commentators have cast doubt on the possibility of doing so, in the light of the apparent incompatibility between liberal ECHR-CFREU models and the social democratic doctrines characterising the majority of Member States' constitutional property regimes.[94] While a detailed comparative analysis would go beyond the scope of this contribution,[95] a sketch of the key features of the three systems will clarify their complex interaction, and enable us to assess the feasibility of reconciling the models.

[89] Corte Costituzionale, 6 April 1996, n 108.

[90] ibid paras 9–10. Similar arguments can be found in several other decisions (eg Corte Costituzionale, Ord 11 March 1988, n 361; 26 June 1973, n 110; 13 April 1972, n 65; 3 April 1968, n 258).

[91] With, eg, a return of the definition of IPRs as a monopoly and the application of Art 41 Cost on the freedom to conduct business (Corte Costituzionale, 8 March 2006, n 110), or rejection of the proprietary qualification (Corte Costituzionale, 9 March 1978, n 20, on pharmaceutical patents). Only in one trade mark case has the Court used Art 42(2) Cost to require the functionalisation of IP to social utility (Corte Costituzionale, 3 March 1986, n 42).

[92] Praesidium (n 11) 23.

[93] ibid.

[94] See eg Michael R Antinori, 'Does Lochner Live in Luxembourg? An Analysis of the Property Rights Jurisprudence of the European Court of Justice' (1995) 18 Fordham International Law Journal 1778; Tom Allen, 'Liberalism, Social Democracy and the Value of Property under the European Convention on Human Rights' (2010) 59 International and Comparative Law Quarterly 1055.

[95] For more detail, see Caterina Sganga, *Propertizing European Copyright. History, Challenges and Opportunities* (Edward Elgar 2018) 191–229 and related bibliography (hereafter Sganga, *Propertizing European Copyright*).

5.1 The Three Models

Art 1 A1P1 ECHR and Art 17 CFREU present broadly similar language. The Convention allows expropriations in the public interest and regulation of the use of property in accordance with the general interest. The Charter protects the right for everyone 'to own, use, dispose of and bequeath his or her lawfully acquired possession', and distinguishes between expropriation and regulation by attaching to the former the owner's right to fair compensation. Due to the very general nature of the two definitions, the characteristic features of the two property models have been determined through decades of case-law.

The most prolific interpretative body has been the ECtHR.[96] The Strasbourg Court has always shown a high deference towards states' margin of appreciation in determining national socio-economic policies.[97] However, this has not prevented it from developing an original test to evaluate state measures, which is inspired by national systems but, nevertheless, constitutes an autonomous constitutional property model.[98]

The test analyses the impact and goals of interference, and assesses its legitimacy on the basis of its legality, reasonableness, presence of a supporting public/general interest, and proportionality (*stricto sensu*) with respect to its aims, which should correspond to a 'pressing social need'.[99] The notions of public and general interest are used interchangeably, overlap with the notion of social function, and have an autonomous meaning identified independently from national definitions. They are broad enough to leave room for state discretion.[100] The effect of a national measure, and thus the balance between property and the public interest, is assessed on the basis of the measure's economic impact, with great importance attributed to the relationship between compensation and the market value of the asset at issue, a relationship which can be derogated from only in cases of important economic reform or objectives of considerable importance to social justice.[101]

The resulting model sees property as a bundle of economic utilities, which can be constrained or nullified by legitimate, reasonable, and proportionate measures, and which can be compensated with the market value of a good in case of *de iure* or de facto expropriation. The notion of public interest is value-neutral, with only a few cases differentiating the degree of protection offered on the basis of the social relevance of the object or the nature—personal or commercial—of the interest underlying the right.[102] This background and the emphasis on protection of property as a human right may suggest a departure from the social democratic model of constitutional property that applies in several Contracting States.[103] However, this conclusion would be fallacious if not accompanied by recognition of the reasons underlying such divergences, which lie in the specific object of the Court's

[96] On the property jurisprudence of the ECtHR, see eg Tom Allen, *Property and the Human Rights Act 1998* (Hart Publishing 2005) (hereafter Allen, *Property*); William Schabas, *The European Convention on Human Rights: A Commentary* (Oxford University Press 2015) 971 ff (hereafter Schabas, *European Convention*).

[97] Stated explicitly by the ECtHR in *Handyside v United Kingdom*, App no 5493/72, 7 December 1976.

[98] The test has been first developed in *Sporrong and Lonnroth v Sweden*, App no 7151/75, 23 September 1982, and further conceptualised in its main pillars by *James v United Kingdom*, 8793/79, 21 February 1986, 139–40 (hereafter *James*).

[99] See Allen, *Property* (n 96) 26–27.

[100] Further case-law on the notion of public interest in Schabas, *European Convention* (n 96) 975–76.

[101] Already in *James* (n 98) para 54.

[102] See eg *Gasus Dosier-Und Fordertechnik GmbH v Netherlands*, App no 15375/89, 23 February 1995; V*enditelli v Italy*, App no 14804/89, 18 July 1994; *Chassagnou v France*, App no 25088/94, 29 April 1999.

[103] As in Allen, 'Liberalism, Social Democracy and the Value of Property' (n 94) 1061.

scrutiny (state violations of property rights), and in the fact that, as opposed to national constitutional courts, the ECtHR does not rule on a property model that is inserted into a broader national/regional constitutional architecture. The wide margin of appreciation left to states and the greater focus on neutral elements such as legality and the economic impact of a contested measure indirectly acknowledge this ontological divergence.[104] These features mean that the ECHR property model is unsuitable to define the content, structure, and functions of property in the EU constitutional framework and justify its treatment as a complementary—rather than an antagonistic—model to the regimes delineated by Member State constitutions.

This conclusion is supported by the characteristics of the property model provided for under the ECJ, where the reference to Member States' common constitutional traditions ought to complement the property right under the Strasbourg model by reference to the social function of property as part of a stable *acquis communautaire*, which justifies limitations on that right when required in pursuit of Treaty goals and the protection of EU fundamental rights. In fact, the EU property model presents much clearer and more definite traits than the model built by the ECtHR, for it is part of a more fully realised constitutional framework.

Member States' constitutional property clauses use language similar to that of the ECHR and CFREU. Some charters explicitly refer to the social function or obligation of property,[105] others to the need for property to be exploited,[106] or the possibility for it to be limited in the public interest.[107] In this sense, national constitutional property clauses trace a spectrum that ranges from strong references to the social democratic model, through an array of more neutral statements and on to a handful of rhetorical relics of individual liberalism. However, whatever the textual option, the judicial evolution of national models has brought them closer to one another. To gain a sense of the convergence, it is sufficient to consider some paradigmatic national property models occupying different points on the spectrum.

One of the most developed examples of the social democratic model of property comes from Germany which, as long ago as the Weimar Constitution of 1919, declared that 'property obliges. Its use shall at the same time serve the public good' (Art 153). The GG of 1949 uses the same language but elevates property to the status of fundamental right (Art 14 GG). However, rather than contradicting the presence of a social obligation within the structure of the right, the qualification emphasises the role that property plays in the new social market economy envisioned by the Constitution: offering to individuals the means for their self-realisation and involvement in the life of the community and making them active participants in the construction of the German welfare state.[108]

The *Funktionseigentum* (property function) theory, under which solidarity duties form part of the structure of the right, has been further detailed in the case-law of the

[104] Explicitly in *Lallement v France*, App no 46044/99, 11 April 2002, but see, on the contrary, *Poltorachenko v Ukraine*, App no 77317/01, 18 January 2005, considering also the applicants' financial and social status.

[105] Italy (Art 42); Germany (Art 14); Spain (Art 33); Ireland (Art 43); Hungary (Art 13); Slovakia (Art 20); Czechia (Art 11); Croatia (Art 48).

[106] Greece (Art 17); Estonia (Art 32); Latvia (Art 105).

[107] France (Art 17 Déclaration); Sweden (Art 15); Finland (Art 15); Denmark (Art 73); Portugal (Art 62); Romania (Art 44); Belgium (Art 16); Netherlands (Art 14); Luxembourg (Art 16); Malta (Art 38); Cyprus (Art 23); Lithuania (Art 23).

[108] Similarly see Gregory Alexander, 'Property as a Fundamental Constitutional Right? The German Example' (2003) 88 Cornell Law Review 733, 745 and Donald P Kommers and Russell A Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany* (3rd edn, Duke University Press 2012) 241–42.

Bundersverfassungsgericht. *Hamburg Flood Control* (1968) framed the protection offered by Art 14 GG as personal rather than economic, where property is a freedom to develop and participate in public life rather than a space of freedom from state interference.[109] This implies the grant of a higher degree of protection to assets that are closely linked to individual dignity, and accords less importance to commercial property or assets held as an investment.[110] Specifying that 'there is no pre-existing and absolute definition of property'[111] crystallised in existing entitlements, Art 14 GG allows restrictions, restructuring, and termination in the public interest; legitimises uncompensated regulatory intervention; and admits indemnification lower than market value.[112] It also makes it possible for the legislator to intervene to regulate conflicting economic interests of private parties, altering their balance in pursuance of social goals.[113]

In line with the *Drittwirkung* tradition, Art 14 GG and the function theory have also been used horizontally. A prohibition on the distribution of flyers in shopping malls has been sanctioned as violating freedom of expression;[114] tenants' rights of access to information[115] have prevailed over property and have required acceptance of their requests to install television antennae to access their home country channels; conflicting property rights over dwellings in the case of residential leases have been resolved by privileging the entitlement closer to a right-holder's personal needs.[116]

Constitutional clauses using a more nuanced text have produced similar judicial results. One example is the Italian model, where Art 42(2) Cost requires the legislator to regulate property 'in order to ensure its social function and to make it accessible to all'. Linking the doctrine to Art 2 Cost, 'which places on all citizens imperative duties of economic and social solidarity',[117] the Corte Costituzionale has upheld uncompensated regulation of uses of 'private goods of public interest',[118] reduction of compensation below market value,[119] and significant limitations of owners' freedom of contract in the case of residential leases in order to ensure dignified housing for all.[120] Similarly, the doctrine has militated in favour of the attribution of a higher degree of protection to assets closest to an owner's personal needs and self-development[121] and has guided the balance between property and conflicting

[109] 24 BVerfgGE 367 (1968).

[110] As in *Besitzrecht des Mieters*, BVerfGE, 89, 1 (1993), on which Andries Van der Walt, *Constitutional Property Clauses: a Comparative Analysis* (Juta 1999) 139. See also Vergleichsmiete I, 37 BVerfGE 132 (1974); *Mitbestimmungsentscheidung*, 50 BVerfGE 290 (1976); 68 BVerfGE 361 (1985).

[111] *Schulbuchprivileg*, BVerfGE 229 (1971).

[112] *Nassauskiesungsbeschluss*, 58 BVerfGE 300 (1981) § 307.

[113] *Feldmühle*, 14 BVerfGE 263 (1962). See also *Boxberg*, BVerfGE, 74, 264 (1987) and *Durkheimer Gondelbahn*, BVerfGE 56, 249 (1981).

[114] See, eg OLG Stuttgart 25 September 1975, 3 Ss (8) 298/75; OLG Karlsruhe 2 February 1978—3 Ss 7/78.

[115] BVerfG, 9 February 1994, BVerfGE 90, 27. AG Tauberbischofsheim, 8 May 1992, NJW-RR 1992, 1098. *Contra* OLG Dusseldorf, 2 December 1992, MDR 1993, 233.

[116] BVerfG 26 May 1993, NJW 1993, 2035.

[117] Corte Costituzionale, 24 October 2007, nn 348-49, [2008] Giur cost 3475.

[118] Corte Costituzionale, 20 January 1966 n 6 [1966] Giur cost 451; 9 March 1967, n 20; 29 May 1968, n 56-57, Giur cost 1968, 884; 4 July 1974, n 202 [1974] Giur cost 1692; 18 July 1997, n 262 [1997] Giur cost 2406; 18 December 2001, n 411 [2001] Giur cost 3943; 9 May 2003, 148 [2003] Giur cost 1235. For a contextual reference to the duty of solidarity, see Corte Costituzionale, 19 July 1996, n 259 [1996] Giur cost 2319.

[119] From the landmark Judgment in Corte Costituzionale, 25 May 1957, n 61 [1957] Giur cost, 1957, 695, the Court has often reiterated the principle. Among the most remarkable are Corte Costituzionale, 30 January 1980, n 4 [1980] Giur cost 21; 21 July 1983, n 223 [1983] Giur cost 1331; 10 June 1993, n 283 [1993] Giur cost 1981; 26 October 2000, n 444 [2000] Giur cost 3327; 24 October 2007, nn 348-49.

[120] As in the landmark Corte Costituzionale, 15 January 1976, n 3 [1976] Giur cost 18, and 5 April 1984, n 89, [1984] Giur cost 496.

[121] Clearly in Corte Costituzionale, 22 April 1980, n 58 [1980] Giur cost 405.

constitutional rights in antenna[122] and shopping mall flyer cases,[123] in judicial extension of the tort of nuisance to protect the right to health,[124] and in constraint on the owner's right of panorama to preserve a neighbour's privacy right.[125]

Again, in Member States characterised by liberal constitutional property models, evolutionary judicial trends have pointed in similar directions. A really striking example is provided by France, where the definition of fundamental rights and liberties is left to the Déclaration (1789), [126] which defines property as a natural and imprescriptible right (Art 2), inviolable and sacred, expropriable only for public necessity and upon payment of just and prior indemnity (Art 17), with no further reference to limitations or functionalisation.[127] Despite the rhetorical proclamations, the Conseil Constitutionnel has adapted the interpretation of the right to the needs of the contemporary French welfare state, transforming the notion of public necessity to expropriate into that of a general interest justifying property limitations.[128] Using 'objectives of general interest' or 'of constitutional value' as key factors in assessing the legitimacy of a legislative measure, the Conseil has been able to distinguish between compensated expropriation and uncompensated regulatory interference,[129] to identify public policy goals that justify restriction of proprietary interests on the basis of a flexible proportionality test,[130] and to uphold the prevalence attributed by law to competing fundamental rights,[131] from freedom of expression and the right to fair trial,[132] to the right to decent housing and respect for human dignity.[133]

Despite the horizontal effects accorded to the ECHR, the frequent references to ECtHR case-law and the Conseil d'Etat's extension of its *référé-liberté* proceedings to property, all of which have caused a partial shift towards a more liberal approach,[134] the broad notions of general interest and social utility mean that the Conseil Constitutionnel's property jurisprudence still shares several traits with the social democratic model of property typical of

[122] Eg Corte di Cassazione, 16 December 1983, n 7418 [1984] Foro it I, 415; 29 January 1993, n 1139 [1993] Rep foro it, entry Radiotelevisione, n 75.

[123] Trib Verona, ord 7 July 1999 [1999] Dir inf 1060.

[124] See the landmark Corte Costituzionale, 23 July 1974, n 247 [1974] Giust cost 2371.

[125] As in Pretura Modena, 14 February 1995 [1995] Arch loc cond 890.

[126] Declared binding by the Conseil Constitutionnel, 16 January 1982, No 81–132, § 18 due to references in the preambles to the Constitutions of 1946 and 1958.

[127] On the evolution of French constitutional property doctrines, see generally Remy Libchaber 'La propriété, droit fondamental' in Rémy Cabrillac, Marie-Anne Frison-Roche, and Thierry Revet (eds), *Libertés et droits fondamentaux* (Dalloz 2015) 817.

[128] Inter alia, Conseil Constitutionnel, 20 July 2000, no 2000-434 DC; similarly in Cour de Cassation, 27 April 2004, no 02-11-219 [2004] Bull civ I, 120, on which Guillaume Merland, *L'intérêt général dans la jurisprudence du Conseil Constitutionnel* (LGDJ 2004) 39 ff.

[129] Most recently in Conseil Constitutionnel, 20 January 2011, no 2010-87 QPC, but the principle had emerged already in Cour de Cassation, 30 May 1972, No 71-70206 [1972] Bull civ III, n 335.

[130] Paradigmatically, see Conseil Constitutionnel, 13 December 1985, no 85–198 DC; 20 January 1993, no 92-316 DC; 9 April 1996, no 96-373 DC; 29 July 1998, no 98-403 DC.

[131] Eg, Conseil Constitutionnel, 22 October 2009, no 2009-590 DC.

[132] *HADOPI* (n 82).

[133] Conseil Constitutionnel, 19 January 1995, no 94–359 DC; 29 December 1995, no 95–371 DC; 29 July 1998, no 98–403 DC; 7 December 2000, no 2000–436 DC.

[134] See Conseil d'Etat, 2 July 2003, no 254536, JCP 2003 II 10180. The shift has been amply analysed by Laurence Gay, 'Propriété et logement. Réflexion à partir de la mise en œuvre du référé-liberté' (2003) Revue française de droit constitutionnel 318. The *referé-liberté* is a fast-track administrative proceeding before the Conseil d'Etat, directed to obtain all the measures necessary to safeguard a fundamental freedom which is put under risk of severe and unlawful prejudice by any national authority (Art L.521-1 of the Code de la justice administrative). When an individual interest constitutes a fundamental freedom, its protection is generally at a higher level than in the case of interests qualified as rights, with an obvious impact on the balance with conflicting interests and goals.

other national traditions, and features concepts that are functionally equivalent to the social function doctrine, although the term is never consistently mentioned in court decisions.

5.2 A Common Path?

Against this background, and reinforced by Art 3(3) TEU, which aims to integrate the internal market and welfare states by creating a 'highly competitive social market economy', the social function doctrine or its functional equivalents may act to promote convergence between the three models.

For the ECtHR, social function is a neutral notion overlapping with the concept of general/public interest. The ECJ has taken a step forward, employing social function as an autonomous concept which excludes the absoluteness of property and allows its limitation in pursuance of Treaty goals. However, its use has been quite limited, and has never determined the outcome of the proportionality assessment. In contrast, at national level, the doctrine enjoys much stronger force. The notion of social function colours property with an implied duty of solidarity, leading to a clearer definition of its relationship with other constitutional rights and social and economic goals. It also ensures that the degree of protection offered to property is dependent on the social relevance of the exercise of that property's object and its connection with the owner's dignity and self-realisation. Horizontally, it defines its scope vis-à-vis other rights on the basis of its object, underlying interest, and public policy goals. Operating as a residual tool to tackle dysfunctional conduct, it guides the interpretation of general balancing clauses, sketching the essence of property and offering clearer weighting criteria. Furthermore, it may justify the extension of property limitations by analogy.

Against this background, it becomes clear that the correct constitutional propertisation of copyright under Art 17 CFREU, which requires a merger of the three models on the basis of the Praesidium's indications, may lead to opposite results to those suggested by the property logic inherent in the apparent silence of Art 17(2) CFREU. This revelation points towards a potential paradigm shift.[135]

Before addressing the impact of the social function doctrine on EU copyright law in more detail, it may be useful to pause briefly to define its content,[136] as delineated by secondary EU law and ECJ decisions.

6. Step 5—From Property to IP. The Social Function(s) of EU Copyright

One of the most oft-mentioned justifications for copyright is that of providing authors with 'appropriate remuneration'[137] as a 'reward'[138] for their creative works, in order to protect

[135] This is also the opinion of Christophe Geiger, 'The Social Function of Intellectual Property Rights, or How Ethics can Influence the Shape and Use of IP Law' in Graeme B Dinwoodie (ed), *Methods and Perspectives in Intellectual Property* (Edward Elgar Publishing 2013) 153.

[136] Although often intertwined, the social function(s) of copyright should not be confused with the goals of harmonisation, since reading them together may attribute a disproportionate emphasis to internal market arguments.

[137] Directive 2012/28/EU of 25 October 2012 on certain permitted uses of orphan works (Orphan Works Directive, OWD) [2012] OJ L299/5, Recital 5 (hereafter OWD).

[138] Recently reiterated by the European Commission Communication, Towards a Modern, more European Copyright Framework, COM(2015) 626 final, 2.

their dignity and independence by allowing them to afford a decent standard of living.[139] In line with the continental model, copyright performs a fundamental social function for creators, strictly connected to their self-realisation, which requires a high degree of constitutional protection. When attributed to producers, publishers, and other commercial actors, copyright performs the social function of incentivising the industrial development and competitiveness of EU creative industries, achieved by ensuring them a 'fair' return on investment or 'a legitimate profit' from exploitation of their works.[140] In both instances, the use of adjectives such as 'appropriate', 'fair', or 'legitimate' hints that the notion of 'a high level of protection' should not be interpreted as covering any possible exploitation of a work, but only those activities that are necessary for right-holders to obtain the level of remuneration needed for copyright to perform its social function(s). This approach, confirmed in *FAPL*,[141] aligns with the ECJ's essential function doctrine, which was developed in the 1970s and 1980s as a means of regulating the interplay between copyright, fundamental freedoms, and competition law.[142]

Along with these goals, remuneration/return on investment are functionalised to the fulfilment of two additional, intertwined sets of objectives, both aiming at achieving a sustainable level of creative production and investment to support the creative industry. The first has the ultimate goal of spurring growth and job creation;[143] the second that of attaining social and cultural objectives,[144] such as 'the widest possible dissemination of works',[145] access to knowledge or culture,[146] and promotion of cultural expression, identity, and diversity.[147] The preamble to the most recent horizontal intervention by the EU legislator, the Directive on Copyright in the Digital Single Market (DSM), confirms the same bipolar structure

[139] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (Information Society Directive, InfoSoc) [2001] OJ L167, Recital 11 (hereafter InfoSoc).

[140] Directive 2004/48/EC of 29 April 2004 on the enforcement of intellectual property rights (Intellectual Property Rights Enforcement Directive, IPRED) [2004] OJ L195/16, Recital 2 (hereafter IPRED).

[141] Joined cases *Football Association Premier League Ltd and Others v QC Leisure and Others* and *Karen Murphy v Media Protection Services Ltd* [2011] ECLI:EU:C:2011:631 (hereafter *FAPL*).

[142] Among the most important cases see, on fundamental freedoms, *Deutsche Grammophon Gesellschaft GmbH v Metro-SB-Großmärkte GmbH & Co* [1971] ECLI:EU:C:1971:59, para 11; joined cases *Musik-Vertrieb Membran and K-tel International v GEMA* [1981] ECLI:EU:C:1981:10, para 12 (hereafter *Musik-Vertrieb Membran*) *SA Compagnie générale pour la diffusion de la télévision, Coditel, and Others v Ciné Vog Films and Others* [1980] ECLI:EU:C:1980:84, para 14 (hereafter *Coditel*); *Warner Brothers Inc and Metronome Video ApS v Erik Viuff Christiansen* [1988] ECLI:EU:C:1988:242, para 15 (hereafter *Warner Bros*). On competition law see eg joined cases *Radio Telefis Eirean (RTE) and Independent Television Publication Ltd (ITP) v Commission* [1995] ECLI:EU:C:1995:98 (hereafter *Magill*) and *IMS Health GmbH & Co OHG v NDC Health GmbH & C. KG* [2004] ECLI:EU:C:2004:257 (hereafter *IMS Health*).

[143] As eg in Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs (Software I Directive) [1991] OJ L122/42, Recital 2; Directive 96/9/EC of 11 March 1996 on the legal protection of databases (Database Directive) [1996] OJ L77/20, Recitals 9, 11–13; Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (Rental Directive) [1992] OJ L346/61, Recital 8; Council Directive 93/98/EEC of 29 October 1993 harmonising the term of protection of copyright and certain related rights (Copyright Term I Directive) [1993] OJ L290/9, Recital 11; Recitals 2 and 4 InfoSoc (n 139); Recital 1 IPRED (n 140).

[144] Explicitly defined in these terms by the European Commission Communication, The management of copyright and related rights in the internal market COM(2004) 261 final, 6.

[145] Recital 2 IPRED (n 140).

[146] Recital 20 OWD (n 137); Directive (EU) 2017/1564 of 13 September 2017 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 [2017] OJ L242/6, Recital 1.

[147] Recitals 12 and 14 InfoSoc (n 139); Directive 2014/26/EU of 26 February 2014 on collective management of copyright and related rights (CMO Directive) [2014 OJ L84/72, Recital 3 (hereafter CMO Directive); Recitals 18 and 23 OWD (n 137).

(Recital 2).[148] It is important to note that social and cultural objectives justify the protection of exclusive rights rather than only acting as functions of exceptions. These objectives are therefore an integral part of the structure of rights and must be realised through the exercise of those rights as well as through the operation of exceptional limitations. It follows that exclusive rights should be exploited according to, and never in opposition to, these goals.

7. Step 6—From Protection to Limitation. Horizontal and Vertical Effects of the 'New' Art 17(2) CFREU on EU Copyright Law

The constitutional propertisation of copyright under the 'new' interpretation of Art 17 CFREU may have a significant impact on the definition of the object, content, and structure of exclusive rights, both at a legislative (vertical) and a judicial (horizontal) level. As to the object, the social function doctrine may justify the attribution of a different degree of protection to different works based on their particular social relevance and nature. For instance, the social importance of raw data and information and the greater monopoly risks posed by copyright in technical and informational works might justify weaker protection in the case of such works. Commercial copyright works ought to be more susceptible to compromises than works that are more closely linked to a right-holder's dignity and self-realisation. Additionally, the more strongly a work contributes to the cultural *milieu* of a community, the less weight it might carry against conflicting interests, as already theorised by the German Constitutional Court, most recently in *Germania 3*.

The social function doctrine could also support the introduction of abandonment and related remedies, in line with patent and trade mark laws.[149] The concept of abandonment does not apply to copyright. All claims and remedies against infringement are either imprescriptible or subject to very long statutes of limitation; fair remuneration rights are often unwaiveable and the inefficiencies caused by right-holder inactivity are usually tackled by collective management or extended licensing schemes.[150] This approach has its origins in moral rights theory and in the conceptualisation of copyright as a defence mechanism for authors, who are perceived as weaker parties requiring protection against commercial right-holders and the public.[151] This stance is also apparent in recent legislative texts[152] and court decisions.[153] It finds confirmation in those directives which address the negative impact

[148] Directive (EU) 2019/790 of 17 April 2019 on copyright and related rights in the Digital Single Market (Directive on Copyright in the Digital Single Market, DSM Directive) [2019] OJ L130/92.

[149] Similarly see Robert Burrell and Emily Hudson, 'Property Concepts in European Copyright Law' in Helena R Howe and Jonathan Griffiths (eds), *Concepts of Property in Intellectual Property Law* (Cambridge University Press 2013) 214 (hereafter Burrell and Hudson, 'Property Concepts').

[150] As in the case of Art 5. Rental. Lately for cross-border licences of audio-visual works (CMO Directive (n 147)) orphan works (OWD (n 137)), and for out-of-commerce works in the DSM Directive (n 148) Arts 8–11.

[151] Burrell and Hudson, 'Property Concepts' (n 149) 217 and 223.

[152] The most recent being the mechanisms introduced by the DSM Directive to tackle the unbalanced bargaining powers of creators vis-à-vis producers, publishers, and other intermediaries (Arts 18–22). For a comment, see the explanatory memorandum in European Commission Communications, Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market 14 September 2016 COM(2016) 593 final, 8.

[153] See explicitly BGH (1995) 129 BGHZ 66, *Mauer-Bilder*, commented in 28 IIC 282 (1997) and Opinion of AG Wathelet in *Soulier and Doke* (n 83) paras 43 and 46–53, rejecting the abandonment argument advanced by the Italian government on the ground of the need for stricter protection of authors under EU secondary law.

of right-holder inactivity on the availability of protected works through exceptions or licensing schemes, as in the field of orphan and out-of-commerce works.[154] While such ad hoc solutions could be argued implicitly to rule out further consequences for the non-use of exclusive rights, the constitutional propertisation of copyright may justify different balancing considerations. Abandonment doctrines in property law could be adapted to match the social function(s) of copyright, which intertwine protection of author self-realisation with industrial incentives and cultural policy goals. Moral rights, and thus the possibility of controlling modifications of a work and the power to withdraw it from the market, would be retained by the author. Economic rights would be terminated only if formally abandoned, in compliance with the author's will, while non-use, if not objectively justified, would be characterised as an implied renunciation of any claim against infringements, thence leading to unenforceability of copyright.[155] This distinction would guarantee the proportionality of the limitation on authors' property rights and would allow the operation of the doctrine to escape the ban against formalities imposed by Art 5(2) of the Berne Convention.[156]

As far as the content of the right protected by copyright is concerned, constitutional propertisation may produce significant results, clarifying and moderating the effects of Recital 9 InfoSoc on ECJ case-law[157] through the operation of the social function doctrine to identify the specific subject matter of each exclusive right.

Traces of this approach are already present in the early decisions of the ECJ, in which the Court refused to grant protection to acts of exploitation that violated fundamental freedoms without being necessary for copyright to perform its essential function.[158] The Court used the same principle to identify the 'exceptional circumstances' in which the exercise of a legitimate copyright monopoly would become an abuse of a dominant position under Art 102 TFEU.[159] More recently, in *UsedSoft*, the Court extended the principle of exhaustion to licences of digital software copies, in order to prevent contractual labelling (licence instead of sale) from excluding the operation of that principle and allowing right-holders to demand further remuneration after each new sale, going beyond what was necessary for

[154] Arts 8–11 DSM Directive (n 148); Art 6 OWD (n 137).

[155] Since non-use would only prevent the enforceability of economic rights, authors would always be able to exercise their moral rights to stop undesired uses of their work. In this sense, the application of the doctrine of abandonment would not result in a form of compelled speech or encroachment of authors' fundamental rights, but only in a circumscribed limitation on the exercise of their rights under Arts 17(2) and 47 CFREU. See more extensively Sganga *Propertizing European Copyright* (n 95) 241–45.

[156] Already in his Opinion in *Soulier and Doke* (n 83) para 40, AG Wathelet maintained that the burden imposed on authors to withdraw from the ECL scheme was incompatible with the prohibition against formalities of Art 2 BC. But see the opposite view of Silke von Lewinski, 'Mandatory Collective Administration of Exclusive Rights. A Case study on Its Compatibility with International and EC Copyright Law' (2004) UNESCO e-Copyright Bulletin, January–March 3.

[157] See eg the contradictory approach to the distribution right, from the restrictive *Peek & Cloppenburg KG v Cassina SpA* [2008] ECR I- I-02731 to the extensive case *Dimensione Direct Sales Srl, Michele Labianca v Knoll International SpA* [2015] ECLI:EU:C:2015:315, para 33 and *Criminal proceedings against Titus Alexander Jochen Donner* [2012] ECLI:EU:C:2012:370. Similarly, on the right of communication to the public, see Mathias Leistner, 'Closing the Book on the Hyperlinks: Brief Outline of the CJEU's Case Law and Proposal for a European Legislative Reform' (2017) 39(6) European Intellectual Property Review 327; João Pedro Quintais, 'Untangling the Hyperlinking Web: In Search of the Online Right of Communication to the Public' (2018) 21(5) Journal of World Intellectual Property 385. Critical on the subjective nature of the criteria P Bernt Hugenholtz and Sam Van Velze, 'Communication to a New Public? Three Reasons Why EU Copyright Law Can Do Without a "New Public"' (2016) 47(7) International Review of Intellectual Property and Competition Law 797, 810 (hereafter Hugenholtz and Van Velze, 'Communication to a New Public').

[158] See eg *Coditel, Magill, IMS Health and Musik-Vertrieb Membran* (n 142).

[159] See *Magill* and *IMS Health* (n 142).

copyright to perform its institutional functions.[160] In this line of cases, notions such as 'appropriate remuneration' or 'satisfactory share' of the market[161] have been employed to draw the borders of rights in cases of conflict with other rights, freedoms, or public policies. In so doing, they have confirmed that EU copyright law does not protect the opportunity to extract the maximum possible profit from a work.[162] However, the Court has never used a function-based approach as a horizontal interpretative method to guide development of the subject. Against this backdrop, a more elaborated and consequential constitutional propertisation of copyright would be very helpful.

Reading the scope of exclusive rights through the lens of the social function doctrine, the core of a right would be constituted only by those acts of exploitation necessary to obtain remuneration that is sufficient to protect an author's dignity, independence, and self-realisation, and to incentivise creativity and industrial investment. By the same token, any conduct that hinders fulfilment of copyright's socio-cultural goals would fall outside its scope and would thus not be protected.

As an example, this approach could lead to the introduction of a de minimis doctrine alongside the concept of originality. This would serve to impose a boundary on the right of reproduction and would allow a distinction to be drawn between protectable and non-protectable excerpts, excluding infringement where the quantity used by a defendant has no impact on the exploitation of the work.[163] Similarly, it could help circumscribe the distribution right to acts strictly associated with the sale of a protected work. Last, it could offer a more balanced definition of the right of communication to the public, by linking the notion of a new public to the economic significance of a new potential market of a work targeted by the communication, and by limiting the scope of the right to direct forms of exploitation which are necessary for right-holders to obtain appropriate/fair remuneration in view of the social functions of copyright. Where the right conflicts with other rights or interests, this would exclude indirect and purely facilitative forms of communication, such as hyperlinking, from the ambit of the right-holder's control.[164]

Propertisation of copyright would have its greatest impact on the reading of exceptions and limitations. At a vertical level, the social function doctrine would require legislators to introduce an exception every time this is needed to protect a conflicting fundamental right,

[160] *UsedSoft GmbH v Oracle International Corp* [2012] ECLI:EU:C:2012:407, para 62 (hereafter *UsedSoft*), following *Metronome Musik* (n 22) para 14; *Foreningen af danske Videogramdistributører, acting for Egmont Film A/S, Buena Vista Home Entertainment A/S, Scanbox Danmark A/S, Metronome Video A/S, Polygram Records A/S, Nordisk Film Video A/S, Irish Video A/S and Warner Home Video Inc. v Laserdisken* (*FDV)* [1998] ECLI:EU:C:1998:422, para 13; and *FAPL* (n 141) para 106.

[161] As in *FAPL* (n 141) para 108. The same language is used by *UsedSoft* (n 160) para 63 and already in *Warner Bros* (n 142) paras 15–16; *Metronome Musik* (n 22) para 16.

[162] The principle is well consolidated. See *Coditel* (n 142) paras 15–16; *Musik-Vertrieb Membran* (n 142) paras 9 and 12; joined cases *Phil Collins v Imtrat Handelsgesellschaft mbH e Patricia Im-und Export Verwaltungsgesellschaft mbH e Leif Emanuel Kraul v EMI Electrola GmbH* [1993] ECLI:EU:C:1993:847, para 20; *FAPL* (n 141) para 94; *Administration des douanes v Rioglass and Transremar* [2003] ECR I-12705, para 23 and the case-law cited therein; *UTECA v Administración General del Estado* [2009] ECR I-1407, para 25 and the case-law cited therein.

[163] Similarly to what is provided by Art 5(3)(o) InfoSoc (n 139) which leaves to Member States the possibility to allow analogue uses 'in certain other cases of minor importance where exceptions or limitations already exist under national law'.

[164] Along the same lines, Hugenholtz and Van Velze, 'Communication to a New Public' (n 157) 812–14, and European Copyright Society, 'Opinion on the Reference to the CJEU in Case C-466/12 Svensson' (European Copyright Society 2013) para 35 <https://europeancopyrightsocietydotorg.files.wordpress.com/2015/12/european-copyright-society-opinion-on-svensson-first-signatoriespaginatedv31.pdf> accessed 30 September 2019.

as in *Deckmyn*.[165] At a horizontal level, the strict reading of an exception in a manner that hinders the fulfilment of its role would be forbidden, particularly when the provision shares the same socio-cultural goals as the exclusive right it limits. The ECJ has already come to this conclusion, albeit on different premises, in *FAPL*. A focus on the functions of legislative limitations may also allow them a flexible, broader interpretation to ensure that they fulfil their role.[166] Cases such as *Ulmer* and *VOB* have followed such an approach, adding other rights or other subject matter to the scope of exceptions in order to allow their proper functioning, sometimes even in disregard of legislative indications.[167] The recent triad of cases (*Funke Medien*, *Pelham*, and *Spiegel Online*) have confirmed the validity of this reading. The social function doctrine would help to generalise this principle under Art 17(2) CFREU and thereby stabilise its application and results.

By the same token, the vague fair balance test, which is as yet underdeveloped in the ECJ's case-law, would be enriched by guidelines, which could lead to its consolidation in a binding doctrine.[168] The impact of social function on the definition of the essence of the exclusive rights would provide an objective and transparent benchmark for a proportionality assessment, in which the core of an exclusive right defined in the specific case, depending on the features of the work and market involved, rather than a generic copyright entitlement, is weighed against conflicting fundamental rights.

The doctrine would also exert a rebalancing impact on the judicial application of the three-step test (Art 5(5) InfoSoc), which the ECJ has used as a filter in applying the existing exceptions to copyright infringement.[169] Interpreting the three prongs of the test in the light of the social functions of copyright would counter-balance the currently predominant market arguments with considerations focused on the values underlying the copyright system. 'Normal exploitation' would be construed on the basis of the social function of the given economic right, and would be limited to the acts required to perform that function, while the legitimacy of the right-holder's interest would also be measured in the light, and within the limits, of its social function, considering the type of work and subject matter involved and any potential conflicting rights. The closer the exercise of the right to

[165] *Johan Deckmyn and Vrijheidsfonds VZW v Helena Vandersteen and Others* [2014] ECLI:EU:C:2014:2132, paras 17–20.

[166] Similarly see Christophe Geiger, '"Constitutionalising" Intellectual Property Law? The Influence of Fundamental Rights on Intellectual Property in Europe' (2006) 37 International Review of Intellectual Property and Competition Law 371, 377 (hereafter Geiger, 'Constitutionalising Intellectual Property Law'); P Bernt Hugenholtz and Martin Senftleben, 'Fair Use in Europe: In Search of Flexibilities' (2011) Social Science Research Network 2011, 13 <http://ssrn.com/abstract=2013239> accessed 6 December 2020 (hereafter Hugenholtz and Senftleben, 'Fair Use in Europe').

[167] *Vereniging Openbare Bibliotheken v Stichting Leenrecht* [2016] ECLI:EU:C:2016:856 and *Technische Universität Darmstadt v Eugen Ulmer KG* [2014] ECLI:EU:C:2014:2196.

[168] The vagueness and instability of the doctrine is well emphasised by Angelopoulos, 'Sketching the Outline of a Ghost' (n 69).

[169] From case *ACI Adam BV and Others v Stichting de Thuiskopie* [2014] ECLI:EU:C:2014:254 onwards. For a critique see Hugenholtz and Senftleben, 'Fair Use in Europe' (n 166), 18; Geiger, 'Constitutionalising Intellectual Property Law' (n 166) 378; Jonathan Griffiths, 'The "Three-Step Test" In European Copyright Law—Problems and Solutions' [2009] Intellectual Property Quarterly 428; Andre Lucas, 'For a Reasonable Interpretation of the Three-Step Test' (2010) 6 European Intellectual Property Review 277; Christophe Geiger, Reto M Hilty, Jonathan Griffiths, and Uma Suthersanen, 'Declaration A Balanced Interpretation Of The "Three-Step Test" in Copyright Law' (2010) 1 Journal of Intellectual Property, Information Technology and E-Commerce Law 119; Christophe Geiger, Daniel Gervais, and Martin R F Senftleben 'The Three-Step-Test Revisited: How to Use the Test's Flexibility in National Copyright Law' (2014) 29(3) American University International LR 581 (hereafter Geiger, Gervais, and Senftleben, 'Three-Step-Test Revisited').

its social function, the more 'normal' the exploitation would be, and the stronger its protection against exceptions.[170]

The notion of social function may also be used to distinguish effectively between the legitimate exercise of exclusive rights from abuses and misuses of copyright which are not formally forbidden but which still tilt the legislative balance and hamper realisation of the goals of regulation, while disproportionately damaging conflicting interests.[171] Behaviours sanctioned by national courts have ranged from those that have no purpose other than to damage others to those that depart from the functions of the right, or which disproportionately and unreasonably harm the interests of others compared to the advantages generated for the copyright holder.[172] Additionally before the ECJ, despite strong market-based nuances, the metrics used to draw a distinction between uses and abuses have been based on the need for conduct to fulfil the essential function(s) of copyright. Such functions are not always uniform but tailored to the sectors and type of work involved.[173]

The doctrine of abuse has been challenged for its alleged incompatibility with the absolute nature of authors' rights and with the three-step-test and strict reading of exceptions.[174] However, the constitutional propertisation of copyright would refute this conclusion; justifying intervention in dysfunctional conduct, particularly in the case of conflict with other interests, rights, and public policy goals. In that light, drawing both on EU and national sources, an instance of copyright misuse would be found every time the exercise of a moral or economic right disproportionately constrains or prejudices the right or legitimate interest of a third party, without objective justification based on the social function of

[170] This interpretation may appear incompatible with the purely economic reading that the WTO Dispute Settlement Body (DSB) has offered of 'normal exploitation' and 'legitimate interest' under Art 13 TRIPS (WTO Document WT/DS160/R). The DSB interpretation covers both actual and potential markets of the work, with no reference to normative criteria such as the functions of copyright law to define the notion of 'normal' and 'legitimate', an approach followed, instead, in the field of patent law (WTO Document WT/DS114/R). For a detailed comment see Martin R F Senftleben, 'Towards a Horizontal Standard for Limiting Intellectual Property Rights?—WTO Panel Reports Shed Light on the Three-Step Test in Copyright Law and Related Tests in Patent and Trademark Law' (2006) 37(4) International Review of Intellectual Property and Competition Law 407, who emphasises how the diverging interpretations offered by the WTO DSB make it impossible to theorise the existence of a uniform interpretation of the test featured in Arts 13 (copyright), 17 (trade mark), and 30 (patent) of the TRIPS Agreement (ibid 435). However, aside from the critiques directed at the DSB approach, it should be noted that the DSB rulings offer an interpretation of the three-step test as a provision regulating the scope of Member States' legislative discretion, while there is nothing which would suggest the existence of a TRIPS-based obligation for courts to apply the test when implementing exceptions in specific cases, which is a judicial trend that has in fact contributed to increase fragmentation in the interpretation of the test itself. See in this sense Geiger, Gervais, and Senftleben, 'Three-Step-Test Revisited' (n 169) 618–22. Against this background, the interpretation suggested above would formally not run counter to EU international obligations under the Agreement, while containing the risk of increased legal uncertainty and distortions in the application of legislative exceptions, and reinforce the normative consistency of EU copyright law.

[171] The same definition is provided also by Reto M Hilty, 'Legal Remedies against Abuse, Misuse and Other Forms of Inappropriate Conduct of IP Right Holders' in Reto M Hilty and Liu Kung-Chung (eds), *Compulsory Licensing: Practical Experiences and Ways Forward* (Springer-Verlag 2015) 379.

[172] An overview of national decisions and related literature can be found in Caterina Sganga and Silvia Scalzini, 'From Abuse of Right to Copyright Misuse: A New Doctrine for EU Copyright Law' (2017) 48(4) International Review of Intellectual Property and Competition Law 405, 416–21 (hereafter Sganga and Scalzini, 'From Abuse of Right to Copyright Misuse').

[173] See the cases reported at (n 142).

[174] See Christophe Caron, 'Abuse de droit et droit d'auteur. Une illustration de la confrontation du droit spécial et du droit commun en droit civil français' (1998) 176 Revue Internationale du Droit d'Auteur 2 and in the area of copyright contract see Centre for the Study of European Contract Law (CSECL), Institute for Information Law (IViR) and Amsterdam Centre for Law and Economics (ACLE), 'Final Report : Comparative analysis, Law & Economics analysis, assessment and development of recommendations for possible future rules on digital content contracts' <https://hdl.handle.net/11245/1.345662> [2011] University of Amsterdam 275 ff.

the right.[175] The basic proportionality test, weighing harms and benefits and using the essence of the right as a benchmark, would be coupled with an assessment of the reasonableness of the conduct, evaluated on the basis of its degree of alignment with the institutional functions of copyright—the closer the alignment, the greater the protection. This doctrine, which would find a strong legal basis in Arts 52 and 54 CFREU and confirmation in Art 3(2) IPRED, which requires states to avoid abuses in copyright enforcement, would not constitute an exception to copyright protection, but rather a circumscription of the scope of the exclusive rights, and would thus escape the filtering of the three-step-test.

Lastly, the constitutional propertisation of copyright would offer a solution to the practice of restricting or excluding the application of exceptions in End User License Agreement (EULA) clauses. The ECJ has already suggested that freedom of contract is not absolute,[176] 'but must be viewed in relation to its social function' and is subject to proportionate limitations.[177] EULA clauses, as forms of copyright exercise, would be assessed in terms of their compatibility with the social function of copyright in cases of conflict with the rights or interests of others. Since exceptions represent uses that do not require authorisation and thus fall outside the scope of what the legislator believes to be essential to protect right-holders' interests, it is questionable whether their contractual limitation can be judged necessary for copyright to perform its function. Against this background, violation of a user's fundamental right arising from enforcement of such a clause would clearly be disproportionate and could not be justified by the need to protect the essence of copyright, as defined in the light of its social function. A user therefore ought to have a valid defence against a licensor's potential claim of infringement in such circumstances.

8. Conclusion

In line with a theory that has characterised the history of the institution since its early days, the constitutional propertisation of copyright under Art 17(2) CFREU has been accused of triggering copyright's over-protection, to the detriment of conflicting rights, interests, and goals. Alongside the property logic that tilts the balance in favour of right-holders in secondary legislation, a number of ECJ decisions which have increased the protection offered to copyright on the basis of Art 17(2) CFREU have been presented as clear evidence of the validity of this thesis.

In fact, the ECJ has never made the degree of protection granted to copyright dependent on its characterisation as a property right. Art 17(2) CFREU has been mentioned only to reiterate that copyright is a fundamental right standing on an equal footing in the balance with other rights and freedoms protected by the Charter. Copyright's characterisation as a property right has not granted it higher status in the proportionality assessment, as it might have done if the CFREU's IP clause were an independent provision rather than part of a general property clause. This chapter has been inspired by a desire to ask whether taking

[175] See Sganga and Scalzini, 'From Abuse of Right to Copyright Misuse' (n 172) 425 ff. On the role of proportionality, see Alain Strowel, 'De "l'abus de droit" au principe de "proportionnalité": un changement de style' in Sébastien Van Drooghenbroeck and François Tulkens (eds), *Liber Amicorum Michel Mahieu* (Larcier 2008).

[176] As in *Société thermale d'Eugénie-les-Bains v Ministère de l'Economie* [2007] ECLI:EU:C:2007:440, paras 21, 24, 28, and 49.

[177] *Sky Österreich* (n 22) paras 42–43.

the propertisation of copyright seriously would produce a different outcome, particularly in the light of numerous national experiences in which the application of constitutional property doctrines to copyright has supported the legitimacy of legislative limitations and emphasised copyright's functionalisation in line with broader public goals.

In order to understand whether the application of EU constitutional property doctrines to copyright via Art 17(2) CFREU would produce results similar to those realised at a national level, it has been necessary to provide a preliminary identification of the features of the EU constitutional property model. The multilevel sources referred to in the Praesidium's Explanatory Notes have been found to converge on the social function doctrine, which colours property with duties of solidarity; functionalises it in line with non-idiosyncratic goals; regulates its interplay with other constitutional rights and cultural, social, and economic policies; and attributes different degrees of protection to property rights dependent on the social relevance of their object and their importance to an owner's dignity and personal needs.

Viewed through this lens, and in the light of the social function(s) attributed to copyright by secondary sources, the constitutional propertisation of authors' exclusive rights and the social function doctrine may have rebalancing effects on the definition of the subject matter of copyright, the degree of protection attributed to different works, the identification of the essence of exclusive rights, the interpretation of exceptions and the three-step test, and the construction of the fair balance doctrine. It would also permit intervention in situations of dysfunctional or abusive conduct.

Rather than implying constitutional hedging and over-protection, technical propertisation of copyright under Art 17(2) CFREU may constitute an important opportunity for the more consistent and balanced development of EU copyright law. This would require the Court to elaborate more fully on the social function doctrine developed in its property jurisprudence, to apply that elaborated doctrine to Art 17(2) CFREU, to deepen its analysis of the (social) function(s) of copyright, and to provide an interpretation of EU secondary law that is consistent with these premises. Responsibility for determining whether this shift will materialise lies predominantly with the Luxembourg judges, and the approach they decide to take in furtherance of the ECJ's harmonisation agenda in the field of copyright.