

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

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

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

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

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

1 The Need to Go Back to the System

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

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

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

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

⁴ See *infra*, § 2.

⁵ See *infra*, note 84.

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

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

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

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

⁸ See *infra*, note 21.

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

¹⁰ See *infra*, § 4.

¹¹ See *infra*, § 3.

¹² *Ibid.*

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

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

2 The “Propertization” of EU Copyright Law

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

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

¹⁴ *Millar v. Kinkaid*, 4 Burr. 2303, 98 Eng. Rep. 210 (1751), *Tonson v. Collins*, 1 Black W. 301, 321, (1760), and the most cited *Donaldson v. Becket*, 4 Burr. 2408, 98 Eng. Rep. 251 (H.L. 1774).

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

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

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

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

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

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

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

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

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

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

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

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

²⁴ On the particular relevance of the “sacred bond,” see Willem Grosheide (1994), p. 207.

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