Making Room for Cultural Policies Within a Market-Oriented Copyright Law: A Function-Based Approach

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Abstract: Not having competence on intellectual property (IP) before 2009, the EU legislator grounded most of its IP acts on Article 114 TFEU. This has colored EU IP law of strong market-based nuances, a feature which was in line with the commercial ontology of industrial property rights, but much less compatible with national copyright laws. As a result, EU copyright has evolved into a hybrid model, where market inspirations have long prevailed over other traditional copyright functions that are more closely related to cultural and social policies. References to non-market considerations, however, feature legislative preambles, soft law documents and decisions of the Court of Justice of the European Union. Yet, their implications are still far from being clarified. Against this background, this chapter aims to investigate whether EU copyright law is sufficiently equipped to make its market and non-market-based goals interplay, or whether reforms are needed to ensure the correct representation of and balance between its multi-faceted functions.

Keywords: copyright functions; EU harmonization; fair balance; CJEU case law; exceptions and limitations; fundamental rights

1. Introduction

Due to the original lack of competence in the field, most of the acts adopted by the European Community (EC) and later European Union (EU) legislator to harmonize intellectual property rights (IPRs) have been grounded on the functional competence provided by Article 95 of the Treaty establishing the European Community (EC) (now Article 114 of the Treaty on the Functioning of the European Union, TFEU), which justifies the EC/EU intervention on national laws when needed to create and foster the functioning of the internal market. While this market-based foundation was in line with the commercially-oriented "genetic code" of industrial property rights, its effects on national copyright laws, which are only partially inspired by economic normative theories, could not be but revolutionary. As a result, EU copyright law has evolved into a hybrid model, where market inspirations prevail over other traditional copyright functions that are more closely related to cultural and social policies.

The advent of the Lisbon Treaty has not substantially changed this framework. Article 118 TFEU gives now full competence to the Parliament and the Council to create unitary European IPRs, but only "in the context of the establishment and functioning of the internal market". Parallel to this, the EU legislator may still intervene on national IP laws under Article 114 TFEU, in pursuance of internal market goals. At the same time, despite the new emphasis on cultural policies (Article 167(4) TFEU), the social nature of the EU market economy (Article 3(3) of the Treaty on European Union, TEU), and the clear interplay between cultural and social policies and copyright law, no reference is made to this connection in the Treaties.

Concluding for a complete irrelevance of non-economic arguments in EU copyright law would be far-fetched, though. References to considerations that go beyond internal market needs have appeared, explicitly or between the lines, in legislative preambles, soft law documents and decisions of the Court of Justice of the European

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Union (CJEU), testifying to the EU lawmakers' awareness of the role of copyright for the respect, protection and fulfillment of cultural and social rights and policies. Yet, such interconnections and their implications are still far from being fully clarified. Against this background, the question remains whether EU copyright law is currently sufficiently equipped to stand the challenge of bridging market and non-market-based rationales and goals, or whether reforms are needed to ensure the correct representation of and balance between its multi-faceted functions.

To respond to this question, this chapter is structured in four parts. Section 2 offers a brief analysis of the early-days applications of EC primary law provisions in the field of copyright by the CJEU, commenting on their inspirations and goals, in search for non-market considerations. Section 3 provides an overview of preparatory materials, soft law documents and secondary sources advancing the harmonization of EU copyright since 1991, highlighting their rationales and interplay between market and non-market goals. Section 4 comments on references to social and cultural rights and policies in landmark CJEU copyright decisions, exploring whether the Lisbon Treaty has led to any change in jurisprudential approach. Section 5 concludes by assessing the current state of the art and proposing on this basis a function-based approach to the interpretation of EU copyright legislation, in order to strike a balance between its market and non-market functions, in line with the indications implicitly offered by the TFEU and TEU.

2. Copyright functions in the Treaties: Suggestions from early CJEU case law

The EC Treaties did not contain any reference to IPRs. However, due to their monopolistic nature, territorial scope, and consequent negative impact on the internal market and its fundamental freedoms, the CJEU had the opportunity to intervene in the field since the early days of EC integration.

The first decision, *Deutsche Grammophon*, dates from 1971.[1] The Court was asked to determine to which extent Article 30 EC, which provided an exception to the Treaty's ban on restrictions on imports and exports (also) for the protection of industrial and commercial property, could justify a complete restriction of fundamental freedoms. The question addressed specifically cases where rightholders leveraged the territoriality of IPRs to partition the internal market, block parallel imports and hinder development of cross-border second-hand markets via license agreements or other forms of exclusive distribution agreements.[2] At stake there was, in fact, the balance between the incentivizing functions of IP monopolies towards creativity and innovation, and their negative impact on fundamental freedoms. To solve the puzzle, the CJEU argued that Article 30 EC left to Member States the competence to regulate the creation, attribution and characteristics of IPRs but did not rule out the possibility for the CJEU to intervene on cases where IP holders violated Treaty provisions by exercising their rights in a manner that went beyond what was necessary for the rights to perform their essential function, and for the legal system to protect their specific subject matter.[3] This new reading (the so-called "existence-exercise dichotomy") allowed the Court to cross out from national copyright laws rules that could be abused to the detriment of the internal market, ruling that any first authorized sale of protected works anywhere in the Community - and not only in the state where the protection was sought - was enough to exhaust, that is to terminate, copyright holders' distribution rights all across the EC (*Community exhaustion*).[4]

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[1] Case C-78/70 *Deutsche Grammophon v. Metro* [1971] ECLI:EU:C:1971:59.

[2] See e.g. Guido Westkamp, 'Emerging Escape Clause? Online Exhaustion, Consent and European Copyright Law', in Jan Rosen (ed), *Intellectual Property at the Crossroad of Trade* (Edward Elgar Publishing 2012) 41; Alain Strowel, Hee-Hun Kim, 'The Balancing Impact of General EU Law on European Intellectual Property Jurisprudence', in Justine Pila and Ansgar Ohly (eds), *The Europeanization of Intellectual Property Law: Towards a European Legal Methodology* (OUP 2012) 121 ff.; Christine Godt, 'Intellectual Property and European Fundamental Rights', in Hans Micklitz (ed), *Constitutionalization of European Private Law* (OUP 2014) 213.

[3] *Deutsche Grammophon* (n. 1) paras 11-13.

[4] Ibid, paras 11-13. Market arguments, however, justified also opposite decisions, where exhaustion was excluded because the type of work or right protected required a territorially segmented exploitation for copyright to perform its essential function of rewarding and incentivizing creators. This was the case in C-62/79 *Coditel v Ciné Vog Films* [1980] ECR 881

The notion of essential function introduced the idea that IPRs are internally limited and functionalized to the achievement of specific goals, set in the Treaties or specified in secondary law, such as, e.g., the protection of creators and inventors to stimulate growth, competitiveness and employment and the fostering of the internal market.[5] It is important to note, however, that the functions and conflicting interests identified by the Court in the early days are mostly market- and industry-oriented, in line with the approach and inspiration of the EC Treaty. This remains visible also in subsequent decisions, which used the notion of essential function to solve questions related to the interplay between copyright and competition law in the 1990s, when the stretch of copyright to cover also informational and technical works gave to rightholders the possibility – which they never had before – to exercise full control over data, information, facts and ideas, insomuch as to completely hinder the creation of new works. Such a shift raised the need for the Court to strike a new balance between copyright protection and anticompetitive practices that violated basic Treaty provisions.[6] Indeed, in *Magill* (1995) the CJEU excluded that the monopoly descending from copyright automatically constituted a dominant position, and specified that the creation of barriers to market entry is an inherent and necessary feature of copyright, which may constitute an abusive antitrust conduct only in "exceptional circumstances".[7] As in *Deutsche Grammophon*, the exercise of an IPR is considered abusive if it goes beyond what is necessary to fulfil its essential function ("to protect the moral rights in the work and ensure a reward for the creative effort"), which occurs when a rightholder blocks the offering of a new product for which there is a consumer demand, without an objective reason, and with the only aim of nullifying any form of competition on second-hand markets.[8]

While the essential function doctrine could develop into an effective balancing tool that leveraged the notion of IP abuse and misuse to set a fair equilibrium between copyright and conflicting rights and interests, the predominance of market-oriented principles in the Treaty influenced the arguments advanced by the CJEU,[9] limiting the scope of its decision to clashes between copyright and other market goals, and thus considering only its economic functions, with no references to socio-cultural objectives or conflicting fundamental rights. The only exception to this trend is represented by *Metronome Musik*,[10] a case on the validity of the Rental I Directive,[11] where the economic and market rationale supporting copyright law is flanked by the consideration of its social and cultural functions. The CJEU deemed the introduction of the rental right proportionate despite the compression of the right to property and freedom to pursue a trade or profession of rental businesses, since the measure was necessary to ensure that copyright could still fulfil its essential incentivizing functions by granting an "appropriate income" to authors and performers and the amortization of risky investments to film and phonogram producers,[12] thus benefitting the economic and cultural development of the Community. *Metronome Musik* remained for a long while the only case where market and non-market functions of copyright are considered jointly to interpret and apply EU copyright law, despite the relevant changes impressed – as we will see – by the Lisbon Treaty and its social market economy principles.

(Coditel I), Case C-262/81 *Coditel SA, Compagnie générale pour la diffusion de la télévision, and others v Ciné-Vog Films SA and others* [1982] ECR 3381 (Coditel II) and C-158/86 *Warner Bros and Metronome Video v Christiansend* [1988] ECR 2605.

[5] On this, extensively, David Keeling, 'Intellectual Property Rights and the Free Movement of Goods in the European Union' (1993) 20 Brook J Int'l L 127, 154; Peter J. Oliver, *Free Movements of Goods in European Community* (Hart 2003), 315 ff.

[6] E.g. Jerome R. Reichman, 'Legal Hybrids Between the Patent and Copyright Paradigms' (1994) 94 Columbia LR 2432; Gustavo Ghidini, *Profili evolutivi del diritto industriale: proprietà intellettuale e concorrenza* (Giuffré 2001), 15.

[7] Joined Cases C-241/91P and C-242/91P *Radio Telefis Eirean (RTE) and Independent Television Publication Ltd (ITP) v Commission* [1995] ECR I-743 (Magill), para. 28.

[8] Ibid, para. 30.

[9] As suggested by Advocate General (AG) Gulmann in its Opinion in Joined Cases C-241/91P and C-242/91P, *Radio Telefis Eirean (RTE) and Independent Television Publication Ltd (ITP) v Commission* [1995] ECR I-743, paras 36 and 50.

[10] Case C-200/96 *Metronome Musik GmbH v Music Point Hokamp GmbH* [1998] ECR I-1953, para. 23.

[11] 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 [1992] OJ L346/61 [Rental I Directive].

[12] Metronome Musik (n 10), paras 21-22.

3. Copyright functions in secondary legislation: Which balance between market and non-market inspirations?

Much more than other IPRs, and chiefly because of its subject matters and the interests touched by its regulation, copyright law features a great variety of actors and institutional goals, and reinforcing or countervailing interactions with social and cultural rights and policies. The protection of exclusive rights is not only essential for authors to reach an adequate standard of living, but it also functions as an incentive for the production of new creations, which nurture cultural development and diversity.[13] Similarly, protecting producers, distributors and intermediaries has the underlying goal of fostering economic growth and employment in the cultural and creative industries, and greater access to and dissemination of cultural and creative products and services.[14] However, an excessively tight copyright enforcement may endanger the enjoyment of several cultural and social rights, from the freedom of art and science to the right to culture and the right to education, and this is even truer for the rights of vulnerable groups and people with disabilities.[15]

While such interplays are nowadays crystal clear, appearances of socio-cultural arguments in preparatory works and pieces of legislation are only relatively recent. They mostly emerge after the enactment of the Lisbon Treaty which, in fact, puts a greater emphasis on social market economy principles and the intertwined nature of market and non-market principles and goals in the EU legislative action.

3.1 Before the Lisbon Treaty: A dominance of market-based considerations

The very first references to copyright in preparatory works already testify for the hybrid soul of this regulatory area, and how intertwined and blurred its market and non-market justifications are in their boundaries. The Parliament's Resolution on the protection of Europe's cultural heritage (1974)[16] and the Commission's Communication on "Community action in the cultural sector" (1977)[17] point to copyright law as a sector to be harmonized in order to incentivize cultural production and thus protect the European cultural heritage, but at the same time justify the potential intervention on the protection of fundamental freedoms and internal market needs.[18] The same link between cultural policies and internal market goals features the Communication "Stronger Community action in the cultural sector" (1982)[19] and the Communication on "Books and reading: A cultural challenge for Europe" (1989),[20] where copyright is a "basic instrument of cultural policy".[21] This is because it rewards publishers, which create a market for protected works that otherwise would not exist,[22] and

[13] As made clear by the Resolution of the Council of 16 November 2007 on a European Agenda for Culture [2007] OJ C287/1, Articles 2 and 3.b. See also Conclusions of the Council on a Work Plan for Culture (2015-2018) [2015] OJ C463/4, which mention this link in sec. II.

[14] As underlined by most of the preparatory documents and Directives' preambles discussed *infra*, section 3.1.

[15] The literature on the difficult interplay between copyright and human rights is immense. Among the most comprehensive studies, see Paul Torremans, *Copyright and Human Rights* (Kluwer Law International 2004), and esp. Ch. 1; Graeme W. Austin, Lawrence Helfer, *Human Rights and Intellectual Property. Mapping the Global Interface* (CUP 2011), esp. Ch. 3, 4 and 5; Christophe Geiger, *Research Handbook on Intellectual Property and Human Rights* (Edward Elgar Publishing 2015), esp. Ch. 17, 24, 30 and 31.

[16] Resolution of the European Parliament on the protection of Europe's cultural heritage [1974] OJ C62/5, at 6.

[17] Communication of the Commission on community action in the cultural sector, COM (1977) 560 final.

[18] Ibid, at 5. However, the Communication identifies the legal basis of the resale right in Article 100 EEC, now Article 114 TFEU (at 14-16).

[19] Communication of the Commission to the Parliament and the Council on Stronger Community action in the cultural sector, COM (1982) 590 final, at 2: "works produced by cultural workers and services (…) are (…) covered by the rules of the common market in the same way as other product and services and can obtain the maximum practical benefit through the application" of common market rules.

[20] Communication of the Commission to the Parliament and the Council on Books and reading: A cultural challenge for Europe, COM (1989) 258 final.

[21] Ibid, at 10.

[22] Ibid, at 2, §2.

it allows authors to live out of their intellectual activity by means of "a right to a fair share of income".[23]

Later documents put a greater emphasis on market objectives. The main and most important example is the Green Paper "Copyright and the Challenge of Technology"[24] (1988), which sets four market-based goals for a future intervention of copyright, which are (i) the fight against piracy to grant a fair return also for extra-Community exploitation,[25] (ii) the improvement of European competitiveness by ensuring that authors and firms enjoy a protection "at least as favorable (….) as that enjoyed by their principal competitors in their home market",[26] (iii) the linked possibility for authors and producers to benefit from an EC single market,[27] and (iv) a balance between rights and exceptions which avoids that the copyright monopoly creates too high obstacles against internal competition and the creation of new works.[28] Even the field of exceptions and limitations, which is generally the place where exclusive rights are balanced against the public interest and conflicting fundamental rights, is read through market lenses. While the Green Paper recognizes that economic interests are "inextricably interwoven with cultural interests and cultural needs",[29] that "creativity is not only a key source of economic wealth"[30] but also "the basis of Europe's cultural identity",[31] and that "market goals should be balanced with access and participation to cultural life",[32] its entire text still revolves around the need to ensure the proper functioning of a borderless internal market[33] and to protect and incentivize investments from creative industries,[34] all in light of the "growing importance of copyright to industry and commerce".[35] The language and rationale of the Green Paper are purely economic, with no reference to cultural policies. Creative works are goods whose "superior performance and non-material attributes (…) constitute their main *competitive advantages*", and are subject to piracy since they can be copied "at a fraction of the cost of developing a competing original".[36] Similarly, creativity should be protected since "the very activities which offer the best hope for *economic expansion*, and are consequently the subject of considerable *new investment*, are those which are particularly exposed to losses through copying".[37]

The approach does not change much in the following years. The Green Paper "Copyright and Related Rights in the Information Society"[38] (1995), which lays the groundwork for the most pervasive intervention of the EC legislator in the field, articulates its analysis around the cultural, social and economic dimensions of copyright. The "cultural dimension" looks only at the remuneration function of copyright as a tool to incentivize the production of common cultural heritage,[39] while the much more elaborated social and economic dimensions are fully market-centered. A high level of copyright protection[40] is needed to stimulate investments by cultural

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[23] Ibid.
[24] Green Paper on Copyright and the Challenge of Technology - Copyright Issues Requiring Immediate Action, COM (1988) 172 final.
[25] Ibid, at 3, §1.3.4.
[26] Ibid, at 3, §1.3.3.
[27] Ibid.
[28] Ibid, at 3, §1.3.5.
[29] Ibid, at 5, §1.4.1.
[30] Ibid, at 5, §1.4.2
[31] Ibid, at 6, §§ 1.4.4-5
[32] Such as, e.g. the obstacles to the access and dissemination of creative works, or the unduly high remuneration granted to rightholders, which is responsible for an additional contraction in the accessibility of protected works. Ibid, at 7, §1.4.6.
[33] Ibid, at 3, § 1.3.2.
[34] Ibid, at 2, §1.2.2-3.
[35] Ibid, at 2, § 1.2.
[36] Green Paper on Copyright and the Challenge of Technology, at 2, §1.2.2 [emphasis added].
[37] Ibid, at 2, § 1.2.3 [emphasis added]. On the emersion of the notion of a high level of protection from the Follow up of 1991 to the most recent Directives see Alexander Peukert, 'Intellectual Property as an End in Itself?' (2011) 33(2) EIPR 67, 69. The Follow-up to the Green Paper - Working programme of the Commission in the field of copyright and neighbouring rights, COM(90) 584 final aligns to the same approach.
[38] Green Paper on Copyright and Related Rights in the Information Society, COM (95) 382 final.
[39] Ibid, at 11, §§ 13-15.
[40] Ibid, at 13, § 21.

and creative industries, and to make them more competitive and a source of job creation.[41] At the same time, a common and borderless market[42] - removing regulatory obstacles such as fragmented, unharmonized national copyright rules - is deemed fundamental for such sectors to thrive, since information society companies need economies of scale to be profitable.[43]

The legislative acts that followed show very similar inspirations. The first harmonizing intervention in the field, Directive 91/250/EC on the protection of computer programs,[44] is justified by the need of removing obstacles to the functioning of the internal market created by fragmented national laws,[45] and of protecting the investment of software producers in order to preserve their contribution to the scientific and industrial development of the Community.[46] The objective of fostering creations and investments, particularly by phonogram and film producers, is supported by Directive 92/100/EC on rental, lending and related rights,[47] which is so market-based that even the introduction of an unwaivable right to equitable remuneration for authors and performers, which is one of the most socially-oriented provisions within classic copyright laws, is justified by purely economic arguments.[48] Also the harmonization of terms of protection, as expressed in Directive 93/98/EC,[49] has the function of removing obstacles to the free circulation of cultural and creative goods and services across the Community. Copyright, instead, has the function to incentivize creativity "in the interest of authors, cultural industries, consumers and society as a whole",[50] with an interesting reference to "consumers" instead of "users" or "individuals", which clearly attributes to copyright law the nuance of a market regulation that balances countervailing (economic) interests of almost equal market players.

Reiterating the same goals and functions, Directive 96/6/EC on the protection of databases[51] has the aims to foster the growth and competitiveness of European companies in the data industry[52] and protect their investments[53] by granting a safe remuneration to database makers and protect them against free riders.[54] The new centrality of investments, which replaces the traditional connection between work and author as a justification for copyright protection, is epitomized by the introduction of the new *sui generis* right,[55] which is granted on the mere ground of a qualitatively or quantitatively substantial investment in the collection, verification and organization of the database content.[56] Not even the introduction of the resale right in favour of authors of graphic and plastic artworks (Directive 2001/84/EC)[57] - a tool that has the social function of

[41] Ibid.
[42] Ibid, at 10, §§ 11-12.
[43] Ibid, at 21, §§ 47-48 and 51.
[44] Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs [1991] OJ L 122/42 [Software Directive I], whose recitals are almost entirely reiterated by Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs [2009] OJ L 111/22 [Software Directive II].
[45] Ibid, Recitals 4 and 5.
[46] Software Directive I and II, Recitals 2 and 3.
[47] 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 [1992] OJ L 346/61 [Rental Directive I], Recital 7. The new exclusive rights are introduced to provide an "adequate" income to rightholders, and thus to foster creations and investments, considered to be particularly risky in the field of phonogram and film production.
[48] Ibid, Recital 15.
[49] Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights OJ L 290/9 [Term Directive], Recital 2.
[50] Ibid, Recital 10.
[51] Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases [196] OJ L 77/20 [Database Directive].
[52] Ibid.
[53] Ibid, Recital 11.
[54] Ibid, Recital 7.
[55] Ibid, Recital 40
[56] Ibid, Recitals 41 and 48 and Article 7.
[57] Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art [2001] OJ L 272/32 [Resale Directive].

helping authors of unique works of art to gain enough revenues from their creations, and thus reach a decent standard of living - is grounded on social or cultural-oriented arguments, but rather on the economic goal of fostering creativity and guaranteeing the competitiveness of the market in contemporary art.[58] While the Resale Directive may be intended as an instrument of cultural policy pursued via market tools, its inspiration remains market-oriented, thus leading to economic reasoning its teleological interpretation.

With its more complex and articulated content and its role of first horizontal act of harmonization of EU copyright law, the Information Society Directive (2001/29/EC)[59] recalls the usual goals[60] of stimulating investments and ensuring a well-functioning internal market,[61] which may facilitate economies of scales and thus foster economic growth, industrial competitiveness and higher employment rates in the cultural and creative industries[62] and in the European information society.[63] Authors as individuals appear only in Recital 11, which mentions the need to safeguard "the independence and dignity of artistic creators and performers" by means of adequate economic rewards stemming from "a rigorous, effective system for the protection of copyright". Still, exclusive rights are attributed to them only as a reward "to continue their creative and artistic work", and for performers and producers "to be able to finance this work" with a satisfactory return on investment.[64] Despite the reference to Article 167 TFEU, which requires the Union "to take cultural aspects into account in its action",[65] copyright protection keeps on being linked to industrial rather than to cultural policies.

Non-economic references emerge only with regard to exceptions and limitations, which represent the traditional harbor for social and cultural considerations within copyright law. Recital 14 links the need to promote learning and culture with the exceptions for education and research introduced under Article 5 InfoSoc, and Recital 31 requires legislators to strike a "fair balance of rights and interests" between different categories of rightholders, and between rightholders and users, which this time are significantly not classified as "consumers". Also in this case, however, - and this is telling - economic arguments play a fundamental role, for the degree of harmonization of exceptions should be defined on the basis of "their impact on the smooth functioning on the internal market".[66] The exhaustive nature of the list of exceptions under Article 5 InfoSoc and the principle of their strict interpretation[67] are justified by the need to "duly reflect the increased economic impact that such limitations and exceptions may have in the context of the new economic environment",[68] and several other recitals illustrating exceptions and limitations comment on their impact on the market of the work rather than on their social and cultural goals.[69]

This blend of market and non-market considerations, with the former prevailing on the latter and influencing their interpretation, characterizes also the last pre-Lisbon act, which is the Enforcement Directive (IPRED).[70] Here, the harmonization of enforcement rules is justified by the need to ensure that business actors feel safe

[58] Ibid, Recitals 3 and 13 and Article 11, while harmonization serves to realize the internal market and avoid discrepancies between national laws that may distort competition. Ibid, Recitals 11, 14, 15

[59] 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 [2001] OJ L 167/10 [InfoSoc Directive], esp. Recital 20.

[60] Such as the protection of the internal market and of competition (ibid, Recital 1) and the development and commercialization of new creative products (ibid, Recital 2).

[61] Ibid, Recital 6.

[62] Ibid, Recital 4.

[63] Ibid, Recital 2.

[64] Ibid, Recital 10.

[65] Ibid, Recital 12.

[66] Ibid, Recital 31.

[67] Ibid, which makes clear that the enumeration of Article 5 InfoSoc is exhaustive.

[68] Ibid, Recital 44.

[69] As in the case of Recital 32 ("this list takes due account of the different legal traditions in Member States, while, at the same time, aiming to ensure a functioning internal market").

[70] Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights [IPRED] [2004] OJ L 157/32, Recital 8.

enough to engage in highly risky investments,[71] which are key to boost competitiveness and employment in the Union,[72] while the respect of conflicting fundamental rights[73] and the balance between IP, access to knowledge and information and privacy play only a side role.[74]

3.2 After the Lisbon Treaty: A real change?

In the road towards the Lisbon Treaty, preparatory works start paying more attention to the cultural objectives underlying copyright law. The first example is the Communication "The management of copyright and related rights in the internal market" (2004),[75] which is clear in stating that "besides the more general economic aims of stimulating investment, growth and job creation, copyright protection serves non-economic objectives, in particular creativity, cultural diversity and cultural identity".[76] Similar sentences can be found in the Communication "on a European agenda for culture in a globalizing world" (2007),[77] and in other Communications on preservation of cultural heritage[78] or access to scientific information,[79] which look at copyright for the obstacles it poses to the cultural policy goals they elaborate on.

This is not yet the time of a real paradigm shift, though. It suffices to mention the Communication "Creative content online in the single market" (2008)[80] - the first document reflecting on the mantra of the digital single market - which advocates for further harmonization of EU copyright law in order to standardize national laws and thus facilitate the cross-border circulation of protected works. This is necessary to make sure that copyright "achieves its full potential in contributing to European competitiveness and in fostering the availability (…) of the great diversity of (…) Europe's cultural and linguistic heritage",[81] with cultural goals once again being only the byproducts of a well-functioning internal market.

In fact, one needs to come very close to the advent of the Lisbon Treaty to witness the first real signs of change in the approach to the subject. Building on the 2007 Review of the Single Market, which defines the free movement of knowledge and innovation as the fifth fundamental freedom,[82] the Green Paper "Copyright in the Knowledge Economy"[83] (2008) revolves around the need to eliminate the clash between such a freedom and copyright, with particular regard to access to research and educational materials.[84] By giving such a forefront importance to education and research, transforming them into policy goals that may justify the imposition of limits to copyright protection, this piece of preparatory works explicitly brings cultural policies within the realm of copyright law. However, market arguments remain strong: copyright protection is the precondition to reward

[71] Ibid, Recital 9.
[72] Ibid, Recital 1.
[73] Ibid.
[74] Ibid, Recital 2.
[75] Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee on the Management of Copyright and Related Rights in the Internal Market, COM (2004) 261 final.
[76] Ibid, at 6, § 1.1.1.
[77] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a European agenda for culture in a globalizing world, COM (2007) 242 final.
[78] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on i2010: Digital libraries, COM(2005) 465 final.
[79] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on scientific information in the digital age: access, dissemination and preservation, COM (2007) 56 final.
[80] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Creative Content Online in the Single Market, COM (2007) 836 final.
[81] Ibid, at 4.
[82] Ibid, at 3, §1.1.
[83] Green Paper on Copyright in the Knowledge Economy, COM (2008) 466 final.
[84] Ibid.

intellectual creations and creative efforts,[85] which stimulate investments and "the maintenance and development of creativity in the interests of authors, producers, consumers and the public at large".[86] In addition, the proposed interventions on the copyright balance are narrow in scope and target, which substantially limits the scope of the bridge between copyright and EU cultural policy goals.[87]

Regardless of the focus, the Communications that follow are characterized by a stronger evidence-based background that is mostly based on economic market studies. This contributes to reinforce the market logic underpinning EU policy considerations. Cultural and creative production is a game of creative industries, whose importance comes from the fact that they contribute to 2.6% of the GDP,[88] while access to cultural and creative content is only a matter of meeting consumer expectations and abate transaction costs, mostly by creating a level playing field for national collective management organizations (CMOs) and by standardizing content, operation, effects and management of multi-territorial music licenses to remove obstacles that hamper the functioning of the digital single market.[89]

In a key preparatory work such as the Communication "A single market for intellectual property rights",[90] copyright (and in general IPRs) is an incentive to growth, competitiveness and job creation "in an environment of undistorted competition" that "facilitates the distribution of knowledge",[91] while the copyright balance is primarily directed to avoid excessive barriers to entry for new creators,[92] and only secondarily to ensure the respect of fundamental rights and cultural diversity.[93] Similarly, the Communication "Trade, growth and intellectual property" (2014)[94] defines IP as a key driver for innovation, growth and employment",[95] and links the introduction of flexible rules to the need to promote development and address "some of today's global challenges",[96] since – and this is the first time such a statement is made – the enforcement of IPRs may not be considered as an end in itself.[97]

Understandably in light of its focus, the market-oriented approach dominates the most important and overarching preparatory document of the past decade, the Communication "A digital single market strategy for Europe" (2015), laying the Commission's 5-years plans for the EU digital economy. In this context, copyright is expected to be one of the main drivers of the projected 12% growth of cultural and creative industries.[98] However, despite the fragmented and incomplete harmonization of EU copyright law and its complex interplay

[85] Ibid, at 4, §1.2.
[86] Ibid.
[87] Ibid. Specific access problems are targeted with narrowly-defined exceptions, no general balancing clauses, and a focus limited to the digitization of libraries and archives collections for preservation purposes, the creation and protection of user generated content (UGC), and the easier access and dissemination of materials for teaching and research.
[88] Reported in the Green Paper on the potential of cultural and creative industries, COM (2010) 183 final, 1, and also in the Green Paper on the Online distribution of audiovisual works in the EU: Opportunities and challenges towards a digital single market, COM (2011) 427 final, at 15-16.
[89] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a Digital Agenda For Europe, COM (2010) 245 final, 7-10.
[90] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on A Single Market for Intellectual Property Rights, COM (2011) 287 final, 15.
[91] Ibid, at 4.
[92] Ibid, at 6.
[93] Ibid, at 7-9.
[94] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Trade, growth and intellectual property, COM (2014) 389 final.
[95] Ibid, at 11.
[96] Ibid, at 2.
[97] Ibid, at 5.
[98] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on A Digital Single Market for Europe, COM (2015) 192 final, at 6.

with several different policy fields, the EU legislator envisions very limited interventions in the field, "so that the rules continue meeting their objectives".[99]

The Commission's plan becomes clearer in the Communication "Towards a modern, more European copyright framework" (2015),[100] which aims at the creation of a well-functioning marketplace for copyright,[101] which may ensure the sustainable financing of the production and distribution of cultural and creative content by granting a fair reward to all market players involved and facilitate the conclusion of fair cross-border agreements.[102] Compared to the past, the document puts less emphasis on market-based solutions to copyright inefficiencies.[103] Still, the language and arguments used are inspired by classic economic arguments. Enough is to note, for instance, how authors and performers are considered for the first time *ex se* among other copyright market actors, but only to note their weaker bargaining power *vis-à-vis* industrial and commercial rightholders, and the Commission plans to tackle the issue by pure market tools, such as collective agreements and unwaivable remuneration rights.[104] It is true that, differently than other times, the Commission shows concern for the current incapability of copyright to take into due account other public interest objectives such as access and accessibility to protected content by people with disabilities, and the enjoyment of the right to education and research, pointing to the lack of harmonization and the frequently strict national approach to exceptions as the main cause of this shortcoming.[105] In addition, and again for the first time, the planned legislative intervention is not justified by internal market needs, but it is linked to cultural policy objectives (e.g. fostering data science research, digital education and the digitization of cultural heritage), to be achieved by market tools.[106] Yet, the outcome is not different than in other occasions, for it remains the traditional narrow proposal of a handful of limited exceptions, such as those directed to allow text and data mining, digital preservation by cultural heritage institutions, access to cultural goods for visually impaired people and illustration in teaching and digitization of library collections.[107]

This does not mean that the new approach inaugurated by the Lisbon Treaty and its new social market economy principles, boosted by the broadening of EU competences to cover more substantially also cultural matters (see, e.g. Article 167 TFEU, and Article 3(3) TEU, which makes express reference to cultural diversity and cultural heritage), had no effect on the conceptualization of rationales and objectives of EU copyright law. In fact, in the Communication which accompanied the Proposal for a Directive on Copyright in the Digital Single Market of September 2016 - the most important piece of horizontal harmonization of copyright since 2001, which entered into force in March 2019 as Directive (EU) 2019/790[108]- copyright functions and ambitions are more clearly diversified and intertwined. While the background drive remains the deepening of the single market, also in the field of exceptions,[109] the text attributes to copyright the task to make cultural and creative industries competitive not only because of their role for growth and employment, but also because they are "a primary source of learning and entertainment and are crucial to maintaining and nurturing Europe's cultural diversity", and their success is essential to make them "reach out to larger audiences and ultimately provide

[99] Ibid, at 2.
[100] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Towards a modern, more European copyright framework, COM (2015) 626 final, stating that the need to intervene on EU copyright rules is justified by the wish "to overcome fragmentation and frictions within a functioning single market" (p. 1), and thus to "inject more single market and (…) a higher level of harmonization into the current EU copyright rules" (ibid).
[101] Ibid, at 2.
[102] Ibid, at 2 and 5.
[103] Ibid, at 5 ("in some areas the promise of market-led solutions (…) will need to be monitored").
[104] Ibid, at 8.
[105] Ibid, at 2.
[106] Ibid.
[107] Communication Towards a modern, more European copyright framework (n 100), 7.
[108] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Promoting a fair, efficient and competitive European copyright-based economy in the digital single market, COM (2016) 592 final, 3, 6-7.
[109] Ibid, at 6.

more choices to citizens".[110] The measures selected to achieve such hybrid goals, however, remain market-based, regardless of whether they intervene on market dynamics, such as the operation of video-on-demand platforms and cross border accessibility of content,[111] or whether they touch upon the functioning of public institutions and the pursuance of purely public interest goals, such as the digitization and dissemination of out-of-commerce works by cultural heritage institutions.[112] Similarly, authors' and performers' social right to enjoy a decent standard of living is translated into rules directed to rebalance their bargaining power *vis-à-vis* producers and distributors and to grant them a fair remuneration, with arguments similar to those used for online publishers *vis-à-vis* big platforms.[113] Once again the problem of the potential conflict between economic, social and cultural functions of copyright, and between copyright and other EU social and cultural policies is not addressed in a holistic manner, but with ad hoc narrow solutions.[114]

The new blend of functions and goals emerges more vividly in the legislative texts that followed the entry into force of the Lisbon Treaty,[115] in some instances facilitated by their particular focus. This is the case of the Orphan Works Directive (OWD),[116] which intervenes on works the authors of which cannot be traced and reached, and introduces a specific exception to allow their digitization by cultural heritage institutions. The function of the provision, that is to help the mass digitization and dissemination of the greatest number possible of works,[117] is strictly linked to a key EU cultural policy objective, which is the protection and making available to all of Europe's cultural heritage.[118] Similarly, the criteria used to calculate the fair compensation due to authors who reappear and want to redeem their works from the orphan status also show a blend of cultural and economic nuances, for they include also - and actually privilege - the cultural promotion mission of the beneficiary of the exception and the public interest purpose of the use.[119] Market considerations are not fully absent, though. They are mostly connected to the goals of harmonization (the removal of regulatory obstacles to the free circulation of cultural content, and stimulating innovation, investment and production in the creative sector),[120] but they emerge also in side references, such as the provision allowing cultural heritage institutions to generate revenue from the use of orphan works in order to finance their digitization, which again links a cultural objective to a market tool.[121]

Interestingly, the second act - Directive 2014/26 on collective management organizations (CMOs) and multi-territorial licensing of musical works for online use[122] - contains references to cultural policy goals despite its strongly market-oriented focus. Its key goal is to create common rules for CMOs operating in the digital single market, levelling national fragmentations and stimulating free competition[123] to create a more thriving marketplace for copyright holders, thus encouraging investments in creativity and innovation.[124] Against this

[110] Ibid, at 10.
[111] Ibid, at 3.
[112] Ibid.
[113] Ibid, at 7.
[114] The problem-based approach is reaffirmed by the plan to continue assessing "a number of other issues related to exceptions" in light of the outcome of cases pending in front of the CJEU. Ibid.
[115] With the exception of the Term Directive, which recasts the 1993 version and reproduces its strong market-based rationales, Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights [2006] OJ L372/12 [Term II Directive], esp. Recital 5.
[116] Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works [2012] OJ L299/5 [OWD].
[117] Also framed as "free movement of knowledge" (Recital 2).
[118] Ibid, Recitals 22 and 23.
[119] Ibid, Recital 18.
[120] Ibid, Recital 14. Recital 5, which defines copyright as a tool to reward the "creative sector", for its function of "economic foundation for the creative industry" is to stimulate innovation, creation, investment and production.
[121] As introduced in ibid, Recital 21.
[122] Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market [2014] OJ L84/72 [CMO Directive].
[123] Ibid, Recital 38.
[124] Ibid, Recital 1.

background, it is meaningful that the Commission enlists among the grounds of the Directive Article 167 TFEU,[125] and thus emphasizes the role of CMOs as "promoters of the diversity of cultural expression", since they give access to the market to the smallest and less popular repertoires, and they provide cultural and educational services not only for rightholders but also for the public.[126]

The timeframe 2016-2019 features not only the landmark Directive on Copyright in the Digital Single Market (CDSM),[127] but also three other acts, a Directive[128] and a Regulation[129] implementing the Marrakesh Treaty on access to protected works by people with disabilities, and a Regulation on cross-border content portability.[130] All actions are introduced by the Communication "Towards a Single Market Act" as parts of the Digital Single Market agenda[131] and, despite their different focus, their explanations all feature social and cultural functions, such as the fulfillment of social rights of consumers through a greater and fairer access to online content;[132] the enjoyment of cultural rights by disabled people through greater accessibility of protected works by the adoption of the Marrakesh exception;[133] the protection of social and cultural rights such as the right to education and research; and the fulfillment of social and cultural goals such as cultural preservation and the fostering of cultural diversity through the exceptions provided by the CDSM Directive.[134] On the contrary, explanatory memoranda and preambles of each act do not so uniformly blend economic, social and cultural functions.

For instance, the Regulation on cross-border portability sees as beneficiaries digital consumers, and the focus in not on individual rights but only on consumer demand,[135] internal market potential,[136] and the removal of contractual barriers to the cross-border availability of lawfully subscribed digital content.[137] Due to its core content, instead, the Marrakesh Directive and Regulation are functionalized to the protection, respect and fulfillment of cultural rights of visually impaired people.[138] Yet, and even if the EU was directly obliged (as a signatory) to implement the Marrakesh Treaty and abide by the UN Convention for the Rights of People with Disabilities (UNCRPD),[139] the legal basis of the Directive is still Article 114 TFEU. This dichotomy is best testified by Recital 1, which mentions at the same time the Directive's function to "provide legal certainty and a high level of protection for rightholders (…), contribute to the proper functioning of the internal market and

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[125] Ibid, Recital 3.

[126] Ibid.

[127] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market [2019] OJ L130/92 [CDSM Directive].

[128] Directive (EU) 2017/1564 of the European Parliament and of the Council 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 [Marrakesh Directive].

[129] Regulation (EU) 2017/1563 of the European Parliament and of the Council of 13 September 2017 on the cross-border exchange between the Union and third countries of accessible format copies of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled [2017] OJ L242/1 [Marrakesh Regulation].

[130] Regulation (EU) 2017/1128 of the European Parliament and of the Council of 14 June 2017 on cross-border portability of online content services in the internal market [2017] OJ L168/1 [Cross-border portability Regulation].

[131] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Towards a Single Market Act, COM (2010) 608 final, at 1.

[132] Cross-border portability Directive, Recital 1.

[133] Marrakesh Directive, Recitals 3 and 5.

[134] CDSM Directive, Recitals 5, 8, 15, 18, 31.

[135] Ibid, Recital 3.

[136] Ibid, Recitals 1-2.

[137] Ibid, Recital 10.

[138] As reported in the Explanatory Memorandum of the Proposal of a CDSM Directive, at 2.

[139] Particularly Article 30 on the right to take part in cultural life, and the obligation for state parties to make sure that their IP laws do not constitute an unreasonable or discriminatory barrier to access to cultural materials for persons with disabilities. On the obligations arising from the Convention, see Caterina Sganga, 'Disability, Right to Culture and Copyright. Which Regulatory Option?', [2015] 29 International Review of Law, Computers and Technology 88; Abbe Brown, Charlotte Waelde, 'Human Rights, Persons with Disabilities and Copyright', in Christophe Geiger (ed), *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar Publishing 2015), 577-604.

stimulate innovation, creation, investment and the production of new content", and "to promote access to knowledge and culture by protecting works (…) and by permitting exceptions or limitations that are in the public interest", by improving "the availability of works and other protected subject-matter in accessible formats for persons who are blind, visually impaired or otherwise print disabled".[140]

The same reference to Article 114 TFEU features the Explanatory Memorandum of the CDSM Directive, where the largest role is played by market-based objectives, this time in response to the advent of new business models, actors, uses, technologies and the impact they had on consumers' access and on the value chain of protected works.[141] Exceptions are linked with the pursuance of specific social and cultural policies, but their function is also to eliminate national differences that could hinder cross-border uses of protected works.[142] In fact, they are mostly directed to solve market failure, which explains why the focus is on "uses and works where clearance of rights is complex",[143] beneficiaries are called interchangeably "consumers" and "citizens",[144] and the fulfillment of their social and cultural functions is only a side effect of a better market regulation. In a similar vein, the related right conferred to online publishers, and the obligation imposed on platforms to preventively filter user-uploaded content or to conclude licenses with rightholders are also directed to solve market failures.[145] However, the publishers' right has also the function of encouraging a free, pluralist, quality press and its "fundamental contribution to the public debate and the proper functioning of a democratic society",[146] while the new prerogative of rightholders *vis-à-vis* online content-sharing platforms wants to ensure that copyright maintains its incentivizing role towards new creations.[147]

Several CDSM recitals recall similar arguments with regard to the function of the harmonization[148] and of copyright.[149] The blended approach is particularly visible in Recital 2, where the better functioning of the copyright marketplace is causally connected to greater cultural diversity, better education and research, consumer welfare, media pluralism, and broader dissemination of cultural products.[150] A number of other policy choices, such as the ample use of license agreements as preferred tools to reach a greater dissemination of out-of-commerce works and/or digitization of cultural heritage,[151] or the specific rules introduced to rebalance the position of authors and performers *vis-à-vis* industrial intermediaries,[152] follow the same logic.

While we are still far from witnessing a clear and independent identification of the cultural and social functions of copyright, preparatory works and acts that followed the entry into force of the Lisbon Treaty show the sign of a progressive paradigm shift. The very same path has been followed by the CJEU, which in the past decades has been very active in expanding scope and content of the EU copyright harmonization.[153]

4. EU copyright law in action: market and non-market goals in the CJEU's case law

[140] Marrakesh Directive, Recital 4.
[141] Explanatory Memorandum of the Proposal of a CDSM Directive, at 2.
[142] Ibid.
[143] Ibid.
[144] Ibid, at 3.
[145] Ibid.
[146] CDSM Directive, Recital 31.
[147] Explanatory Memorandum of the Proposal of a CDSM Directive, at 3.
[148] Ibid, Recitals 2, 3, 5, 19, 36.
[149] CDSM Directive, Recital 2.
[150] Explanatory Memorandum of the Proposal of a CDSM Directive, at 4.
[151] CDSM Directive, Article 7.
[152] Explanatory Memorandum of the Proposal of a CDSM Directive, at 3.
[153] In this sense, the CJEU's interventions have been defined a sort of "harmonization by stealth" by Lionel Bently, 'Harmonization by Stealth: Copyright and the ECJ' (20th Annual IP Law and Policy Conference, Fordham Law School, April 2012).

Apart from the indirect reference made by *Metronome Musik,* one needs to wait *Promusicae* (2008) to first read in a CJEU decision the notion of fair balance between copyright and conflicting fundamental rights.[154] Despite the fact that the case offered ample room for intervention, the Court did not formulate any specific guidelines for the balance, but for one general principle, which requires Member States' legislators, authorities and courts to "rely on an interpretation of the directives which allows a fair balance to be struck between the various "[EU] fundamental rights".[155] The extreme genericity of the statement weakened its potential as a basis for the horizontal application of fundamental rights in EU copyright law, leading instead to opposite and contradicting judgments.[156]

Subsequent decisions specified that "nothing whatsoever in the wording" of Article 17(2) Charter of Fundamental Rights of the European Union (CFREU) - which criptically states that "Intellectual property shall be protected" - "or in the Court's case-law […] suggest that [copy]right is inviolable and must for that reason be absolutely protected",[157] and ruled for the prevalence of providers' freedom to conduct a business (Article 16 CFREU), and users' privacy and freedom of information (Articles 8 and 11 CFREU).[158] Yet, years and years passed without specifications on the criteria to be followed in the balancing exercise. On the contrary, the fundamental rightcheck was in some instances limited to a mere element of the proportionality analysis, especially in the field of copyright injunctions.[159] Such a vagueness led the fair balance/fundamental right doctrine to have quite a weak cogency. This, coupled with the fact that the Court rarely makes space for cultural and social considerations if not explicitly called upon it, caused the CJEU's teleological interpretation of copyright rules to be for long unilaterally driven by copyright's market-oriented functions.[160]

The entry into force of the Lisbon Treaty has not caused the revolution it could potentially do. However, in the last decade the Court's case law presents a number of examples that hint to a change of direction. It suffices to mention four landmark decisions and the historical triad of the Grand Chamber of July 2019.

In *Deckmyn*[161] the CJEU intervened for the first time on the optional nature of exceptions under Article 5 of the InfoSoc Directive, declaring the notion of parody an autonomous concept of EU law, and ruling in favor of its standardization across the Union. However, instead of going for a strict interpretation, it offered a relatively broad reading of its scope and requirements, and ruled out that Member States could provide a more restrictive interpretation. To our end, the most interesting aspect of the decision is that the Court justified its harmonizing intervention not on the usual ground of removing obstacles to the internal market, but on the need to reach a uniform realization of the fair balance principle and of the function of the provision, which is to ensure the respect of freedom of expression.

The same purpose-based approach characterizes *Ulmer.*[162] Here, the CJEU extended the exception provided under Article 5(3)(n) InfoSoc, which allowed libraries to offer the digital version of their collections on dedicated terminals, to cover also their digitization, arguing that without this stretch the provision would have not been able to perform its cultural promotion role to foster "research and private study, through the dissemination of knowledge".[163] The same socio-cultural arguments – the contribution to cultural promotion and participation - backed the Court's decision to apply the public lending exception also to e-books in

[154] Case C-275/06 *Productores de Música de España v Telefónica de España SAU* [2008] ECR I-271.
[155] Ibid, para 68.
[156] As in case C-461/10 *Bonnier Audio AB e altri contro Perfect Communication Sweden AB* EU:C:2012:219, para 58.
[157] Case C-70/10 *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL* (SABAM) [2011] ECR I-11959, para 43; Case C-360/10 *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog NV* EU:C:2012:85, para 41.
[158] Scarlet Extended, paras 43 and 53; Netlog, paras 45 and 51.
[159] Case C-314/12 *UPC Telekabel Wien GmbH v Constantin Film Verleig GmbH* EU:C:2014:192, paras 50-54 and Case C-484/14 *Tobias McFadden v Sony Music Entertainment Germany GmbH* EU:C.2016:689, paras 148-149.
[160] See the detailed analysis of Mathias Leistner, 'Europe's Copyright Law Decade: Recent Case Law of the European Court of Justice and Policy Perspectives', (2014) 51(2) CMLR 559.
[161] Case C-201/13 *Johan Deckmyn and Vrijheidsfonds VZW v Helena Vandersteen and Others* EU:C:2014:2132.
[162] Case C-117/13 *Technische Universität Darmstadt v Eugen Ulmer KG* EU:C:2014:2196,
[163] Ibid, para 27.

Vereniging Openbare Bibliotheken (VOB),[164] with a significant shift in the CJEU's approach, which abandoned the literal and systemic interpretation of EU and international provisions that usually led to limit the notion of "copy" to tangible supports,[165] in order to protect some of the key cultural goals of copyright.

A move back from the market to the individual, and the return of authors at the center of copyright, is marked by *Soulier and Doke*.[166] The decision outlawed, as contrary to EU law, the first French law on out-of-commerce works, which allowed selected CMOs to license the right to digitize and commercialize works published before January 2001 and no longer distributed, provided that specific requirements were met. Although the Court recognized the public interest goal underlying the mechanism, and excluded the need to secure rightholders' consent for every exercise of exclusive rights, it still requested authors to be informed and enabled to oppose unwanted uses of their works, without being subject to formalities or agreements with concurrent rightholders.[167] While the Info Soc Directive allows Member States to grant "certain rights or certain benefits to third parties, such as publishers",[168] the CJEU ruled that this should not "harm the rights which that directive gives exclusively to authors".[169] This statement highlighted one of the functions of copyright that has been long neglected by the EU legislator, which is the protection of the author's interest in controlling the use of her work and enjoying the fruits of her efforts in full autonomy, *id est* her possibility to enjoy and exercise some of her basic social and cultural rights.

The most substantial shift, however, is marked by three landmark precedents issued by the Grand Chamber in July 2019 - *Funke Medien, Pelham* and *Spiegel Online*.[170] The decisions are long, dense of arguments representing historical turning points, and destined to become key doctrines in EU copyright law. For our limited purposes, it will suffice to recall some of their most meaningful considerations.

First, the Court excluded that fundamental rights may allow the judicial introduction of new exceptions beyond the scope set by the EU legislator, and based this reiterated rigidity on the fact that their inconsistent application and unharmonized proliferation would have a negative impact on the functioning of the internal market.[171] However, the CJEU also confirmed and crystallized the principle of extensive reading of exceptions every time this is necessary to preserve their function and strike a fair balance between copyright and conflicting fundamental rights.[172] In fact, the Court went even further, by attributing for the first time to exceptions the standing of users' rights. As a consequence of the function-based approach, this time the CJEU devoted much more attention to the nature of the speech and the importance of the information or expression at stake when balancing conflicting rights and interests.[173] The same granular and function-based lens was used to define the scope of exceptions. *Spiegel Online* excluded that the limitation to the right of reproduction for the purpose of reporting current events (Article 5(3)(c) InfoSoc) may be subject to the author's prior consent, for this would

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[164] Case C-174/15 *Vereniging Openbare Bibliotheken v Stichting Leenrecht* (VOB) EU:C:2016:856, para 51.

[165] See Article 7 of the WIPO Copyright Treaty (WCT) and to the WIPO Agreed Statement on Articles 6 and 7 WCT, available at http://www.wipo.int/treaties/en/text.jsp?file_id=295456 [accessed January 6, 2022]. See similarly Case C-135/10 *Società Consortile Fonografica (SCF) v Marco Del Corso* EU:C:2012:140, para 55.

[166] Case C-301/15 *Marc Soulier and Sara Doke v Premier Minister and Ministre de la Culture et de la Communication* ECLI:EU:C:2016:878.

[167] Opinion of AG Wathelet in Case C-301/15 *Marc Soulier and Sara Doke v Premier Minister and Ministre de la Culture et de la Communication* ECLI:EU:C:2016:536, paras 49-50.

[168] The statement is in line with the "author principle" expressed in Case C-277/10 *Martin Luksan v Petrus van der Let* EU:C:2012:65, para 69.

[169] Case C-572/13 *Hewlett-Packard Belgium SPRL v Reprobel SCRL* EU:C:2015:750.

[170] Case C-469/17 *Funke Medien NRW GmbH v Bundesrepublik Deutschland* EU:C:2019:623 (Funke Medien); case C-476/17 *Pelham GmbH and Others v Ralf Hütter and Florian Schneider-Esleben* EU:C:2019:624 (Pelham); case C-516/17 *Spiegel Online GmbH v Volker Beck* EU:C:2019:625 (Spiegel Online).

[171] Funke Medien, paras 56-63; Pelham, paras 58-64; Spiegel Online, paras 41-48.

[172] Funke Medien, para 71; Spiegel Online, para 55.

[173] Ibid.

frustrate the objective of disseminating the information rapidly to satisfy the informatory interest of the public, and thus hinder the fulfillment of freedom of expression and of the press.[174]

The most relevant step forward, however, was made by *Pelham*, where the Court used the same interpretative tool to draw the external borders of exclusive rights. Asked whether a two-second sample of a phonogram constituted a partial reproduction prohibited by Article 2 InfoSoc, the CJEU solved the puzzle in three steps, by (i) qualifying samplings as a form of artistic expression covered by freedom of the arts (Article 13 CFREU and 10(1) ECHR);[175] (ii) identifying the function of the producer's reproduction right in that of protecting her investment and the opportunity of receiving a satisfactory return; (iii) verifying whether or not to allow a producer preventing a short sample taken for the purpose of artistic creation, in this way compressing another fundamental right, is essential or not for copyright to perform its basic function(s) in the specific case at stake.[176] Having answered to the negative, the fundamental right of artistic expression prevailed.

For the first time after the last appearance of the essential function doctrine, and reordering hints that had already featured in previous decisions, the Court went back to the institutional goals of copyright to inspire the interpretation of copyright rules, and took as a point of reference for the copyright balance not generic entitlements inspired by mere market considerations, but the specific subject matter of the right at stake, defined on the basis of the multi-faceted function(s) it performed in the specific case.

5. Conclusions: a function-based approach to balance market and non-market goals in EU copyright law

Both the path followed by the EU legislator and the one drawn by the CJEU point to a direction where the functions of EU copyright law play an increasingly key role in orienting the interpretation of copyright norms and in defining the future and content of their harmonization. Parallel to this process, the Lisbon Treaty, by attributing to the EU direct competence to legislate on unitary IP rights (Article 118 TFEU), has marked a turning point in the conceptualization of copyright functions. They have moved from a predominantly marked-based nature, with a focus on economic efficiency, industrial growth, competitiveness, and incentives to creativity and investments, to a more complex blend of market and non-market policy goals, where authors and users as individuals come back to the main stage, and cultural and social objectives are not only byproducts of market policies, but self-standing (and sometimes principal) goals of several EU copyright acts. While it is true that Article 114 TFEU remains the legal basis of EU copyright directives and regulations, and market tools are still the regulatory option preferred by the EU legislator also for the realization of cultural and social objectives, the impact of such a paradigm shift can be traced not only in preparatory works and preambles of directives and regulations, but also in the arguments supporting recent CJEU decisions.

It is difficult to foresee whether this is a path that is going to translate into a more stable, balanced, and independent considerations of all functions of copyright law. What is clear is that a function-based approach to the drafting and interpretation of copyright rules, grounded on a clear distinction of copyright goals based on their nature, may help guiding the process towards more balanced and consistent results. At the same time, it may also assist in tackling more efficiently the complex interactions between copyright and other policy sectors that are directly or indirectly touched by its operation.

In order to better orient the development of EU copyright law, it would represent a good drafting practice for the EU legislator to be more specific in distinguishing between goals of the harmonization and goals of new copyright rules, and spell out each function of copyright in a clearer fashion, paying utmost attention to give adequate weight to the cultural and social impact(s) of each norm, and reflect such impact(s) in the definition of its purpose(s). Straightforward definitions are not only of great help for the CJEU and for national legislators

[174] Spiegel Online, paras 71-73.
[175] Pelham, para 35.
[176] Ibid, para 37.

and courts, but may also ensure transparency in the ultimate goals of each new piece of regulation and the directions it is going to take once implemented.

A consistent teleological interpretation of copyright rules by the CJEU and national courts would also be key to bring more certainty, predictability and stability to the copyright balance and to the judicial development of EU copyright law. Already on the basis of existing legislative sources, opting for a function-based interpretation would shed light on the fact that exclusive rights are not protected per se, but are protected to provide an "appropriate remuneration" or "reward" to authors, sufficient to protect their dignity and ensure for them a decent standard of living,[177] or to ensure a "fair return on investment" or "legitimate profit" to incentivize a sustainable industrial development and competitiveness of the EU creative sectors, and achieve growth and jobs creation.[178] "Fair" and "appropriate" indicate that copyright protection does not cover any possible exploitation of the work, but only what is necessary to perform these more limited functions. At the same time, EU acts are now clear in stating that copyright is also granted to fulfill social and cultural goals such as the dissemination of works, access to culture, and the promotion of cultural diversity and identity, which should consequently be understood not only as grounds for exceptions, that is as internal limitations to exclusive rights, but also as functions of copyright, that is as metrics to ontologically define the content of exclusive rights.[179]

Against this background, it is clear that the implementation of a function-based approach would fill up most of the gaps that are still left uncovered in the CJEU case law. First, it would help defining the essence or core of copyright under Article 17(2) CFREU, that is the specific subject matter of each exclusive right. Only those exploitations necessary to reach the basic objectives of the right would belong to its core. Since not only reward-incentive goals but also socio-cultural objectives are part of the essential function of EU copyright, any disproportionate act that hinders their fulfilment would fall outside the scope of protection. This would represent a valid benchmark for the proportionality test as well, for it would use in the assessment not a generic market-based economic right, but would look at its specific subject-matter in all its multi-faceted (and thus also social and cultural) components, allowing a much more tailor-made solution to the balancing exercise.

Along the same line, the function-based approach would allow a better definition of the criteria to be used when interpreting exceptions through the lens of fundamental rights, reinforcing and giving contents to the key pillars of the fair balance doctrine as expressed in *FAPL, Deckmyn, VOB* and *Ulmer*, and reshaped by the Grand Chamber trio in 2019. This would drastically reduce the risk that those elements that are still vaguely described, such as the notion of essence of the right protected under Article 17(2) CFREU, expose the fair balance doctrine to controversial outcomes and dangerous *revirements*.

The road ahead is still long, but the path is traced. The hope is that the EU lawmakers will follow it consistently, and that the unveiling of the social and cultural functions and implications of copyright will be made explicit and completed in a shorter time than the three decades it took to kick it off.

[177] InfoSoc Directive, Recital 11; OWD, Recital 5.

[178] InfoSoc Directive, Recitals 2-4; IPRED, Recitals 1-2; Rental Directive, Recital 11; Software I Directive, Recital 2; Database Directive, Recitals 9, 11–13; Rental I Directive, Recital 8; Resale Right Directive, Recitals 3, 11, 13;

[179] See, e.g., IPRED, Recital 2 ("the widest possible dissemination of works"), OWD, Recital 20 (access to knowledge or culture), Infosoc Directive, Recitals 12 and 14; OWD, Recitals 18 and 23 (promotion of cultural expression, identity and diversity).