Multilevel constitutionalism and the propertization of EU copyright: an even higher protection or a new structural limitation?

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ABSTRACT

It represents a common narrative among scholars that the propertization of copyright has contributed to its constitutional hedging vis-à-vis other interests and rights, with distortive consequences for the copyright balance. The entry into force of Article 17(2) CFREU and a number of controversial CJEU decisions have reinforced this belief. This chapter proves that argument too simplistic and partially fallacious. It uses CJEU property case law, the main features of the EU constitutional property model, and a number of national court decisions operating constitutional propertization of copyright, to build a counter-narrative where the qualification of copyright as a property right under Article 17(2) CFREU offers, instead, the opportunity for a more consistent and balanced development of EU copyright law.

KEYWORDS: propertization, EU copyright, property, harmonization, CJEU, Article 17 CFREU, constitutionalization, social function, horizontal effects, fundamental rights

1. Introduction

It is a common *topos* in contemporary scholarship that the propertization 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 Article 17(2) CFREU, which adds to the Charter's property clause the statement '*intellectual property shall be protected*', has reinforced this belief, later confirmed by decisions where the CJEU has used the provision to increase the degree of protection conferred on copyright, beyond the boundaries set by EU and national laws.

However, a closer look at CJEU case law proves this narrative too simplistic, and partially fallacious. In fact, the Court has never justified the specific degree of protection granted to copyright on the basis of its qualification as a property right under Article 17(2) CFREU. In almost the totality of instances where the provision is mentioned, its function is to support the insertion of copyright in the list of fundamental rights among which a fair balance has to be struck, with no distinctive consequence for the outcome of the balancing exercise attached to the constitutional propertization of copyright. In this sense, the ultimate effect of Article 17(2) CFREU seems to be "merely" that of elevating copyright to the rank of a fundamental right, standing on an equal footing with other rights and freedoms protected by the Charter, as if the provision were an independent IP clause and not part of the Charter's property clause. Against this background, it remains to be clarified whether the CJEU would grant the same degree of protection to copyright, should it treat it as a property right, as Article 17(2) CFREU requires.

Three elements suggest the need to investigate the matter further. The first of these lies in the property case law of the Court of Justice, which features principles and doctrines that largely differ from those characterizing its copyright decisions. The second stems from the examples offered by several national experiences, where the constitutional propertization of copyright has supported limitations of its scope and its functionalization for public interest goals. The third comes from the features of the EU constitutional property model which – if correctly construed on the basis of the indications of CJEU property case law and the Praesidium's explanatory notes on Article 17 CFREU – depicts a similarly limited, functionalized entitlement. Elaborating on these hints may result in a counter-narrative that not only would dispel the myth of absoluteness triggered by the mishandled property logic contaminating EU copyright, but also could provide reliable guidelines for the implementation of Article 17(2) CFREU, transforming it from a flexible harmonization tool for the CJEU into in a relevant provision shaping the development of EU copyright law.

To build such a counter-narrative, this chapter starts with an overview of the history of Article 17(2) CFREU, the interpretation offered by the Praesidium, and its effects on secondary law and CJEU decisions (Step 1). Step 2 illustrates the key features of CJEU property case law. Step 3 showcases selected national counter-examples of the balancing effects of constitutional property doctrines on copyright rules.

Step 4 follows the Praesidium's indications 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 propertization of EU copyright on the interpretation of existing rules and on the evolution of the discipline.

2. Step 1 – the background. What do we know about Article 17(2) CFREU and its effects?

The insertion of an IP clause in the CFREU represented a salient change compared to the silence of most Member State constitutions[1] and to independent protection of the interests of authors and inventors offered by some national charters and international human rights treaties,[2] for the CFREU did not introduce a separate provision, but mentioned IP under its property clause.

The decision was in line with the case law of the ECtHR and its predecessor, the European Commission of Human Rights, which already back in the 1990s granted protection to patents[3] and copyright[4] as property rights under Article 1 of the First Protocol (P1) of the ECHR. The Strasbourg Court followed suit in 2005, with three decisions on trademarks (*Anheuser-Busch Inc v Portugal*[5]) and copyright (*Melnychuck v Ukraine*[6] and *Dima v Romania*[7]), ruling that Article 1 P1 is 'applicable to intellectual property as such',[8] and offering protection to rightholders against state intervention interfering with their IPRs.[9] .

Since IP was only one of the intangible assets which the ECtHR brought under Article 1 P1, and by far not the most revolutionary,[10] the Praesidium's decision to add only an IP clause to Article 17 CFREU –

[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 UDHR and Art 15 ICESCR. On the matter see Lea Shaver, 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, 94-A Eur Comm'n HR Dec & Rep 136 (1998); *Smith Kline & French Lab Ltd v Netherlands*, App No 12633/87, 66 Eur Comm'n HR Dec & Rep 70, 79 (1990) (admissibility decision).
[4] *Aral v Turkey*, App No 24536/94, ECHR:1998:0114DEC002456394 (1998, admissibility decision).
[5] (2007) 44 EHRR 42.
[6] App No 28743/03 (ECHR 5 July 2005).
[7] App No 58472/00 (ECHR 16 November 2006).
[8] *Anheuser-Busch*, 849–850
[9] On the impact of the ECtHR's case law on the degree of protection offered to IPRs see already Lawrence Helfer, 'The New Innovation Frontier? Intellectual Property and the European Court of Human Rights' (2008) 49 Harvard International Law Journal 1.
[10] Ibid at 6.

otherwise an almost slavish copy of Article 1 P1 ECHR – is puzzling. Both the Praesidium's Explanations[11] and the comments by the Commission Network of Independent Experts on Fundamental Rights[12] motivate the decision with '[the] economic weight' of IP 'and the activism of the Community legislator' in the field, offering a descriptive picture which is not enough to justify its classification as a fundamental right and to shed light on the implications of the clause.[13] Instead – and in particular for use of the verb "shall" and for silence on limitations[14] – the provision has been read as introducing (i) a positive obligation of protection for the EU legislator, leading to expansion of the list and the scope of exclusive rights, and (ii) a negative institutional guarantee, causing the crystallization 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 (Article 6(1) TEU) seemed to support this view. Recital 23 IPRED linked the Directive's goal of achieving "full respect for intellectual property" to Article 17(2) CFREU; without mentioning the Charter, Recital 9 Infosoc connected the requirement for a high level of protection to the proprietary qualification of copyright, and *Laserdisken* upheld as proportionate the restriction on the freedom to receive information "in the light of the need to protect intellectual property […] which forms part of the right to property".[16]

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",[17] depicting the IP clause as a specification of the property clause and not as an attribution of absoluteness to IP rights. Similarly, the use of the neutral modal verb "is" instead of "shall" in other translations of the Charter

[11] Praesidium, Explanations relating to the Charter of Fundamental Rights [2007] OJ C-303/17, 23.
[12] EU Network of Independent Experts on Fundamental Rights, Commentary of the Charter of Fundamental Rights of the European Union, http://ec.europa.eu/justice/fundamental-rights/files/networkcommentaryfinal_en.pdf, June 2006, 165 et seq (accessed 30 September 2019).
[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) EIPR 113, 117.
[14] See Alexander Peukert, 'Intellectual Property as an End in Itself' (2011) 33(2) EIPR 67, 69.
[15] In these terms Geiger (n 13), 115. See also Jonathan Griffiths, 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.
[16] Case C-479/04, *Laserdisken v Kulturministeriet* [2006] ECR I-8089, §65.
[17] Praesidium (n 11), 23.

hinted at a descriptive rather than a normative role for the provision.[18] Yet at the same time, the argument had little traction against the opposite rhetorical perception of IPRs as absolute rights triggered by the ambiguities of Article 17(2) CFREU, which thus became the new flag bearer of the "property logic" that had already emerged in secondary EU law and preparatory works.[19] This has led commentators to conclude that the constitutional hedging of IP as a property right in the CFREU has indeed contributed to heightening the degree of protection granted to copyright.[20] A closer look at CJEU case law, however, portrays a more complex and different scenario.

With the exception of *Metronome Musik* (1998) – where the Court used the social function of property to exclude finding that the constitutional propertization of copyright implied its absolute protection[21] – and *Laserdisken*, none of the cases decided before the entry into force of the CFREU made any reference to common constitutional property doctrines or, later, to the Nice Charter, nor indeed have they attached consequences to their cursory definition of copyright as a property right. In this respect, the advent of the Lisbon Treaty did not trigger any substantial change. In the landmark case of *Promusicae* (2008), Article 17 CFREU features only in a cursory statement that has no decisive impact on the fair balance exercise.[22] Subsequent decisions invoke the provision as one of the elements involved in the balance, with no distinguishing implication emanating from the qualification of copyright as a property right. The CJEU refers neither to Member States' common constitutional traditions and property doctrine, as it regularly does in traditional property cases, nor to ECtHR jurisprudence on Article 1 P1. In fact, Article 17(2) CFREU seems to have merely the effect of raising copyright to the status of a fundamental right standing on an equal footing *vis-à-vis* other fundamental rights and freedoms protected by the Charter.

This does not imply that the advent of Article 17(2) CFREU had no effect on CJEU case law. On the contrary, the neutral connotation of the new provision, coupled with the problematic use of fundamental

[18] But see Griffiths-McDonagh (n 15) 80–81, noting the absence of descriptive provisions in the CFREU, along with Geiger (n 14), 116.
[19] For a diachronic overview and critical analysis, see Peukert (n 14) 67–69.
[20] Ibid, 68.
[21] Case C-200/96, *Metronome Musik GmbH v Music Point Hokamp GmbH* [1998] ECR I-1953, §21. Similarly see case C-283/11, *Sky Österreich GmbH v Österreichischer Rundfunk* [2013] EU:C:2013:28, §§23-24.
[22] Case C-275/06 *Productores de Música de España v Telefónica de España SAU* [2008] ECR I-271, §62.

rights and proportionality in copyright cases,[23] has led to questionable results.

The field of remedies stands as a telling case in point. In *Coty Germany,*[24] the CJEU ruled that a German provision allowing banks to refuse to disclose information on the holders of bank accounts linked to trademark infringements was contrary to EU law, holding it in violation of the essence of Articles 17(2) and 42 CFREU on the right to an effective remedy. This led the Court to presume the absence of a fair balance, and thus to skip the proportionality assessment. The decision, broadly criticized for its irreconcilability with the balance struck by Article 8(1) IPRED between the right to privacy and the right to request information, resulted in the judicial introduction of a remedy not granted by national laws, and in the use of Article 17 CFREU to increase the degree of protection granted to IP holders by EU secondary law.[25] Yet, and once again, the consequence derived from Article 17(2) CFREU was the protection of intellectual property as a fundamental right equal to others, with no implications attached to its qualification as a property right. The same approach reappeared in *New Wave*[26] and *Bastei Lübbe*.[27]

Mc Fadden confirmed the *Coty* doctrine. The CJEU had to decide whether a shop owner offering free access to his wi-fi network could be subject to injunctions to (i) terminate the network or (ii) examine all the connections, or (iii) 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 (Article 16 CFREU), the Court concluded that also denying password protection would have amounted to depriving the IP of any effective remedy,[28] implicitly suggesting an obligation for Member States to implement the measure, grounded on the need to preserve the essence of Article 17(2) CFREU.[29] The reasoning excluded – on the basis of debatable assumptions – the notion that the measure would undermine the essence of the ISP's freedom to conduct a business and users' freedom of

[23] *CROSS-REFERENCES WITHIN BOOK*
[24] Case C-580/13*, Coty Germany GmbH v Stadtsparkasse Magdeburg* [2015] EU:C:2015:485.
[25] 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), ???
[26] Case C-427/15 *NEW WAVE CZ, a.s. v ALLTOYS, spol.sr.o.* [2017] EU:C:2017:18.
[27] Case C-149/17 *Bastei Lübbe GmbH & Co KG v Michael Strotzer* [2018] EU:C:2018:841.
[28] Case C-484/14, *Tobias McFadden v Sony Music Entertainment Germany GmbH* [2016] EU:C.2016:689, §80, §§98-99.
[29] Ibid §81. See Mylly (n 25) at ???; contra Martin Husovec, 'Holey cap! CJEU drills (yet) another hole in the e-Commerce Directive's safe harbours' [2017] 12(2) JIPLP 115.

information, but failed to engage in any analysis of what the essence of copyright as a property right under Article 17(2) CFREU is, assuming only the need to provide a remedy that may dissuade users from infringement.

Decisions defining the scope of exclusive rights present similar features. A glaring example is *GS Media*,[30] where the Court – called upon to draw the boundaries of the right of communication to the public (Article 3 InfoSoc) – justified the introduction of additional criteria to distinguish between legitimate and illegitimate conduct[31] with the need to strike a fair balance between freedom of expression (Article 11 CFREU) on the one hand and, on the other, copyright[32] protected under Article 17(2) CFREU and to be granted a high level of protection (Recital 9 InfoSoc).[33] However, the Court did not draw any specific consequence from the constitutional propertization of copyright. The reference to Article 17(2) CFREU was used to confirm the attribution to copyright of the rank of a fundamental right, to be balanced against other rights under Article 52 CFREU. Only in *Scarlet Extended* and *Netlog* did the CJEU take an explicit stance on the specific effect of the provision, excluding any idea that its introduction has granted absolute protection and inviolability to IPRs.[34] Similarly, an indirect reference to the non-absolute nature of the right to intellectual property appeared in *UPC Telekabel*,[35] where it was used to justify a not entirely efficient blocking of infringing conduct by an ISP as still 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.[36] The concept was reiterated in the recent CJEU Grand Chamber trilogy of *Funke Medien*,[37] *Pelham*[38] and *Spiegel Online*[39], where the Court used the very same language to justify the need to strike a fair balance between copyright and other fundamental

[30] Case C-160/15, *GS Media BV v Sanoma Media Netherlands BV and Others* [2016] EU:C:2016:644.
[31] Ibid §§49-51.
[32] Ibid §31.
[33] Ibid §30.
[34] Case C-70/10 *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)* [2011] ECR I-11959, §43; Case C-360/10 *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog NV* [2012], EU:C:2012:85, §41.
[35] Case C-314/12 *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft mbH* [2014] EU:C:2014:192.
[36] Ibid §§62–63.
[37] Case C-469/17 *Funke Medien NRW GmbH v Bundesrepublik Deutschland* [2019] EU:C:2019:623, §72.
[38] Case C-476/17 *Pelham GmbH and Others v Ralf Hütter and Florian Schneider-Esleben* [2019] EU:C:2019:624, §33.
[39] Case C-516/17 *Spiegel Online GmbH v Volker Beck* [2019] EU:C:2019:625, §56.

rights,[40] and to interpret broadly the exceptions provided for in Article 5 InfoSoc 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'.[41]

Despite this forward step, however the Court has never clarified the relation between Article 17(2) and Article 17(1) CFREU, leaving unanswered the question of the implications of copyright propertization, that is, the applicability to copyright of the guarantees and limitations provided for general property rights.

Against this background, the CJEU's interchangeable use of the two paragraphs when analyzing copyright matters has only increased the degree of conceptual confusion. A paradigmatic decision is *Luksan,* where the CJEU invalidated the Austrian denial of copyright over a cinematographic work to its director for violation of EU law, but added that the measure constituted a deprivation of the director's property right, "lawfully acquired" under EU law, violating Article 17(1) CFREU.[42] 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 recognize IP rights granted by EU law within their legal system under Article 17(2). Here stands the institutional guarantee for existing entitlements, while any different regulatory decision would amount to an illegitimate deprivation under Article 17(1). The reference to the provision, however, was only secondary to the finding of infringement of an EU Directive, making its use "cosmetic" rather than technical and binding.[43] Slightly different are the implications of another decision – *Sky Osterreich* – where Article 17(1) CFREU was used to challenge the validity of Article 15(6) of Directive 2010/13, requiring broadcasters to authorize, without compensation, any other broadcaster established in the EU to issue short news reports out of events of high interest that they transmit on an exclusive basis.[44] Although the Court

[40] *Pelham,* §34; *Funke Medien*, §70; *Spiegel Online*, §54.
[41] *Funke Medien*, §71.
[42] Case C-277/10, *Martin Luksan v Petrus van der Let* [2012] EU:C:2012:65, §§68–70.
[43] The reference to Article 17 CFREU in Luksan is strongly criticized by Jonathan Griffiths, 'Constitutionalising or harmonizing? The Court of Justice, the right to property and European copyright law' [2013] 38 ELR 65, 75, who defines it as a mere tool to advance the CJEU's harmonization 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, who downplays its real impact on the outcome of the decision and questions the presumption that IPRs are granted by EU and not national law.
[44] *Sky Osterreich,* §30.

excluded the application of Article 17 – since *Sky Osterreich*'s exclusive broadcasting rights were acquired by means of a contract[45] – the answer seems to suggest that an uncompensated exception to an exclusive right provided by EU law could be challenged for disproportionate violation of Article 17(1) CFREU, as if the Charter provision would indeed have introduced an absolute institutional guarantee for copyright and other IPRs.

The recent decisions centred on the impact of fundamental rights on the interpretation of EU copyright law – namely *Funke Medien*,[46] *Pelham*[47] and *Spiegel Online*[48] – provided a number of useful clarifications, but contributed only minimally to the construction of Article 17(2) CFREU. In *Pelham*, sampling was excluded from the scope of the right of reproduction (Article 2 InfoSoc) to safeguard a fair balance between copyright – which the Court reiterated as not being an absolute right – and Articles 11 and 13 CFREU on freedom of expression and the arts. To support its conclusions, the CJEU argued that preventing the use of unrecognizable samples of a work would be unjustified, since it would hinder the exercise of a fundamental right even if the samples themselves 'would not interfere with the opportunity which the producer has of realising satisfactory returns on (…) investment'.[49] Interestingly, this reasoning echoes the Court's essential function doctrine, adopted from the 1970s to balance between copyright and fundamental freedoms, by taking as a benchmark for the balance not a generic copyright entitlement but the specific subject matter of the right, and thus shelving the blind reference to a "high level of protection" and the related principle of broad interpretation of exclusive rights. Yet the argument was left implicit, if not causally connected to the particular content and structure of copyright as a property right under Article 17(2) CFREU.

The decisions converged in excluding the idea that fundamental rights may allow the introduction of exceptions beyond the scope of Article 5 InfoSoc, for this would endanger harmonization, legal certainty, and consistency in implementation of the InfoSoc Directive.[50] At the same time, however, the CJEU confirmed that Article 17(2) CFREU does not confer any absolute or inviolable status to copyright,[51] but required a broad interpretation of exceptions every time it is necessary to safeguard

[45] Ibid §38.
[46] (n 37)
[47] (n 38)
[48] (n 39)
[49] Ibid §38.
[50] *Funke Medien*, §§56-63; *Pelham*, §§58-64; *Spiegel Online,* §§41–48.
[51] *Funke Medien*, §72; *Pelham,* §33; *Spiegel Online,* §56.

their effectiveness, particularly when they aim at protecting fundamental rights and freedoms,[52] and offered a fundamental right-oriented interpretation of the news reporting exception (Article 5(3)(c) InfoSoc) along the lines of *Deckmyn*.[53] With a remarkable step forward, the CJEU referred to ECtHR case law to draw criteria for the balance between copyright and freedom of expression,[54] and identified the background and tools for interpreting Charter rights in the form of common constitutional traditions and international human rights instruments.[55] Three remaining elements, however, were missing to complete the reordering and correct the distortions affecting CJEU case law. These were: (i) clarification of the relationship between the first and second paragraphs of Article 17 CFREU, that is, the implications of the constitutional propertization of copyright; consequently, (ii) explicit identification of the sources to be used to define the content and structure of the rights protected under Article 17(2) CFREU; and, on that basis (iii) a definition of the essence of copyright and of clearer criteria for a fair balance/proportionality assessment.

The oft-concise, fact-specific reasoning of the CJEU, together with limited or no attention paid to systematic arguments, caused by its predominantly functional and policy-oriented approach to interpretation of EU sources, leaves courts with a "mute" Article 17(2) CFREU that offers no guidance for copyright balance, and that has triggered contradictory interpretative outcomes, some of them resulting in a strong constitutional hedging of copyright. This phenomenon, coupled with the a-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 propertization of copyright crystallized in the CFREU.

Yet a real constitutional propertization of EU copyright is still missing. Indeed, a comparison between the principles featuring CJEU property case law and the arguments used in its copyright decisions clearly shows that the Court has never used its constitutional property doctrines when ruling on copyright matters.

[52] *Funke Medien,* §71; *Spiegel Online,* §55.
[53] *Spiegel Online,* §§71–73.
[54] *Funke Medien,* §70; *Spiegel Online,* §54.
[55] *Funke Medien,* §59; *Pelham,* §61; *Spiegel Online,* §44.

3. Step 2 – Divergent approaches: CJEU copyright case law vs CJEU property case law

The first CJEU decisions on constitutional guarantees and limitations to property trace back to the 1970s, when the Court started evaluating the legitimacy of limitations of national property rights by Community acts. In *Hauer*[56] and *Nold*[57] the CJEU recognized 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'.[58] 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 inclusion of the social function of property as a characterizing trait of the EU property model, representing the lens through which property rights, '*far from constituting unfettered prerogatives, must be viewed*'.[59]

Provided that the essence of the right is preserved and the measure is proportionate, the doctrine of social function represents the platform on the basis of which the CJEU justifies EU interventions – even if uncompensated – that limit national property rights in the general interest, and interfere with Member-State property laws beyond the boundaries set by the Treaties.[60] Instead of being linked to common constitutional traditions, however, the meaning of the concept has been connected to Treaty goals. This originally caused identifying the right with the objectives of construction of the internal market,[61] industrial development, competition, and the like, with marginal mentions of other

[56] Case C-44/79 *Hauer v Land Rheinland-Pfalz*, [1979] ECR 3727.
[57] Case C-4/73, *Nold v Commission* [1974] ECR. 491, 506.
[58] *Hauer*, §17.
[59] *Nold*, §14.
[60] See, eg, case T-65/98 *Van den Bergh Foods Ltd. v Commission* [2003] ECR II-4653, §23; case C-280/93 *Germany v Council* [1993] ECR I-3667, §78; case C-5/88 *Hubert Wachauf v Germany* [1989] ECR I-2609; the Golden Shares cases C-367/98 *Commission v Portugal* [2002] ECR I-4731; Case C-483/99 *Commission v France* [2002] ECR I-4781; Case C-503/99 *Commission v Belgium* [2002] ECR I-4809
[61] The notion of social function should be considered 'particularly in the context of a common organization of the market' in case C-265/87 *Schräder v Hauptzollamt Gronau* [1989] ECR 2237, §15; *Wachauf*, §18; C-170/86 *Von Deetzen v Hauptzollamt Hamburg-Honas* [1988] ECR I-2355, §28; C-177/90 *Kuhn* [1992] ECR I-35, §16; *Germany v Council*, §§78–79; C-306/93 *SMW Winzersekt v Land Rheinland-Pfalz*, [1994] ECR I-5555, §22; C-22/94 *Irish Farmers Association v Minister for Agriculture, Food and Forestry Ireland*, [1997] ECR I-1809, §27; *Metronome Musik*, §21; joined cases C-20/00 and C-64/00 *Booker Aquaculture and Hydro Seafood Ltd v The Scottish Ministers*, [2003] ECR I-7411, §71; joined Cases T-93/00 & T-46/01 *Alessandrini and Others v Commission* [2003] ECR II-1635, §86; Joined Cases C-120/06 and C-121/06 *FIAMM and Others v Council and Commission* [2008] ECR I-6513*, §183*.

objectives such as protection of the right to health or of public security.[62] 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 Article 17 CFREU,[63] even though in some instances the concept has made way for Article 52 CFREU, as in the case of other rights protected by the Charter.[64] This, however, has not caused any substantial change in the test applied to distinguish between expropriation and legislative limitations not requiring compensation, which is still based on the degree of interference with the essence of the right, and on the necessity, appropriateness, and strict proportionality of the constraining measure.[65] The proportionality assessment keeps on being highly detailed, with each step discussed separately and applied to the factual circumstances of the case, offering at the same time the necessary case-by-case evaluation and generalized principles that can be re-used in subsequent decisions, ensuring legal certainty and consistency among precedents.[66] The real shift after Lisbon can be noticed, instead, on the side of the Treaty goals linked to the notion of social function. Since 2009, an increasing number of cases have

[62] See, eg, on the right to health, case C-293/97, T*he Queen v Minister of Agriculture, Fisheries and Food, ex parte Standley and others* [1999] ECR I-2603; case C-491/01, *The Queen v Secretary of State for Health, ex parte British American Tobacco Ltd and Imperial Tobacco Ltd* [2002] ECR I-11453; C-535/03 *Unitymark Ltd, North Sea Fishermen's Organisation v Department for Environment, Food and Rural Affairs,* [2006] ECR-I 2689; joined cases C-154/04 and C-155/04 *Alliance for Natural Health et al v Secretary of State for Health and National Assembly for Wales* [2005] ECR I-6451; on work health and safety see joined cases C-184/02 and C-223/02 *Kingdom of Spain and Republic of Finland v European Parliament and Council of the European Union* [2004] ECR I-07789; on security see joined cases C-402/05 and 415/05 *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [2008] ECR I-6351; on animal health and public health requirements see joined cases *ABNA Ltd and Others v Secretary of State for Health and Food Standards Agency* (C-453/03), *Fratelli Martini & C SpA and Cargill Srl v Ministero delle Politiche Agricole e Forestali and Others* (C-11/04), *Ferrari Mangimi Srl and Associazione nazionale tra i produttori di alimenti zootecnici (Assalzoo) v Ministero delle Politiche Agricole e Forestali and Others* (C-12/04) and *Nederlandse Vereniging Diervoederindustrie (Nevedi) v Productschap Diervoeder* (C-194/04) [2005] ECR I-10423.

[63] As in case C-220/17 *Planta Tabak-Manufaktur Dr Manfred Obermann GmbH & Co KG v Land Berlin* [2019] EU:C:2019:76, §94, where the Court links the principle to Art 52 CFREU; case C-530/11 *Commission v United Kingdom* [2014] EU:C:2014:67, §70; case C-12/11 *McDonagh v Ryanair Ltd.* [2013] EU:C:2013:43, §60; case C-544/10 *Deutsches Weintor v Land Rheinland-Pfalz* [2012] EU:C:2012:526, §54; case C-416/10 *Jozef Križan and others v Slovenská inšpekcia životného prostredia* [2013] EU:C:2013:8, §113; joined cases C-379/08 and C-380/08, *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-2007, §80.

[64] See case C-235/17 *Commission v Hungary* [2019] EU:C:2019:432, §72; case C-600/16 *National Iranian Tanker Company v Council of the European Union* [2018] EU:C:2018:966, §83; case C-258/14 *Eugenia Florescu and Others v Casa Județeană de Pensii Sibiu and Others* [2017] EU:C:2017:448, §49.

[65] Similarly see Ferdinand Wollenschlager, '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), 478–479.

[66] Ibid.

referred to the concept of non-market goals such as protection of fundamental rights, the environment and consumers, bringing CJEU jurisprudence closer to common constitutional traditions and judicial property doctrines.[67]

Tellingly, the Court's copyright decisions do not feature any of the most salient characteristics of its property case law. The notion of social function has never appeared in the reasoning, either 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.[68] Moreover, due to the particular focus of requests for a preliminary ruling submitted by national courts, the CJEU does not provide any rule of thumb to distinguish between deprivations and limitations, but only excludes the presence of a fair balance if the essence of the right is violated, but without offering any further indication. Aside from excluding affirmation that Article 17(2) CFREU confers absoluteness on copyright, which is the only statement that echoes principles featuring property cases, the Court does not use any of its property doctrines to inspire or guide its decisions on copyright matters.

Against this background, theorizing – that the degree of protection granted to copyright emerges from the fact that the CJEU follows a property logic grounded on Article 17(2) CFREU – may be misleading, and may result in improperly labelling the implications of copyright propertization as something that is only the effect of a non-technical proprietary rhetoric.

In fact, if properly developed, the consequences of the constitutional propertization of copyright could be remarkably distant from those generated so far by the judicial application of Article 17(2) CFREU. This is well attested to by the effects of applying consolidated constitutional property doctrines to copyright in a number of Member States.

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[67] As in case C-530/11, *Commission v United Kingdom* [2014] EU:C:2014:67, §70, and case C-157/14, *Société Neptune Distribution v Ministre de l'Economie et des Finances* [2015] EU:C:2015:823, §§66-68. See also, with reference to the right to health see *Planta Tabak*, §97, *Deutsches Weintor*, §55; on the protection of consumer see McDonagh, §63; on environmental protection see *Križan and others*, §114, and *ENI and others*, §82.

[68] On the challenges raised by the pitfalls of the proportionality assessment in copyright cases see Mylly (n 27); Christina Angelopoulos, 'Sketching the Outline of a Ghost: the Fair Balance Between Copyright and Fundamental Rights in Intermediary Third Party Liability' [2015] Info 72 ; more generally, see Filippo Fontanelli, 'The Mythology of Proportionality n Judgments of the Court of Justice of the European Union on Internet and Fundamental Rights' [2016] 36 OJLS 630.

4. Step 2 – counterexamples. The constitutional propertization 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-realization, and participation in the socio-cultural life of the community – copyright has been subject to constitutional propertization (Article 14 GG) since 1971, with significant effects on the copyright balance. In the first and most paradigmatic decision, *Schulbuchprivileg* (1971),[69] the Federal Constitutional Court (*Bundesverfassungsgericht*) followed its property jurisprudence and excluded the notion that authors' exclusive rights covered any form of exploitation, ruling that Article 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 her rights to the extent necessary to pursue the public good'.[70] The notion of social function under Article 14 GG and the 'social character of intellectual property'[71] was also used to support provisions allowing non-commercial school use of copies of protected works after the first licence (*Bibliotheksgroschen*),[72] and unauthorized performance of a protected musical piece at a non-profit event, against equitable compensation (*Kirkenmusik*). More recently, in *Germania 3,* the *Bundesverfassungsgericht* reiterated that proprietary protection of copyright does not cover any form of exploitation,[73] adding that authors must tolerate limitations to their right when needed to allow the expression of others' artistic freedom (Article 5(3) GG),[74] since 'the more the work fulfils its social role, the more it may serve as the origin of another artistic endeavour'.[75] On similar grounds, in *Metall auf Metall*[76] – the case landed before the CJEU as *Pelham* – it reversed two Supreme Court (*Bundesgerichtshof,* BGH) decisions,[77] which condemned as infringing the unauthorized use of a two-second excerpt of a song in a hip-hop loop for disproportionate violation of the claimant'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, limited interference

[69] *Schulbuchprivileg,* 31 BVerfGE 229 (1971), §28.
[70] Ibid, 247–48.
[71] *Kirkenmusik*, 49 BVerfGE 382 (1978).
[72] *Biblioteksgroschenentscheidung*, 31 BVerfGE 248 (1971).
[73] 1 BvR 825/98 (2000), §19.
[74] Ibid.
[75] Ibid, §23.
[76] 1 BvR 1585/13 (2016).
[77] BHG, GRUR 2013, 614.

with exploitation of the work had to be judged proportionate and legitimate.[78]

The results are no different in France, despite its more property-friendly constitutional *milieu*. In the first copyright case (2006), the *Conseil* classified as an illegitimate uncompensated expropriation an obligation imposed on rightholders to provide information on technological measures of protection applied to their works for interoperability purposes, justifying their power to prevent private copying of their works under the property clause of Article 17 *Declaration* with no reference to limitations.[79] While this judgment seemed to confirm fears for the constitutional propertization of copyright,[80] three more recent judgments have taken a different direction.

In *HADOPI* (2009), the French Constitutional Council distinguished copyright from other property rights in the light of its *spécificité,* and excluded the possibility that its protection could justify attributing to an administrative authority, with no judicial review, the power to sanction online infringement with the termination of an internet connection, which deprived users of their freedom of expression.[81] In *Soulier and Doke* (2013), ruling on the constitutionality of a law creating a non-voluntary collective management scheme for digitization of out-of-commerce books, the *Conseil* extended to copyright the three-step proportionality assessment used in other balancing exercises, upholding the measure as proportionate in the light of the general interest protected by law and the guarantees offered to rightholders.[82] The same principle was applied to uphold a provision presuming the joint transfer of a reproduction right and ownership of support in the case of works of art, rejecting claims of violation of an Article 17 *Déclaration* by concluding that rightholders could freely contract around the presumption, which had the public interest goal of facilitating the market for such creations.[83]

A similarly interesting application of constitutional property doctrines to copyright comes from the Spanish *Tribunal Supremo*. In

[78] *Metall auf Metall*, §47.

[79] 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 Propr intell 240; Thierry Revet, 'Les droits de propriété intellectuelle sont des droits de propriété' (2006) RTDCiv 791; Michel Vivant, 'Et donc la propriété littéraire et artistique est une propriété …' (2007) 23 Propr intell 193.

[80] As noted particularly by Bénabou (n 65) 241 and Vivant (n 65) 195.

[81] Conseil Constitutionnel, 10 June 2009, no 2009-580 DC, §§14–17.

[82] Conseil Constitutionnel, 28 February 2014, no 2013-370 QPC. The legislation, challenged before the CJEU, was declared in violation of EU law. See case C-301/15, *Marc Soulier and Sara Doke v Premier ministre and Ministre de la Culture et de la Communication* [2016] EU:C:2016:878.

[83] Conseil Constitutionnel, 21 November 2014, no 2014-430 QPC, 4–7.

Megakini (2012), the Tribunal used the civil code prohibition of abuse of rights and the doctrine of *ius usus inocui* – grounded on the social function of property rights (Article 35 Constitution) and allowing third parties to innocuously 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, it rejected Megakini's claim of copyright infringement against Google's use of snippets of its website in search results, qualifying it as a misuse that was not justified by a legitimate interest or necessary to protect the market for the work, and banning exercise of exclusive rights which divert them from their function and disproportionately harm third parties.[84]

Despite the great similarities between Italian and German constitutional traditions and property doctrines, the precedents of the Italian *Corte Costituzionale* may instead be adduced as evidence of the negative effects that a superficial approach to the constitutional propertization of copyright can impress on development of the subject.

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 compression of freedom of association and freedom to conduct business caused by the monopoly attributed to SIAE over the collective management of authors' rights.[85] No reference was made to the property clause of Article 42 of the Italian Constitution (Cost.), but only to the freedom to conduct a business (Article 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.[86] Later, the Corte was often called upon to assess whether regulation of copyright was compliant with the social function of property under Article 42(2) Cost., but could avoid responding through shying away by declaring the inadmissibility of these claims.[87]

Only in a handful of cases did the Italian constitutional judges seem to perceive the importance of offering a constitutional qualification for copyright *per se*, the most relevant being 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 (Article 41 Cost.), the right to property of the owner of support (Article

[84] 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 JIPITEC 162.
[85] Corte Costituzionale, 19 April 1972, n 65.
[86] Corte Costituzionale, 15 May 1990, n 241.
[87] Eg, Corte Costituzionale, 9 July 1970, n 112; 12 April 1973, n 38.

42 Cost.), and the right to culture (Article 9 Cost.).[88] The *Corte* rejected the claim, underlining the priority granted by law to authors' rights to stimulate creativity and thus to pursue the general interest towards cultural development. It then qualified copyright as property under Article 42 Cost., and briefly evaluated the legislative balance between conflicting constitutional objectives. The reasoning, however, was too concise and did not elaborate on the consequences of applying the social function of property to the specificities of copyright.[89] The superficiality of the precedent weakened its persuasiveness, and opened the gate to the return of conflicting classifications of IP rights, again swinging between Articles 41 and 42 Cost.,[90] with no real implications attached to their constitutional qualification.

In contrast to CJEU case law, the constitutional propertization of copyright at a national level, when properly implemented, carries relevant implications for the copyright balance. To understand whether taking the constitutional propertization of copyright seriously in interpreting Article 17(2) CFREU may lead to similarly virtuous results, the first 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 clarifies that the meaning and scope of the right to property under Article 17 CFREU 'are the same as those of the right guaranteed by the ECHR'.[91] Article 1 P1 ECHR and related ECtHR case law are thus the main reference sources for interpreting the provision. However, the Notes also add that property is a 'fundamental right common to all national constitutions',[92] which requires, under Article 6(3) TEU and Article 52(4) CFREU, taking into account Member States' common constitutional traditions when building the EU constitutional property model, in line with a practice followed by the CJEU since the very early days.

Moulding the three systems presupposes the possibility to find a

[88] Corte Costituzionale, 6 April 1996, n 108.
[89] Ibid, §§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).
[90] 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 trademark case has the Court used Art 42(2) Cost to require the functionalization of IP to social utility (Corte Costituzionale, 3 March 1986, n 42).
[91] Praesidium (n 11), 23.
[92] Ibid.

minimum common denominator, on which commentators have cast doubt in the light of apparent incompatibility between liberal ECHR-CFREU models and the social democratic doctrines characterizing the majority of Member States' constitutional property regimes.[93] While a detailed comparative analysis would go beyond the scope of this contribution,[94] illustrating the key features of the three systems will still suffice to simplify the complexity of their interaction, and verify the feasibility of the operation.

a) The three models

Article 1 P1 ECHR and Article 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 characterizing features of the two property models have been construed through decades of case law.

The most prolific body is the ECtHR.[95] Despite the high deference shown towards the state margin of appreciation in determining national socio-economic policies,[96] from *Sporrong*[97] and *James*[98] the test devised to evaluate state measures has led to delineation of an autonomous constitutional property model having specific characteristics.

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, used interchangeably, overlap with the notion of social function, and have an autonomous meaning identified independently from national definitions, albeit broad

[93] 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 LJ 1778; Tom Allen, 'Liberalism, Social Democracy and the Value of Property under the European Convention on Human Rights' [2010] 59 ICLQ 1055.

[94] I delve into the analysis in more detail in Caterina Sganga, *Propertizing European Copyright. History, Challenges and Opportunities* (Edward Elgar 2018), 191–229 and related bibliography.

[95] On the property jurisprudence of the ECtHR see, eg, Tom Allen, *Property and the Human Rights Act 1998* (Hart Publishing 2005); William Schabas, *The European Convention on Human Rights: A Commentary* (OUP 2015), 971 et seq.

[96] The ECtHR stated it explicitly in *Handyside v. United Kingdom*, (1976) 1 EHRR 737.

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

[98] See *James v United Kingdom*, (1986) 8 EHRR 123, 139–140.

[99] See Allen (n 81) 26–27.

enough to leave room for state discretion.[100] The effect of the measure, and thus the balance between property and the public interest, is assessed on the basis of its economic impact, with great importance attributed to the correspondence between compensation and the market value of the asset, which can be derogated from only in case of important economic reforms or objectives of greater 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 compensated with the market value of the 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 pronounced emphasis on protection of property as a human right may suggest a departure from the social democratic model of constitutional property characterizing several contracting states.[103] Yet this conclusion is fallacious if not accompanied by consideration of the reasons underlying such divergences, which lie in the specific object of the Court's 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 and its value-laden options. The wide margin of appreciation left to states and the greater focus on neutral elements such as legality and economic impact of the measure are indirect acknowledgements of this ontological divergence.[104] These features render the ECHR property model unfit to define the content, structure and functions of property in the EU constitutional framework, and justify its consideration as a complementary – rather than as an antagonistic – model to the regime delineated by Member State constitutions.

This conclusion is supported by the traits of the property model depicted by the CJEU, where the reference to Member States' common constitutional traditions allows complementing the Strasbourg model by reference to the social function of property as part of a stable *acquis*

[100] Further case law on the notion of public interest in Schabas (n 81), 975–6.
[101] Already in *James,* §54.
[102] See, eg, *Gasus Dosier-Und Fordertechnik GmbH v Netherlands*, (1995) 20 EHRR 403; V*enditelli v. Italy*, (1995) 19 EHRR 464; *Chassagnou v France* (2000) 29 EHRR 615.
[103] As in Allen (n 72) 1061.
[104] Explicitly in *Lallement v France*, [2002] ECHR 413, but contra *Poltorachenko v. Ukraine*, Appl no 77317/01 (ECHR, 18 January 2005), considering also the applicants' financial and social status.

communautaire, which justifies limitations to property rights when required by pursuit of Treaty goals and 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 constitutional frame that orients the development of its features.

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, to an array of more neutral statements and a handful of rhetorical relics of individual liberalism. Whatever the textual option, however, the judicial evolution of national models is bringing them closer. To gain a sense of the convergence, it is enough to look at paradigmatic national property models belonging to different parts of 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' (Article 153). The *Grundgesetz* (GG) of 1949 uses the same language but elevates property to the status of a fundamental right (Article 14 GG). Rather than contradicting the presence of a social obligation within the structure of the right, however, the qualification emphasizes the role that property plays in the new social market economy envisioned by the Constitution: offering to individuals the means for their self-realization and involvement in the life of the community, making them active participants in the construction of the German welfare state.[108]

The *Funktionseigentum* (property function) theory, where solidarity duties are parts of the structure of the right, has been further detailed in the case law of the *Bundersverfassungsgericht*. *Hamburg Flood Control* (1968)

[105] Italy (Art 42); Germany (Art 14); Spain (Art 33); Ireland (Art 43); Hungary (Art 13); Slovakia (Art 20); Czechia (Art 11, Charter of Fundamental Rights and Freedoms); 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 LR 733, 745, and Donald P Kommers, Russell A Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany* (3rd edn, Duke University Press 2012), 241–242.

framed the protection offered by Article 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 less importance to commercial property or assets held as an investment.[110] Specifying that 'there is no pre-existing and absolute definition of property' (*Schulbuchprivileg*)[111] crystallized in existing entitlements, Article 14 GG allows its restrictions, restructuring and termination in the public interest, legitimizes uncompensated regulatory intervention, and admits indemnification lower than market value (*Nassauskiesungsbeschluss*),[112] also upholding the rebalancing of the conflicting economic interests of private parties (*Feldmühle*) if in pursuance of social goals.[113]

In line with the *Drittwirkung* tradition, Article 14 GG and the function theory have also been used horizontally. Forbidding flyering in shopping malls has been censured as in violation of freedom of expression;[114] tenants' right of access to information[115] has prevailed over property and forced acceptance of their requests to install television antennas 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 the rightholder's personal needs.[116]

Constitutional clauses using a more nuanced text have produced similar judicial results. One example is the Italian model, where Article 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 Article 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]

[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] BVerfGE 229 (1971).
[112] 58 BVerfGE 300 (1981), §307.
[113] 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 348–349, [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

reduction of compensation below market value,[119] and owners' freedom of contract in the case of residential leases to ensure dignified housing for all.[120] Similarly, the doctrine has been causally connected to the attribution of a higher degree of protection to assets closer to the owner's personal needs and self-development[121] and guided the balance between property and conflicting constitutional rights in antenna[122] and shopping mall flyering cases,[123] in judicial extension of the tort of nuisance to protect the right to health,[124] or in constraint on the owner's right to panorama to preserve a neighbour's privacy right.[125]

Again, in Member States characterized by liberal constitutional property models, evolutionary judicial trends have pointed in similar directions. A glaring example is France, where the definition of fundamental rights and liberties is left to the *Déclaration* (1789), which defines property as a natural and imprescriptible right (Article 2), inviolable and sacred, expropriable only for public necessity and upon payment of just and prior indemnity (Article 17), with no further reference to limitations or functionalization.[126] Despite the rhetorical proclamations, the *Conseil Constitutionnel* has adapted interpretation of Article 17 *Déclaration*[127] to the needs of the contemporary French welfare state, transforming the notion of public necessity in expropriation into that of general interest which justifies general 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* could distinguish between compensated expropriation and

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 Corte Costituzionale, 25 May 1957, n 61 [1957] Giur cost, 1957, 695, the Court has reiterated the principle in a high number of precedents. Among the most remarkable 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 348–349.

[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.

[122] Eg, Corte di Cassazione, 16 December 1983, n 7418 [1984] Foro it I, 415; 29 January 1993, n1139 [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] 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.

[127] Declared binding by the Conseil Constitutionnel, 16 January 1982, No 81–132, §18 due to the reference made by the preambles of the constitutions of 1946 and 1958.

[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 et seq.

uncompensated regulatory interference,[129] identify public policy goals justifying compression of proprietary interests on the basis of a flexible proportionality test,[130] and uphold the prevalence attributed by law to another fundamental right against property,[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 granted to the ECHR, frequent references to ECtHR case law and the *Conseil d'Etat*'s extension of its *référé-liberté* proceedings to property that have caused a partial shift towards a more liberal approach,[134] the broad notions of general interest and social utility still make the *Conseil Constitutionnel*'s property jurisprudence share several traits with the social democratic model of property typical of other national traditions, and feature concepts that are functionally equivalent to the social function doctrine, although the term is never consistently mentioned in court decisions.

b) A common path?

Against this background, and backed by Article 3(3) TUE, which aims at bringing internal market and welfare states closer by creating a 'highly competitive social market economy', the social function doctrine or its functional equivalents may act as a convergence platform between the three models.

For the ECtHR, social function is a neutral notion overlapping with the concept of general/public interest. The CJEU takes a step forward, using social function as an autonomous concept which excludes the absoluteness of property and allows its limitations in pursuance of Treaty goals. However, its use has been quite limited, and never a determinant for the result of the proportionality assessment. In contrast, at a national level the doctrine enjoys much stronger force. The notion of social function *qua* doctrine colours property with an implied duty of solidarity; it leads to a clearer definition of its interplay with other constitutional rights as well as cultural, social, and economic goals; and it

[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; 28 July 1998, no 98-403 DC.
[131] Eg, Conseil Constitutionnel, 22 October 2009, no 2009-590 DC.
[132] *Hadopi* (n 57).
[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 analyzed by Laurence Gay, 'Propriété et logement. Réflexion à partir de la mise en œuvre du référé-liberté' (2003) *Revue française de droit constitutionnel* 318.

makes the degree of protection offered to property dependent on the social relevance of its object and its connection with the owner's dignity and self-realization. Horizontally it defines its scope *vis-à-vis* other rights on the basis of its object, underlying interest, and public policy goals; it operates as a residual clause to tackle dysfunctional conduct; it guides interpretation of general balancing clauses, sketching the essence of property and offering clearer weighting criteria; and it may justify the extension of property limitations by analogy.

Against this background, it becomes clear how the correct constitutional propertization of copyright under Article 17 CFREU – merging the three models on the basis of the Praesidium's indications – may lead to opposite results compared to those triggered by the property logic suggested by the silence of Article 17(2) CFREU, opening the road to 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 briefly define its content,[136] as delineated by secondary EU law and CJEU 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 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-realization, which requires a higher degree of constitutional protection compared to other entitlements. When attributed to producers, publishers and other commercial actors, copyright performs the social function of incentivizing the industrial development and competitiveness of EU creative industries, achieved by ensuring them a 'fair' return on

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

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

[138] Recently reiterated by the Commission's Communication 'Towards a modern, more European copyright framework', COM (2015) 626 final, 2.

[139] InfoSoc, Rec 11.

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 meant as covering any possible exploitation of a work, but only those activities necessary for rightholders to obtain the level of remuneration needed for copyright to perform its social function(s). This approach, confirmed in *FAPL*,[141] aligns with the CJEU's essential function doctrine, developed in the 1970s and 1980s, namely to regulate the interplay between copyright, fundamental freedoms, and competition law.[142]

Along with these goals, remuneration/return on investment are functionalized 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 in order to spur growth and job creation,[143] the second in order to attain social and cultural goals[144] such as 'the widest possible dissemination of works',[145] access to knowledge or culture,[146] and promotion of cultural

[140] Dir 2004/48/EC of 29 April 2004 on the enforcement of intellectual property rights [2004] OJ L195/16 (IPRED), Recital 2.

[141] Joined Cases C-403/08 *Football Association Premier League Ltd and Others v QC Leisure and Others* and C-429/08 *Karen Murphy v Media Protection Services Ltd* [2011] ECR I-09083 [FAPL]

[142] Among the most important cases see, on fundamental freedoms, Case C-78/70, *Deutsche Grammophon Gesellschaft GmbH v Metro-SB-Großmärkte GmbH & Co* [1971] ECR 487, §11; Joined Cases 55/80 and 57/80 *Musik-Vertrieb Membran and K-tel International v GEMA* [1981] ECR 147, §12; Case C-62/79**,** *SA Compagnie générale pour la diffusion de la télévision, Coditel, and others v Ciné Vog Films and others* [1980] ECR 881, §14; Case C-158/86, *Warner Brothers Inc and Metronome Video ApS v Erik Viuff Christiansen* [1988] ECR 2605**,** §15. On competition law see, eg, 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], and case C-418/01*, IMS Health GmbH & Co OHG v NDC Health GmbH & C. KG* [2004] ECR I-503.

[143] As, eg, in Council Dir 91/250/EEC of 14 May 1991 on the legal protection of computer programs [1991] OJ L122/42 (Software I), Recital 2; Dir 96/9/EC of 11 March 1996 on the legal protection of databases [1996] OJ L77/20 (Database), Recitals 9, 11–13; Council Dir 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), Rec 8; Council Dir 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights [1993] OJ L290/9 (Term), Recital 11; InfoSoc, Recs 2 and 4, IPRED, Rec 1.

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

[145] IPRED, Rec 2.

[146] OWD, Rec 20; Dir (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, Rec 1.

expression, identity, and diversity.[147] The preamble to the most recent horizontal intervention by the EU legislator – the CDSM Directive – confirms the same bipolar structure (Recital 2).[148] It is important to note that social and cultural objectives justify protection of exclusive rights rather than only acting as functions of exceptions. This makes them an integral part of the structure of rights that have to be realized through their exercise and not only through their exceptional limitations. It follows that, in order to receive full protection against conflicting interests, exclusive rights should be exploited according to – and never in contrast with – these goals.

7. Step 6 – from protection to limitation. Horizontal and vertical effects of the "new" Article 17(2) CFREU on EU copyright law

The constitutional propertization of copyright under the "new" interpretation of Article 17 CFREU may have a significant impact on defining 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 attributing a different degree of protection to different works based on their social relevance and nature. For instance, the social importance of raw data and information and the greater monopoly risks posed by copyright when applied to technical and informational works would justify more limited exclusivity, and a weaker position in the case of a clash with other rights/interests. Commercial copyright would be more exposed to compromises than copyright closer to the rightholder's dignity and self-realization. Additionally, the more strongly a work contributes to the cultural *milieu* of a community, the weaker it would be against conflicting interests, as already theorized by the German Constitutional Court – most recently in *Germania 3*.

The doctrine could also support the introduction of abandonment and related remedies, in line with patent and trademark laws.[149] Copyright does not know abandonment; all actions and remedies against infringement are either imprescriptible or subject to very long

[147] InfoSoc, Recs 12 and 14; Dir 2014/26/EU of 26 February 2014 on collective management of copyright and related rights [2014 OJ L84/72, Rec 3, OWD, Recs 18 and 23.

[148] Dir (EU) 2019/790 of 17 April 2019 on copyright and related rights in the Digital Single Market [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* (CUP 2013), 214.

statutes of limitation; fair remuneration rights are often unwaiveable, and the inefficiencies caused by rightholder inactivity are usually tackled by collective management or extended licensing schemes.[150] The drivers of the approach lie in moral rights and in the conceptualization of copyright as a defence tool for authors, who are seen as weaker parties to be protected *vis-à-vis* commercial rightholders and the public.[151] This argument recurs in recent legislative texts[152] and court decisions,[153] and finds confirmation in those directives addressing the negative impact of rightholder 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 the use of ad hoc solutions seems to exclude the possibility of attaching further consequences to the non-use of exclusive rights, the constitutional propertization of copyright may instead justify different balancing considerations. Property law remedies provided for abandonment could be adapted to match the social function(s) of copyright, which intertwine protection of author self-realization with industrial incentives and cultural policy goals. In this sense, moral rights would be retained by rightholders, and thus the possibility to modify a work and withdraw it from the market. 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 qualified as an implied renunciation of any claim against infringements, thence leading to unenforceability of copyright.[155] This distinction would guarantee the proportionality of limiting authors' property rights and escape the ban against formalities imposed by Article 5(2) of the Berne Convention.[156]

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[150] As in the case of Art 5 Rental. Lately for cross-border licences of audiovisual works (CMO Dir, 2014) orphan works (OWD, 2012), and for out-of-commerce works in the CDSM Dir, Arts 8–11.

[151] Burrell and Hudson (n 155) 217, 223.

[152] The most recent being the mechanisms introduced by the CDSM Dir 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 COM(2016) 593 final, 8.

[153] See, explicitly, BHG (1995) 129 BGHZ 66, *Mauer-Bilder*, commented in 28 IIC 282 (1997), and Opinion of AG Whatelet in *Soulier and Doke* (n 58) §43, 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.

[154] CDSM Dir, Arts 8-11; OWD, Art 6.

[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 (n 76) 241–245.

[156] Already in his Opinion in *Soulier and Doke* (n 58, §40) AG Wathelet maintained that the burden imposed on authors to withdraw from the ECL scheme was incompatible

Again on the side of **content** of the right, the constitutional propertization of copyright may produce significant results, clarifying and moderating the effects of Recital 9 InfoSoc on CJEU case law[157] via use of the social function doctrine to identify the specific subject matter of each exclusive right.

Traces of this approach are already present in those early decisions where the CJEU 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 exercise of a legitimate copyright monopoly would turn into abuse of a dominant position under Article 102 TFEU.[159] More recently, in *UsedSoft* the Court extended exhaustion to licences of digital software copies, in order to avoid mere contractual labelling (licence instead of sale) excluding operation of the principle and allowing rightholders to demand further remuneration after each new sale, going beyond what was necessary for copyright to perform its institutional functions while tilting the internal balance of the discipline. [160] In this strain of cases, notions such as "appropriate remuneration" or "satisfactory share" of the market[161] have been used to draw the borders of rights in cases of conflict with other rights, freedoms or public policies, excluding the notion that EU copyright law would protect the possibility to extract the maximum profit possible from a work.[162] Yet the Court has never used a function-

with the prohibition against formalities of Art 2 BC. But see *contra* 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* (n 25) to the extensive Case C-516/13 *Dimensione Direct Sales Srl, Michele Labianca v Knoll International SpA* [2015] EU:C:2015:315, §33 and Case C-5/11, *Criminal proceedings against Titus Alexander Jochen Donner* [2012] 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) EIPR 327; Joao 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 Bernt Hugenholtz, Sam Van Velze, 'Communication to a New Public? Three Reasons Why EU Copyright Law Can Do Without a "New Public"' (2016) 47(7) IIC 797, 810.

[158] (n 150).

[159] See *Magill* and *IMS Health* (n 150).

[160] Case C-128/11, *UsedSoft GmbH v Oracle International Corp* [2012] EU:C:2012:407, §62, following *Metronome Musik,* §14; Case C-61/97 *FDV* [1998] ECR I-5171, §13, and *FAPL*, §106.

[161] As in *FAPL,* §108. The same language is used by *UsedSoft*, §63, and already in *Warner Bros,* §§15-16; *Metronome Musik,* §16.

[162] The principle is well consolidated. See *Coditel I,* §§15-16; *Musik-Vertrieb Membran,* §§9,12; Joined Cases C-92/92 and C-326/92, *Phil Collins v Imtrat Handelsgesellschaft mbH e Patricia Im-und Export Verwaltungsgesellschaft mbH e Leif Emanuel Kraul v EMI Electrola*

based approach as a horizontal interpretative method to guide development of the subject. Against this backdrop, a more elaborated and consequential constitutional propertization of copyright would help in filling these gaps.

Reading the scope of exclusive rights through the lens of the social function doctrine, the core of the right would be constituted only by those acts of exploitation that are necessary to obtain remuneration enough to protect the author's dignity, independence and self-realization, and incentivize 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 thus not be protected.

This approach could lead, for instance, to flanking the filter of originality with a *de minimis* doctrine to draw the borders of the right of reproduction and to distinguishing between protectable and non-protectable excerpts, excluding infringement where the quantity used has no impact on – nor competes with – exploitation of the work.[163] Similarly, it could help circumscribe the distribution right to acts strictly directed to 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 rightholders to perceive appropriate/fair remuneration in view of the social functions of copyright. In the case of conflict with other rights or interests, this would exclude indirect and merely facilitative forms of communication, such as hyperlinking.[164]

Propertization 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, as in

GmbH [1993] ECR I-05145, §20; FAPL, §94; Case C-115/02 *Administration des douanes v Rioglass and Transremar* [2003] ECR I-12705, §23 and the case law cited therein; Case C-222/07 *UTECA v Administración General del Estado* [2009] ECR I-1407, §25 and the case law cited therein.

[163] Similarly to what is provided by Art 5(3)(o) InfoSoc, 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 Hugenholz and Van Velze (n 164) 812–814, and European Copyright Society 'Opinion on the Reference to the CJEU in Case C-466/12 Svensson' https://europeancopyrightsocietydotorg.files.wordpress.com/2015/12/european-copyright-society-opinion-on-svensson-first-signatoriespaginatedv31.pdf (accessed 30 September 2019) §35.

Deckmyn.[165] At a horizontal level, a strict reading of an exception that hinders fulfilment of its role would be forbidden, particularly when the provision shares the same socio-cultural goals as the exclusive right it limits. The CJEU indeed shared the same conclusion, albeit on different premises, in *FAPL*. Focus on the functions of legislative limitations may also allow them a flexible, broader interpretation to ensure they fulfil their role.[166] Cases such as *Ulmer* and *VOB* have followed the same 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 (*Funke Medien*, *Pelham* and *Spiegel Online*) confirm the validity of this reading. The social function doctrine would help in generalizing this principle under Article 17(2) CFREU, stabilizing its application and results.

By the same token, the vague fair balance test would be enriched by guidelines, still underdeveloped in CJEU case law, leading to its consolidation in a binding doctrine.[168] The impact of social function on defining the essence of exclusive rights would provide an objective and transparent benchmark for performing proportionality assessment, weighing against conflicting fundamental rights not a generic copyright entitlement but the core of an exclusive right defined in the specific case, depending on the features of the work and market involved.

The doctrine would also exert a re-balancing impact on judicial application of the three-step test (Article 5(5) InfoSoc), which the CJEU has used as a filter for applying existing exceptions.[169]. Interpreting the three prongs of the test in the light of the social functions of copyright would counterbalance the predominance of market arguments with value-laden considerations. "Normal exploitation" would be construed on the

[165] Case C-201/13, *Johan Deckmyn and Vrijheidsfonds VZW v Helena Vandersteen and Others* [2014] EU:C:2014:2132, §§17–20.

[166] Similarly see Christophe Geiger, "'Constitutionalising" Intellectual Property Law? The Influence of Fundamental Rights on Intellectual Property in Europe' [2006] 37 IIC 371, 377, and Bernt Hugenholtz, Martin Senftleben, 'Fair Use in Europe: In Search of Flexibilities', available at http://ssrn.com/abstract=2013239, 13.

[167] Case C-174/15, *Vereniging Openbare Bibliotheken v Stichting Leenrecht* [2016] EU:C:2016:856 and Case C-117/13, *Technische Universität Darmstadt v Eugen Ulmer KG* [2014] EU:C:2014:2196.

[168] The vagueness and instability of the doctrine is well emphasized by Angelopoulos (n 68).

[169] From Case C-435/12, *ACI Adam BV and Others v Stichting de Thuiskopie* [2014] EU:C:2014:254 onwards. For a critique see, Hugenholtz and Senftleben (n 172), 18; Geiger (n 172) 378; Jonathan Griffiths, 'The "Three-Step Test" In European Copyright Law – Problems and Solutions' [2009] IPQ 428; Andre Lucas, 'For a Reasonable Interpretation of the Three-Step Test' (2010) 6 EIPR 277; Christophe Geiger, Reto Hilty, Jonathan Griffiths, Uma Suthersanen, Declaration 'A Balanced Interpretation Of The "Three-Step Test"' [2010] 1 JIPITEC 119; Christophe Geiger, Daniel Gervais, Martin 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.

basis of the social function of the given economic right, and limited to the acts required to perform it, while the legitimacy of the rightholder's interest would be measured in the light – and within the limits – of its social function, considering the type of work and subject involved and potential conflicting rights. The closer the exercise of the right to 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 effectively used to distinguish 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 realization of the goals of regulation, while disproportionately damaging conflicting interests.[171] Behaviours sanctioned by national courts have ranged from those having 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 CJEU, 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

[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 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) IIC 407, who emphasizes how the diverging interpretations offered by the WTO DBS make it impossible to theorize the existence of a uniform interpretation of the test featured in Arts 13 (copyright), 17 (trademark) and 30 (patent) of the TRIPS Agreement (ibid at 435). However, aside from the critiques moved to the DBS approach (see n 169), 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-Senftleben (n 169) 618–622. 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 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, Silvia Scalzini, 'From Abuse of Right to Copyright Misuse: A New Doctrine for EU Copyright Law' (2017) 48(4) IIC 405, 416–421.

essential function(s) of copyright, tailored to the sectors and type of work involved.[173]

The doctrine 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 propertization of copyright may confute this conclusion, instead requesting intervention in dysfunctional conduct, particularly in the case of conflict with other interests, rights, and public policy goals. In that light, blending the indications coming from 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 qualified interest of a counter-interested party, without objective justification based on the social function of the right.[175] The basic proportionality test, weighing harms and benefits and using as a benchmark the essence of the right, 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. The doctrine, which would find a strong legal basis in Articles 52 and 54 CFREU and confirmation in Article 3(2) IPRED, which requires States to contrast abuses in copyright enforcement, would not entail an exception but rather a circumscription of the scope of exclusive rights, and would thus escape the filtering of the three-step-test.

Last, the constitutional propertization of copyright would offer new balancing solutions to the practice of compression or exclusion of exceptions in End User License Agreement (EULA) clauses. The CJEU has already suggested that freedom of contract is also not absolute,[176] 'but must be viewed in relation to its social function' and subject to proportionate limitations.[177] EULA clauses, as forms of exercising copyright, would be assessed in terms of their compatibility with the

[173] See (n 150).

[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 RIDA 2 and, in the area of copyright contract, see CSECL-IViR-ACLE, 'Final report. and development of recommendations for possible future rules on digital content contracts', available at http://ec.europa.eu/justice/consumer-marketing/files/legal_report_final_30_august_2011.pdf (accessed 30 September 2019), 275 et seq.

[175] See Sganga and Scalzini (n 178), 425 et seq. 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 Case C-277/05, *Société thermale d'Eugénie-les-Bains v Ministère de l'Economie* [2007] ECR I-6415, §§21,24,28,49.

[177] *Sky Österreich,* §§42–43.

social function of copyright in cases of conflict with the rights or interests of others. Since exceptions represent uses that do not require authorization and thus fall outside the scope of what the legislator believes to be essential to protect rightholders' interests, it is at least 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 not justified by the need to protect the essence of copyright, as defined in the light of its social function, thus constituting a valid defence against the licensor's potential claim of infringement.

8. Conclusions

In line with a theory that has characterized the history of the institution since its early days, in the EU, too, the constitutional propertization of copyright under Article 17(2) CFREU has been accused of being the ultimate culprit of its overprotection, to the detriment of conflicting rights, interests and goals. Together with the traces of property logic in secondary sources, tilting the balance in favour of rightholders, a number of CJEU decisions which have increased the protection offered to copyright on the basis of Article 17(2) CFREU have been used as clear evidence of the validity of this thesis.

In fact, the CJEU has never made the degree of protection granted to copyright dependent on its qualification as a property right. Article 17(2) CFREU is mentioned only to reiterate how copyright is a fundamental right that stands on an equal footing in the balance with other rights and freedoms protected by the Charter, but the proprietary qualification does not attribute any higher status to copyright in the proportionality assessment, as if the CFREU's IP clause were an independent provision rather than part of the general property clause. The question inspiring this chapter was, then, whether taking the propertization of copyright seriously would still generate the same results, or would rather produce a different outcome, particularly in the light of numerous national experiences where applying constitutional property doctrines to copyright has been used to uphold the legitimacy of legislative limitations and to emphasize its functionalization to broader public goals.

Understanding whether drawing application of EU constitutional property doctrines to copyright from Article 17(2) CFREU may produce results similar to those realized at a national level required preliminary

identification of the features of the EU constitutional property model. The multilevel interplay of sources suggested by the Praesidium's Explanatory Notes to construct the meaning and scope of the right of property under Article 17 CFREU found a convergence platform in the social function doctrine, which colours property with solidarity duties, functionalizes it to 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 depending on the social relevance of their object and their proximity with the owner's dignity and personal needs.

Read through this lens and in the light of the social function(s) attributed to copyright by secondary sources, the constitutional propertization of authors' exclusive rights and the social function doctrine may have – as happened at a national level – rebalancing effects on the definition of the subject matter of copyright, the degree of protection attributed to different works, identification of the essence of exclusive rights, interpretation of exceptions and the three-step test, and construction of the fair balance doctrine, also allowing intervention in dysfunctional or abusive conduct.

Rather than implying its constitutional hedging and extremization, technical propertization of copyright under Article 17(2) CFREU may constitute an important opportunity for 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, apply that elaborated doctrine to its interpretation of Article 17(2) CFREU, deepen its analysis of the (social) function(s) of copyright, and provide an interpretation of EU secondary law consistent with these premises. Whether this shift will materialize remains mostly in the hands of the Luxembourg judges, and the approach they decide to take in furtherance of the CJEU's harmonization agenda in the field of copyright.