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Caterina Sganga

THE ROLE OF COPYRIGHT HISTORY IN CASTING OUT THE DEMONS OF COPYRIGHT PROPERTIZATION

1. Reading the contributions of some of the most authoritative US copyright scholars, it is not rare to find strong arguments against the qualification of copyright as property, also defined as its "propertization". The phenomenon has been held responsible for the incontrollable expansion of exclusive rights to the detriment of fair uses, the extension of the term of protection, the compression of the public domain, and the consequent enclosure of knowledge that has particularly characterized the digital revolution and its "pay-per-access" philosophy[1]. Artic-

[1] *Ex multis*, see J. Hughes, *Copyright and Incomplete Historiographies: Of Piracy, Propertization, and Thomas Jefferson*, in *Southern California Law Review*, 79, 2006, p. 993 ff.; A. Mossoff (ed.), *Intellectual Property and Property Rights*, Cheltenham-Northampton, 2013, p.xi and related ample bibliography; S. Gosh, *Globalization, Patents and Traditional Knowledge*, in *Columbia Journal of Asian Law*, 17, 2003, p. 75 ("*Scholars have criticized the increased propertization of intellectual property to the detriment of the public domain and non-market values*"); M. J. Madison, *Legal-Ware: Contract and Copyright in the Digital Age*, in *Fordham Law Review*, 65, 1998, p. 1143 ("[G]rowth in 'propertization' of intellectual property rights is driving increases in transactional practice"); R.P. Merges, *Intellectual Property and the Costs of Commercial Exchange: A Review Essay*, in *Michigan Law Review*, 93, 1993, pp. 1571-72; R.C. Picker, *From Edison to the Broadcast Flag: Mechanisms of Consent and Refusal and the Propertization of Copyright*, in *University of Chicago Law Review*, 70, 2003, p. 281 ("roughly 100-year path that has taken us from the age of Edison to the age of encryption and the propertization of copyrighted works"); M.C. Staples, *Kelly v. Arriba Soft Corp.*, in *Berkeley Technology Law Journal*, 18, 2003, p. 69; A. Sieber, *Note,*

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ulated doctrinal discussions analyse the economic, philosophical and conceptual implications of the proprietary qualification of copyright, with little care for dogmatic aspects, due to the broad subject matter of property in common law, and its uncontested extension to cover a broad range of immaterial goods.

On the contrary, the traditional aversion of civil law scholarship against the notion of intangible property has long hindered the development of a similar debate in Europe. Here, the doctrine has traditionally engaged in heated skirmishes on the dogmatic nature of copyright, always recognizing that, in any case, the proprietary classification of authors' rights would only be a theoretical *divertissement* deprived of any systematic effect, in light of the bare compatibility of civil code property rules, tailored around tangible assets, with the immaterial object and personalist nuances of copyright[2]. However, the evolutions of the continental property model towards higher flexibility and a coverage of intangible goods, coupled with the hybrid traits of the system built by the harmonization of EU copyright, seem to have caused a change in the approach to the issue[3].

With an acceleration in the past decade, the language of property has also penetrated in the tangles of EU copyright sources. Recently, the EU legislator has offered some clear hints as to its preferred definitory option. Article 17(2) of the Charter of Fundamental Right of the European Union (CFREU) provides that "intellectual property shall be protected", placing the cryptic intellectual property (IP) clause under the provision protecting the right to property[4]. Recital 9 of the Infor-

The Constitutionality of the DMCA Explored: Universal City Studios, Inc. v. Corley & United States v. Elcom Ltd., in *Berkeley Technology Law Journal*, 18, 2003, p. 37.

[2] See, most recently, T. Dreier, *How Much "Property" Is There in Intellectual Property? The German Civil Law Perspective*, in H.R. Howe, J. Griffiths (eds.), *Concepts of Property in Intellectual Property Law*, Cambridge, 2013, p. 116 ff., esp. pp. 126-7. See, more generally, A. Peukert, *Guterzourdnung als Rechtsprinzip*, Tübingen, 2008.

[3] In this context, see the example of the Draft Common Frame of Reference, which states that «"property" means anything which can be owned; it may be movable or immovable, corporeal or incorporeal'» (C. Von Bar, E. Clive, H. Schulte-Nolte et al (eds.), *Principles, Definitions and Model Rules of European Private Law – Draft Common Frame of Reference, Outline Edition,* Munich, 2009, p. 56. Along the same lines, see S. Van erp, *From "Classical" to Modern European Property Law?*, in *Essays in Honour of Konstantinos D Kerameus,* Athens-Brussels, 2009, p. 1517 ff.

[4] For a comment, see C. Geiger, *Intellectual Property Shall be Protected!? – Article 17(2) of the Charter of Fundamental Rights of the European Union: a Mysterious Pro-*

mation Society Directive (InfoSoc, 2001/29/EC)[5] demands the granting of a high level of protection to copyright in light of its key role in stimulating intellectual creations, and recognizes intellectual property "as an integral part of property", causally linking this qualification to the incentive it provides "for the maintenance and development of creativity in the interests of authors, performers, producers, consumers, culture, industry and the public at large". A similar language can be found in Recital 32 of the Enforcement Directive (2004/48/EC)[6], while a number of copyright cases decided by the Court of Justice of the European Union (CJEU) have used the proprietary label with no additional argumentation, oftentimes to justify the preference attributed to authors' rights against conflicting rights or the public interest[7].

This qualification comes in the context of the construction of an EU copyright model that, similarly to the trends identified on the other side of the Atlantic Ocean, has consistently left unsolved, or even created, significant imbalances between copyright and users' fundamental rights and freedoms, while hindering the fulfilment of several social and cultural policies goals. It is against this background that some commentators have theorized that the hidden "property logic" influencing the approach of EU legislator and courts might have had a distortive impact on the evolution of EU copyright law[8], and contributed to its systematic asymmetries and departure from its originating

vision with an Unclear Scope, in *EIPR*, 2009, p. 115, ad J. Griffiths, L. Mc Donagh, *Fundamental Rights and European IP Law: The Case of Art 17(2) of the EU Charter*, in C. Geiger (ed.), *Constructing European Intellectual Property Achievements and New Perspectives*, Cheltenham-Northampton, 2013, p. 75 ff.

[5] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L 167/10 [InfoSoc]

[6] Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, OJ L 157/45. Recital 32 reads «This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In particular, this Directive seeks to ensure full respect for intellectual property, in accordance with Article 17(2) of that Charter».

[7] For a broader analysis, allow me to refer to C. Sganga, *Propertizing European Copyright. History, Challenges and Opportunities*, Cheltenham-Northampton, 2018, pp. 110 ff. and 151 ff.

[8] Among the literature available in English, see A. Peukert, *Intellectual Property as an End in Itself,* in *EIPR*, 33(2), 2001, p. 67.

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national copyright models. Yet, the use of the term "logic" testifies to a view of the proprietary qualification as mere rhetorical stance, dogmatically wrong, hence not worth of systematic analysis, but only of straight rejection and correction of its improper effects. This line of arguments appears, in fact, quite linear and simplistic when compared to the articulated narrative and reflections featuring the North-American analysis, which has also crossed the borders of doctrinal *querelles* to reach courtrooms and legislative debates[9].

There is one element that the two experiences share in common, though, and that is the oversimplification of the nature and effects of copyright propertization, as if the phenomenon would be – and has always been – unitary in its epiphanies, always non-technical, and inevitably negative for the copyright balance. This assumption has consistently led to the rejection of the proprietary classification of authors' rights, usually in favour of its qualification as monopoly, seen as more regulatory, less absolute and open to flexibility and constraints in consideration of other rights, interests and goals[10]. It comes as no surprise that, with the exception of few remarkable attempts[11], there is no trace of comprehensive contributions that would try to verify whether the use of private law and constitutional property as systematic framework could, instead, guide the evolution of copyright law towards more predictable, consistent and balanced results.

This paper aims to confute the validity of this oversimplification, through a de-structured analysis of genesis, rationales and impact of the epiphanies of propertization in copyright history. To lay the groundwork, Part II briefly provides the methodological background inspiring the study and its approach. Part III focuses on the most significant phases of development of the two main models of copyright (Eng-

[9] As reported in J. Hughes, *op. cit.*, pp. 995-6.

[10] See the recent reconstruction of R. Caso, G. Dore, *Copyright as Monopoly: The Italian Fire Under the Ashes* (March 12, 2016), *Trento Law and Technology Research Group Research Paper* No. 26, available at www.ssrn.com/abstract=2746794 [last accessed 15 December 2019], and related bibliography.

[11] Apart from A. Peukert, *Guterzourdnung,* cit., see M. Goldhammer, *Geistiges Eigentum und Eigentumstheorie*, Tübingen, 2012, and L. Moccia, *La proprietà intellettuale come proprietà globale: tendenze e problemi*, in Aa.Vv., *Studi in onore di Aldo Frignani. Nuovoi orizzonti del diritto comparato e transnazionale*, Napoli, 2011, p. 645 ff., with a focus on the implications of having the propertization of intellectual property stemming chiefly from supranational sources.

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land) and authors' rights (France)[12], using as complementary test beds Germany and Italy, in light of the second-generation nature of *diritto d'autore* and *Urheberrecht*, and their distinct traits compared to the French system. The analysis identifies the factors influencing the emergence of proprietary language, arguments and rules in the construction and evolution of the four copyright/authors' rights models, shedding light on their interaction, and explaining the variables which led apparently similar copyright propertizations to the production of often radically different regulatory outputs. The results of this comparative exercise represent the ultimate evidence of the fallacies underlying the doctrinal oversimplification of the phenomenon and the improper generalization of its potential results. At the same time, they can provide useful analytical tools for legal formants to better understand origins and implications of the contemporary copyright propertization, and to – hopefully – better orient its effects and correct its distortions.

2. For decades now, comparative legal studies have emphasized the important role played by legal history for the assessment of analogies and divergences between national legal systems and institutions, and for a more thorough understanding of the meaning, implications and forces directing the interpretation of contemporary rules[13]. The historical analysis is fundamental to uncover the drives behind the adoption

[12] A terminological specification is necessary. The term "authors' rights" is commonly used to identify the entitlements protected in civil law countries, while "copyright" identifies the common law entitlement. This paper maintains to the extent possible the lexical distinction, with few exceptions of generalized use of the term "copyright", as in the case of copyright propertization. On the issue, see A. Strowel, *Droit d'auteur et copyright. Divergences et convergences*, Brussels, 1993, p. 13 ff.

[13] The literature on the topic is immense, making it impossible to provide a comprehensive, balanced list of reference. For an ample bibliography and a general overview see J. Gordley, *Comparative Law and Legal History*, in M. Reimann, R. Zimmermann (eds.), *The Oxford Handbook of Comparative Law*, Oxford, 2008, p. 753 ff. For a deeper analysis of the potential interplays between legal history and comparative law in the study and for the understanding of legal cultures, see also M. Graziadei, *Comparative Law, Legal History, and the Holistic Approach to Legal Cultures*, in *Zeitschrift für Europäisches Privatrecht*, 7, 1999, p. 531 ff. See also H. Kötz, *Was erwartet die Rechtsvergleichung von der Rechtsgeschichte?*, in *Juristenzeitung*, 1992, pp. 20 ff; A. Watson, *The evolution of Law*, Baltimore, 1985, passim; R. Sacco, *Legal Formants: a Dynamic Approach to Comparative Law, in American Journal of Comparative Law*, 39, 1991, p. 343 ff. On the Trento Theses, emphasizing the qualification of comparative law as historical science, see A. Gambaro, *The Trento Theses*, in *Global Jurist* 4, 2004, p. 1 ff.

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of a particular solution, and the reason for the use of a specific definition or semantic option. It helps unveiling the interplay of normative theories, political stances, economic forces and doctrinal dogmas in shaping a statute or judicial trend. It traces the circulation of legal solutions across borders, illuminating their mutations when implemented by the legal formants other jurisdictions[14]. Building on these elements and mechanisms, the diachronic comparison offers a fresh look into the interpretative patters that shape the evolution of a doctrine, and overcome the superficial fallacies that a simple dogmatic analysis of a legal institution may produce, explaining instead how and why identical definitions, concepts and structures may lead to even opposite results in different legal systems.

These analytical tools are particularly helpful in the field of authors' rights. Due to their relatively late appearance compared to other institution, they have grown outside classical private law categories, thus missing a clear systematic guidance in their construction and evolution, and being subject to a range of different classifications[15]. At the same time, the normative theories supporting their introductions have been the most diverse, each of them making non-technical use of legal concepts and definitions to qualify the entitlements[16]. Depending on which theory – or combination thereof – predominated in the legislative drafting, one or the other non-technical definition has been translated into law, meeting with the technical notions and doctrinal structures characterizing each legal system. National legal formants have then internalized and implemented such definitions and rules, even if ultimately similar, in an oft-diverging manner. Analogously, when early national statutes circulated in other countries as model laws and were either slavishly transplanted or merged in second-generation mixed acts, their interpretation, filtered through the conceptual lenses of the importing legal system, has naturally resulted in different outputs.

[14] Similarly in J. Gordley, *op. cit.*, p. 762 ff.

[15] As Mark Rose correctly noted, "the institution of copyright is the child of technology" (M. Rose, *Technology and Copyright in 1735: The Engraver's Act*, in *Journal of the Information Society* 21, 2005, p. 63, but already E. Laboulaye, *Etudes sur la propriété littéraire en France et en Angleterre*, Paris, 1858, p. 1, and C. Hesse, *The Rise of Intellectual Property, 700 b.C. – a.D. 2000: An Idea in the Balance*, in *Daedalus*, 26, 2002, p. 27.

[16] This point is broadly investigated by J. Hughes, *The Philosophy of Intellectual Property*, in *Georgetown Law Journal*, 287, 1988, p. 281.

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Among the various qualifications adopted at a normative and conceptual level, the rhetorical power of the proprietary label made it one of the most common but also most debated choices, particularly in light of its bare compatibility with the personality-right nuances given to the right by the close link between the work and the author's spirit and dignity. Propertization is, in fact, one of the oldest phenomena featuring the history – and to a certain extent also the prehistory – of copyright. Due to the interdisciplinary and systematic polysemy of the term "property"[17], the origins, rationales and effects of the proprietary qualification in different national experiences have been the most various, being them also influenced by the interplay of other non-legal variables. Against this background, the bald critiques moved against the propertization of digital copyright, depicted as new and negative but rarely subject to systematic analysis, suggest two main observations. First, and most basically, the contemporary copyright debate badly misses a technical assessment of the real and potential consequences of using property as systematic framework to assist the development of the discipline. Second, national legal formants are generally unable to contextualize in a historical perspective the main traits of their copyright laws, and to understand their evolutionary paths. This deprives them of effective tools to implement without distortive or unintended effects rules, concepts and definitions carrying hidden implications, as it was the case for the modernization of copyright law vis-à-vis the digital revolution, and its alleged propertization. Similarly, it makes them unable to properly handle new hybrid models, such as the one introduced by EU copyright harmonization, which do not fit within the traditional conceptual schemes built through centuries of doctrinal contributions, and carries forward a property logic prone to generate short-circuits if not properly directed[18].

In this context, the comparative historical analysis of the evolution

[17] Broadly, from the different perspectives, M.R. Cohen, *Property and Sovereignty*, in *Cornell Law Quarterly* 13, 1927, p. 8; U. Mattei, *Basic Principles of Property Law. A Comparative Legal and Economic Introduction*, New York, 2000, p. 13 ff. An essential comparative overview is provided by A. Gambaro, *Property Rights in Comparative Perspective: Why Property is So Ancient and Durable*, in *Tulane European and Civil Law Forum*, 26, 2011, p. 201, and by L. Moccia, *Réflexions sur l'idée de propriété*, in *Revue international de droit comparé*, 63, 2011, p. 7 ff. and Id., *Basic Ways of Defining Property*, in Aa.Vv., *Colloqui in ricordo di Michele Giorgianni*, Naples, 2007, p. 761 ff.

[18] Comparative lawyers have defined this phenomenon as one of path dependence,

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of modern copyright models is, methodologically, a necessitated step. First and foremost, its results may help scholars assess the soundness of the contemporary propertization critiques, avoiding oversimplification and generalizations by showing the highly varied effects of the phenomenon and their strong dependence from a plethora of different (legal and non-legal) variables. On the other hand, it may provide the analytical means needed by legal formants to deconstruct and understand the reactions of their legal systems to external sources featuring hybrid traits and hidden mechanisms – as in the case of the EU copyright model and its propertization.

3. To test the validity of the approach and achieve the most comprehensive results, the analysis will proceed along two stages. The first stage focuses on the construction and evolution of the English copyright and the French *droit d'auteur*, unquestionably considered the origins of the two main contemporary models of copyright (common law) and authors' rights (civil law) protection. Their history shows the use of similar property arguments and similar intertwined normative justifications, with yet the achievement of results that are so diverging that they justify the qualification of the two models as belonging to, and in fact founding, two distinct legal traditions in the field. Explaining the reasons of such opposite effects requires the identification of the role played by the proprietary arguments on the two sides of the Channel, their advocates and adversaries, the normative theories supporting them, and the other institutional factors that have influenced their adoption and subsequent interpretation. This exercise would be already enough to distinguish between philosophical, rhetorical and technical qualifications, sketch their interplay and differentiate their effects. However, the analysis would still not be complete without the inclusion of two additional test beds, whose features allow the consideration of other scenarios and interplay of factors influencing the role and effects of copyright propertization. The German and Italian experiences, with their different institutional features, interaction between normative and systematic theories, and characteristics of their property models are perfect cases in point. Before delving into the study, however, a brief overview of its prehistory of copyright may be useful to

particularly visible in case of legal transplants. See A. Watson, *Legal Transplant. An Approach to Comparative Law*, Atlanta, 1974, especially Chapter 3.

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understand the roots of its late development and of its bare compatibility with classical private law institutions – two of the main reasons why copyright propertization results in such a complex phenomenon.

3.1. Until Gutenberg launched its movable-type printing press in the 15th century, creating a market for literary works and thus attributing to them a value in trade, no legal system provided for *ad hoc* instruments of protection of intellectual creations[19]. As a divine gift, knowledge was considered inalienable, and its transmission was originally just oral, so that its construction and transmission was shared and built on the indistinguishable contribution of many[20]. Patronage and public funding of artists, scientists, performers, philosophers and storytellers were common and justified in light of their social function[21].

Even when the market of written papyri grew exponentially, as in the Roman imperial era, the belief that ideas came directly from the divinity and could not be commercially exploited remained strong[22] – a circumstance that explains the lack of regulatory intervention on the question of authorship or ownership of literary products[23]. The only debate engaging contemporary scholars revolved around the ownership of the material support, which carried a high market value due to the substantial time and effort needed for its production. Until the papyri were prepared under dictation by specialized slaves (*scribae*), their *dominus* acquired automatically their ownership[24]. Then, when being a *scriba* became a

[19] This shift is particularly emphasized by C. Hesse, *op. cit.*, p. 27, and B. Edelmann, *Le Sacré de l'auteur*, Paris, 2004, p. 7 ff.

[20] See M.C. Suchman, *Invention and Ritual: Note on the Interrelation of Magic and Intellectual Property in Preliterate Societies*, in *Columbia Law Review*, 89, 1989, p. 1264; J. Goody, I. Watt, *The Consequences of Literacy*, in J. Goody (ed.), *Literacy in Traditional Societies*, Cambridge, 1968, p. 27 ff.

[21] M.C. Suchman, *op. cit*.

[22] As in F.G. Kenyon, *Books and Readers in Ancient Greece and Rome*, Oxford, 1932, p. 8; E.C. Havelock, *The Muse Learns to If 'rite: Reflections on Orality and Literacy from Antiquity to the Present*, New Haven, 1986, pp. 3-7. "Μῆνιν ἄειδε θεὰ Πηληϊάδεω Ἀχιλῆος" – "Sing, oh Goddess, of the wrath of Achilles, son of Peleus" – is the incipit of Homerus' Iliad, which clearly indicates the attribution of authorship to the divinity. The examples in classic Greek literature are abundant. C. Hesse, *op. cit.*, p. 29 refers, for instance, to the incipit of Hesiod's Theogony.

[23] M. Fabiani, *Diritto di autore gastronomico*, in *Diritto d'autore* 58, 1987, p. 116 reports on the protection of recipes collections in Sibari.

[24] Broadly A.C. Renouard, *Traité des droits d'auteurs, dans la littérature, les sciences et les beaux-arts*, Paris, 1838, pp. 9-10; U. Bartocci, *Aspetti giuridici dell'at-*

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profession for free men, Roman law solved the question of attribution applying the *litterae chartis cedunt* rule, thus qualifying the writer as temporary *locator* of the papyrus, whose owner retained also the property of the work[25]. This was far from signifying a meditated approach to the problem, as highlighted by Gaius, who reports the different treatment reserved to *tabulae pictae*, where the painting won over the ownership of the material support[26]. Absent a class of professional authors and publishers, the legal system was only required to regulate the ownership and circulation of unique writings or works of art, as special tangible objects on which conflicts of attribution were more frequent due to the particular features characterizing their production[27].

Also in the Middle Age jurists focused on the material support, considering both writings and paintings as composed things, and trying to conceptually define whether the ownership over the support absorbed the work embedded in it, or its modifications were so extreme to cause the extinction of the original title and the transfer of its ownership to the *dominus* of the ink or paint (*id est* the author)[28]. It is in medieval glosses and in their elaboration of Roman principles that it is possible to find the archetype of the conceptualization of copyright as a proprietary entitlement. The age of legal abstraction was still yet to come, and no legal fiction could avoid the strict link to materiality imposed by the Gaian distinction between *res corporales* and *res incorporales*, and the need to identify in intangible goods any feature that could allow the application by analogy of provisions designed around corporeal assets[29].

tività letteraria in Roma antica. Il complesso percorso verso il riconoscimento dei diritti degli autori, Torino, 2009, pp. 48-50; E. Eisenstein, *The Printing Revolution in Early Modern Europe*, Cambridge, 1983, p. 29.

[25] E. Eisenstein, *op.cit.*, p. 30.

[26] The Gaian excerpts (Inst. II, tit. I, 33-34) are recalled by S.Stromholm, *Le droit moral de l'auteur en droit allemand, français et scandinave*, Stockholm, 1967, p. 53.

[27] Similarly, see A. Pottage, B. Sherman, *On the Prehistory of Intellectual Property*, in H.R. Howe, J. Griffiths (eds.), *Concepts of Property in Intellectual Property Law*, Cambridge, 2013, pp. 19-20. Authors are only seldom protagonists of claims for plagiarism or false attribution, as reported in U. Bartocci, *op. cit.*, pp. 177-8.

[28] See the analysis of M. Madero, *Tabula Picta. Painting and Writing in Medieval Law*, Philadelphia, 2009, pp. 38-80. The A. refers to the works of Placentinus, Azo and Odofredo who used concepts such as *ferruminatio*, *adplumbatio* and *specificatio* to solve by analogy the original acquisition of ownership over the artifact.

[29] A. Pottage, B. Sherman, *op. cit.*, pp. 27-28, makes here an analogy with the reaction of scholars vis-à-vis the digitization of creative works.

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These almost obliged proprietary analogies will cross the centuries, and resonate in the first attempts of classification of authors' rights.

When Gutenberg's printing revolution minimized the time and monetary investment required to duplicate works, laying the foundation for the development of a new mass market and the rise of a class of professional printers and booksellers[30], the socio-economic changes prompted the political power to react. Willing to import the new technique, in 1469 the Venetian Collegio della Serenissima offered to Johann von Speier the first printing privilege in history[31] – a life-long monopoly on the activity of production and distribution of books, not on specific titles[32]. Its example was soon followed by other European states[33]. Then, when the use of the technology spread and the number of books circulating witnessed a dramatic increase, reaching a greater number of people due to the fall in prices[34], governments started fearing the effects of such an uncontrolled diffusion of ideas and information, and identified in printers the perfect allies to filter dangerous materials before they could reach the public[35]. As a consequence, the exclusivity granted through privileges shifted in focus from the printing activity to specific books or category of works, as

[30] On the centrality of the notion of reproduction in the evolution of copyright systems, see mostly J. Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, in *Law and Contemporary Problems*, 66, 2003, p. 42, and S. Teilmann-Rock, *On Real Nightingales and Mechanical Reproductions*, in H. Porsdam (ed.), *Copyright and Other Fairy Tales: Hans Christian Andersen and the Commercialisation of Creativity*, Cheltenham-Northampton, 2006, p. 25.

[31] The privilege is reported in C.L.C.E. Witcombe, C*opyright in the Renaissance. Prints and the Privilegio in Sixteenth-Century Venice and Rome*, Leiden, 2004, p. 21, and C. May, *The Venetian Moment: New Technologies, Legal Innovation and the Institutional Origins of Intellectual Property*, in *Prometheus*, 20, 2002, p. 152.

[32] C. May, *op. cit*., p. 169.

[33] For example, the House of Savoy attributed the first privilege to Leonardo Torrentino in 1562 (published in A. Brofferio, *Cenni storici intorno all'arte tipografica e suoi progressi in Piemonte dall'invenzione della stampa sino al 1835*, Turin, 1876, p. 51 ff.), while Richard III enacted a royal act allowing the free establishment in England of European printers for almost fifty years. See A. Johns, *The Nature of the Book: Print and Knowledge in the Making*, Chicago, 1998, pp. 326-7.

[34] With a process well-described by The process is well described by D.C. North, R. Thomas, *The Rise of the Western World: A New Economic History*, Cambridge, 1973, p. 88 ff.

[35] In P. Samuelson, *Copyright, Commodification, and Censorship: Past as Prologue, But to What Future?*, in N. Elkin-Koren, N.W. Netanel (eds.), *The Commodification of Information*, Alphen aan den Riin, 1999, p. 4.

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a form of decentralized censorship on the book market[36]. These administrative authorization, different in duration and content, shared little or nothing with modern copyright. Dependent on the royal discretion, they represented not the recognition of a subjective right with the purpose of incentivizing creativity, but a form of market regulation dependent on the royal discretion, granted mostly on classic works of long-deceased authors, with no attention paid to the protection of authorship[37]. In fact, authors still relied mostly on patronage, and not on the profits deriving from the commercialization of their works.

Until the early 16th century, local states shared basic political, cultural and institutional traits, as well as the interest in consolidating their power and prevent insurrections, while printers gladly accepted their censorship role in exchange for safe returns. It was the change in the institutional characteristics, power relationships and market structures of two nation states – France and England – which caused the departure of their regulatory framework towards two seemingly different destinations.

3.2. When the Tudors, tormented by financial problems and lacking an efficient and pervasive administration, were in need of an effective and cheap tool to control the book market, the Stationers' Company represented an immediate choice[38]. This strong corporation of printers, founded at the end of the 14th century, had a strong territorial presence, an undisputed market predominance, and a consolidated set of internal rules and enforcement procedures[39], which they could immediately use to regulate every printing activity in the kingdom as soon as the Stationers' Charter entrusted them with this role in 1557.

Through general regulations, special ordinances, and privileges granted to its members on single works or categories thereof, and backed by the enforcement arm of the Star Chamber, the Company became the delegated regulatory and executive power in charge of the correct functioning of the book market[40-41]. The (onerous) inscription of the privilege

[36] EAD. See also C.L.C.E. Witcombe, *op. cit.*, pp. 326-43.

[37] A similar opinion can be found in U. Izzo, *Alle origini del copyright e del diritto d'autore*, Roma, 2010, p. 15.

[38] U. Izzo, *op. cit.*, p. 45.

[39] The history of the Stationers and their Company is comprehensively analyzed by L.R. Patterson, *Copyright in Historical Perspective*, Nashville, 1968, pp. 28-41, and H.S. Bennett, *English Book & Readers 1558 to 1603*, Cambridge, 1989, pp. 64-65.

[40] See L.R. Patterson, *op. cit.*, p. 31, and H.S. Bennett, *op. cit.*, pp. 59-60.

[41] The Universities of Oxford and Cambridge retained special authorizations di-

in the Company's registry attributed to its holder the exclusive right to reproduce the work(s), which could have been inherited by the Stationer's widow[42]. Later on, these entitlement were flanked by negotiable stocks over the profits arising from the commercialization of the works[43]. The stable set of rules and sanctions against infringements consolidated the view of the Company's privilege not as discretional administrative concessions, but as absolute and perpetual rights, based on a chain of titles and protected by proprietary remedies[44] – a perception confirmed by their exclusion from the application of the Monopolies Act of 1624, which curtailed, instead, the duration and scope of letter patents[45].

Until this point, the Stationers' regulation made the enactment of dedicated legislative acts unnecessary. The situation changed, however, in 1640, when the Habeas Corpus Act suppressed the Star Chamber[46], endangering the Company's public support. The Stationers believed it was wiser to request a new legislative intervention in support of their position, justifying their request in light of their role of guarantors of authors' economic interests, whose protection was necessary – they argued – to stimulate the production of new works, and thus to advance knowledge and encourage learning[47]. The authors debuted on the stage for the first time, albeit without any trace of natural law arguments advocating for the direct attribution to them of economic and moral

rectly granted by the Crown – a circumstance that constituted a hybrid private/public system. The Crown also directly attributed privileges in particular areas. See, eg, the exclusivity granted to Tottel on common law books, reported in Bennett (n 40), 66. More generally, see H.T. Gomez-Arostegui, *What History Teaches Us about Copyright Injunctions and the Inadequate Remedy-at-Law Requirement*, in *Southern California Law Review* 81, 2008, p. 1223 ff.

[42] Unless she re-married with a non-member, as in this case the privilege went back to the Company. See M. Rose, *Authors and Owners: The Invention of Copyright*, Boston, 1993, p. 14.

[43] Id., and L.R. Patterson, *op. cit.*, pp. 106-113.

[44] The importance of this element is strongly emphasized by B.W. Bugbee, *Genesis of American Patent and Copyright Law*, Washington DC, 1967, pp. 38-39.

[45] The Monopolies Act represents, in this sense, the historical separation of patents and copyright. See the comments of D.C. North, R. Thomas, *op. cit.*, p. 154, and H.S. Bennett, *op. cit.*, p. 52.

[46] Emphasized by L.R. Patterson, *op. cit.*, p. 119.

[47] The Humble Remonstrance of the Company of Stationers to the High Court (1643), reported in E. Arber, *A Transcript of the Registers of the Company of Stationers of London*, London, 1875, p. 585 ff.

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rights. Censorship goals remained the main reason leading the Crown to reinforce the Company's monopoly[48], and this is the reason why, after the Restoration and the slackening of censorship, its power faced again challenges[49]. Pressured to lobby to protect their primacy, the Stationers opted for the most intuitive strategy: advocating for the legislative recognition of a perpetual, proprietary copyright at common law, customarily derived from the inscription in the Company's registry[50].

The 1662 Printing Act did not provide any definition, but deprived the Stationers of their censorship power in favour of the parliamentary Office of the Surveyor of the Press, retained for the Crown the power to grant special privileges, and requested the renewal of the legislative act every two years, exposing the Company to the constant risk of losing more ground and power[51]. The shift was also caused by the intervention of influential thinkers, who underlined before the Parliament the negative effects of the Stationers' monopoly on authors and on access to knowledge. Interestingly, one of these voices was that of John Locke.

While scholars usually identify in his labour-desert property theory the foundation of the natural law justification for copyright protection, Locke's main intervention in the copyright debate – its 1694 Memorandum – was instead a harsh critique against the Stationers' power and a pamphlet for the termination of the Printing Act[52]. The Memorandum defined copyright as an exclusive right, coloured with strong person-

[48] The act is reproduced in Acts and Ordinances of the Interregnum, 1642-1660 (1911), 184-6, www.british-history.ac.uk/report.aspx?compid=55829&strquery=stationerscopyright [last accessed 15 December 2019].

[49] With the Act of Indemnity and Oblivion, the link between the Stationers and the Crown got severed. See A. Johns, *op. cit.*, p. 190.

[50] As reported by H. Travis, *Pirates of the Information Infrastructure: Blackstonian Copyright and the First Amendment*, in *Berkeley Technology Law Journal*, 15, 2002, pp. 777, 809.

[51] Printing Act, 13 & 14 Car. II c. 33 (1662), reported by L.R. Patterson, *op. cit.*, p. 64, and C. Blagden, *The Stationers' Company: a History: 1403–1959* (Redwood City, 1977), p. 153 ff. For a comment see R. Deazley, *Commentary on the Licensing Act 1662*, in L. Bently, M. Kretschmer (eds.), *Primary Sources on Copyright (1450–1990)*, www.copyrighthistory.org/cam/tools/request/showRecord?id=commentary_uk_1662 [last accessed 15 December 2019].

[52] Its history and analysis can be found in J. Hughes, *Locke's 1694 Memorandum (and More Incomplete Copyright Historiographies*, in *Cardozo Arts and Entertainment Law Journal* 27, 2010, p. 555.

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ality nuances but never labelled as property[53], to be recognized only to authors as a reward for their creative work, and as an incentive – in a utilitarian perspective – for the production and diffusion of new knowledge. Its duration should have not been perpetual, but functionalized to the pursuance of these goals, for also the existence of a thriving public domain was fundamental to ensure access to culture and new creations[54]. On the contrary, the Company's monopoly was described as economically unreasonable, and contrary to public interest goals[55].

Locke's arguments won, leading to the non-renewal of the Printing Act in 1694 and the penetration of authorship in the language of politics and of a number of contemporary doctrinal contributions[56]. Riding on the success of the theory, the Stationers justified their proposal of a new legislative act, which was supposed to grant them back the lost monopoly, as a necessary measure to reinstate order in the book market, and thus prevent piracy and ensure a steady income to authors, in order to stimulate their productivity[57]. «A Bill for the Encouragement of Learning and for Securing the Property of Copies of Books to the Rightful Owners Thereof», which already in the title merged pretended utilitarian arguments with natural law assertions ("rightful owners"), ultimately aimed at obtaining the recognition of an "undoubted property" to authors, and hence to publishers[58]. Its text was not immediately rejected, but substantially amended. The natural law term "securing" was changed in "vesting", to emphasize that copyright was not recognized as preexisting entitlement but granted by law for utilitarian reasons. The duration of the privilege was set to 14 years, after which it returned to the author if alienated to a printer, offering to the former the possibility

[53] The apparent contradiction have been emphasized by several commentators. Among them, see Several authors focused on this apparently contradictory aspect. Among the most recent see L. Moscati, *Un Memorandum di John Locke tra censorship e copyright*, in *Rivista di storia del diritto italiano*, 76, 2003, p. 69; J. Lowenstein, *The Author's Due. Printing and the Prehistory of Copyright*, Chicago, 2002, p. 230, M. Rose, *Authors and Owners*, cit., p. 78.

[54] J. Hughes, *Locke's 1694 Memorandum*, cit., p. 560; L. Moscati, *op. cit*., p. 73.

[55] J. Hughes, *op. cit.*, p. 558.

[56] A broad literature overview on this point is provided by D. Cornu, *Swift, Motte and the Copyright Struggle: Two Unnoticed Documents*, in *Modern Language Notes*, 54, 1939, p. 113.

[57] This change in the approach is vividly underlined by P. Jaszi, *Toward a Theory of Copyright: the Metamorphoses of "Authorship"*, in *Duke Law Journal*, 1991, p. 471.

[58] The point is evidenced by M. Rose, *Authors and Owners*, cit., pp. 42-43.

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to decide again on the exploitation of her work. The term "undoubted property" was removed by the title, although the author was still mentioned as the "proprietor" of the work[59]. However, the inscription in the register was clearly defined as an administrative formality not giving rise to any common law property right, but only authorizing the "printing and reprinting" of the work(s), and the amount to be paid by eventual infringers was split between the privilege holder and the Crown, making it resemble more to an administrative fine than to a compensation for the infringement of a proprietary interest[60].

The bill, approved and signed by Queen Anne on April 5, 1710[61], and considered the first copyright statute, maintained a vague text, and did not provide detailed definition that could clarify doubts and avoid conflicting readings[62]. For many years its cogency appeared weak, with equitable remedies preferred over its enforcement measures[63]. The fact that the Court of Chancery kept on providing proprietary remedies on the basis of the sole evidence of a publishing contract, as in case of real property claims, contributed to the perception of the Act as mere additional tool of protection of an existing common law property right[64]. These uncertainties gave rise to the historical judicial "battle of the booksellers" between London Stationers and independent Scottish printers, entirely revolving around the joint or mutually exclusive availability of statutory and common law remedies, and the consequent dogmatic definition of copyright[65]. In fact, the doctrinal skirmishes were just a rhetorical pretext to cover the epochal, final clash between old and nascent economic powers, against the background of rapidly changing market and institutional settings.

[59] As noted by J. Feather, *Publishing, Piracy and Politics. An Historical Study of Copyright in Britain*, London, 1994, p. 61, and L.R. Patterson, *op. cit*., p. 143.

[60] Id., pp. 144-150, commenting on the single provisions and linking them to the legislative debate.

[61] 8 Anne, c.19 (1710).

[62] This is also the opinion of S.Strömholm, *op.cit.*, p. 6. See also the various essays in the celebratory book L. Bently, U. Suthersanen, P. Torremans (eds.), *Global Copyright. Three Hundred Years Since the Statute of Anne, from 1709 to Cyberspace*, Cheltenham-Northampton, 2010.

[63] Similarly see J. Lowenstein, *op. cit*., pp. 233-4. The most relevant casa law on the matter is reported and commented on by H.T. Gomez-Arostegui, *op. cit.*, p. 1221 ff.

[64] Ibid., and L.R. Patterson, *op. cit.*, pp. 160-3.

[65] On the history and traits of this commercial rivalrly, see P. Prescott, *The Origin of Copyright: a Debunking View*, 12 EIPR 453 (1989), and related bibliography.

In the first episode of the saga, *Millar v Kinkaid* (1743)[66], a group of Stationers argued that the Glasgow and Edinburgh printers' capability of selling classic works at a highly discounted price severely damaged their business, and claimed compensation for the alleged violation of their perpetual common law property, maintaining that the Statute of Anne provided only additional remedies that did not exclude the recourse to already existing ones, nor terminated previously existing rights. Parallel to the lawsuit, several contributions advocated for the recognition of a Lockean property to authors in light of their intellectual efforts, necessarily characterized by perpetuity due to its link with the owner's personality[67].

The House of Lord rejected this first attempt, opting for a literal and strict reading of the Act of Queen Anne[68]. The balance of powers changed, however, with the appointment of Lord Mansfield, the Stationers' attorney, as chief justice of the King's Bench. In *Tonson v Collins*, the second act of the battle, resulted in a procedural dismissal, William Blackstone took the role of counsel for the Company, strongly advocating for the recognition of a common law literary property on pure natural law grounds[69]. His arguments found the opposition of the defendants' attorney, Joseph Yates, who argued that the act of publication constituted an abandonment that extinguished the Lockean entitlement, making the work fall into the public domain, and then subject to statutory copyright. While his arguments testified to the dogmatic hardships faced by scholars in distinguishing the ownership of the material support and the right over the intangible creation, Blackstone's reasoning presented without hesitation real property analogies, maintaining that the distribution of the work resulted in the attribution to buyers of an entitlement similar to the right of way: they could read but not dispose of the book, as much as the servitude holder could cross the land but not dispose of it[70].

The same arguments returned in *Millar v Taylor*[71], asking the King's

[66] 4 Burr. p. 2319, 98 Eng. Rep. p. 210 (1751).

[67] Like Warburton, reported by R. Hurd, *The Works of the Right Reverend William Warburton* (Hansard&Son for Cadell and Davies, 1811), pp. 405-416.

[68] As explained in M. Rose, *Authors and Owners*, cit., pp. 71-4.

[69] *Tonson v Collins*, Black. W. 301, 96 Eng. Rep. 169 (1760).

[70] Id., pp. 185-188.

[71] 4 Burr. 2303, 98 Eng. Rep. 201.

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Bench to rule on the existence of a literary property at common law, and on whether its perpetual duration had been overstepped by the time limitation introduced by the Statute of Anne[72]. Lord Mansfield, delivering the opinion of a divided King's Bench in favour of the Stationers[73], offered a detailed description of a Lockean, personality-based literary property, arising from natural law upon the mere act of creation, and finalized to the protection of the integrity of the work. His narrative offered articulated dogmatic and philosophical justifications to explain the distance between this entitlement and the new statutory copyright, and to distinguish between literary property and the ownership of the support, in order to specify that only the latter could be considered abandoned after publication, and therefore subject to the time and scope limitation set by the Act[74].

Mansfield's arguments represent a paradigmatic example of the use of dogmas to pursue specific policy goals, where the care for rhetorical effects overcome the attention towards systematic precision[75]. The interplay between economic and moral aspects of the right was not adequately taken into account and explained, nor was the distinction between authors' and publishers' rights. The decision depicted a two-headed system: on one side a common law literary property, originally personality-based but having a purely economic content; on the other side a regulatory copyright, intervening as additional statutory instrument with mere anti-monopolistic goals[76]. In this sense, and despite its fast overruling, *Millar v Taylor* introduced concepts destined to shape the common law copyright model for the centuries to come[77].

[72] Id., p. 248.

[73] With, however, the dissent of Joseph Yates, who highlighted the prerogatives of the Parliament to legislate on the content and duration of copyright, and emphasized the dogmatic inconsistency of the parallel between real and literary property, due to their different objects. Id., p. 250.

[74] Id., pp. 251-3.

[75] *Millar v Taylor* represented the first full victory for the Stationers, their perpetual copyright and the image of the author-proprietor, used as a rhetorical tool to defeat their provincial competitors. Along the same lines M. Rose, *Authors and Owners*, cit., p. 30; but contra J. Raven, *The Business of Books: Booksellers and the English Book Trade (1450-1850)*, New Haven, 2007, p. 231, contesting the historical relevance of the decision.

[76] According to L.R. Patterson, *op. cit*., p. 172.

[77] This is an opinion also shared by A. Strowel, *op. cit*., p. 116.

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Few years later[78], *Donaldson v Becket* closed the war with the final victory of provincial booksellers[79], with a decision taken upon the vote of twelve laymen, and inspired by the speech of Lord Camden, who vehemently accused the Stationers of using fake dogmatic arguments to reinforce their monopoly with no advantages for authors, but only negative effects for the public domain, the competition among booksellers, and access to culture[80]. The notion of literary property was rejected on the ground of utilitarian reasons[81], which supported the choice for a regulatory copyright limited in time and scope, finalized to public interest goals, and subject to statutory interventions when necessary in response to changing socio-economic circumstances. The link between the proprietary qualification offered by the Statute of Anne and the rhetoric of a perpetual and absolute ownership, backed by natural law and common law arguments, was once forever severed, and its immunity from legislative constraints radically denied, in favour of broader, non-idiosyncratic considerations[82].

The characteristics of the Anglo-Saxon propertization of copyright have been undoubtedly shaped by the flexible and ample notion of property typical of common law legal systems, the swinging market dominance of groups carrying conflicting interests, the institutional traits of England between the 15th and the 18th centuries, and the stronger influence of utilitarian arguments against purely natural law rhetorical inspirations. During the 19th and 20th century the English model developed traits common also to other national experiences, stretching to new works and new uses, and coming closer to the civil law authors' rights system in compliance with the Berne Convention[83]. However, its

[78] In *Hinton v. Donaldson*, reported by I. Simpson Ross, *Lord Kames and the Scotland of His Day*, Oxford, 1972, pp. 141-2.

[79] 4 Burr. 2408, 17 Cobbert's Parl. Hist. 992 (H.L. 1774), decided with a yes-no answer by laymen upon the mere advisory opinion of the twelve Law Lords.

[80] Id., pp. 998-9.

[81] Particularly Lord De Grey, Chief Justice del Common Pleas (id., 992) and Lord Lyttleton (id., 1002-3).

[82] In this sense L.R. Patterson, *op. cit*., p. 229, citing also *Jeffreys v. Boosey* (1854) 4 HLC 815 as confirmation of the positivist view of copyright. Similarly, see also A. Strowel, *op. cit*., pp. 113-115.

[83] Fragmented statutes intervened during the 19th century to extend the duration of the exclusivity, protect new categories of works and cover new reproduction and distribution techniques. See R. Rogers Bowker, *Copyright: Its History and Its Law*, Boston, 1912, p. 31 ff, providing an elaborated summary of the legislative evolution.

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genetic features remained the same, maintaining the distance with the continental model, as particularly visible when looking at the effects and implications of copyright propertization.

3.3. While the Stationers flourished in England between the 15th and the 17th century, their French counterparts were far from having the same success, power and close connection to the Crown, mostly due to the different political and institutional settings[84]. In France censorship was exercised by local courts (parliaments) and the Faculty of Theology of the Sorbonne University[85], and the letter patents granted to printers specified that the monopoly they conferred had the goal of controlling the press and helping their holders to obtain an adequate return on investment[86]. Only few privileges were directly conferred to authors to prevent the unauthorized publication of their works[87].

The interest of the Crown towards the centralization of censorship grew proportionally to the increase in the number of circulating books, and the Chancery initiated a tough competition with local parliaments for the release of privileges[88], supported by ad hoc regulations that required the royal authorization for any printing activity. The system was far from effective, though, due to the non-standardized nature of the letter patents and their weak, fragmented enforcement[89]. The effects of the lack of a strong and influential publishers' association appear clear in cases like the *affaire Muret* (1586), which identified in the author and not in the printer the target of the administrative protection, set to expire, as a consequence, after the author's death[90]. As further evidence

The reordering came with the Copyright Act of 1911 (An Act to amend and consolidate the Law relating to Copyright, Geo.6 5(1911) c.46).

[84] On this point, see more broadly the comparative analysis of E. Buring, J.L. Van Zanden, *Charting the "Rise of the West": Manuscripts and Printed Books in Europe. A Long-Term Perspective from the Sixth Through Eighteen Centuries*, in *The Journal of Economic History*, 69, 2009, p. 417 ff.

[85] Or the University of Paris. See E. Armstrong, *Before Copyright. The French Book Privilege System 1428–1526*, Cambridge, 1990, pp. 42-66.

[86] This is visible in the examples of privileges reported by A. Parent, *Le métiers du livre à Paris au XVIe siècle (1535–1560)*, Paris, 1974, pp. 101-105.

[87] A. Parent, *op. cit.*

[88] A. Parent, *op. cit.*, pp. 105-8, and E. Armstrong, *op. cit.*, pp. 22-28.

[89] These weaknesses are extensively commented on by A.C. Renouard, *op. cit.*, pp. 48-9; M.C. Dock, *Etude sur le droit d'auteur*, Paris, 1963, p. 68; E. Laboulaye, G. Guiffrey, *La propriété littéraire au XVIIIe siècle*, Paris, 1859, p. 526.

[90] The case is reported in B. Edelmann, *op. cit*., p. 87 and F. Rideau, *La formation*

of the printers' weakness, when the Crown granted to the corporation of Paris booksellers the power to release privileges, it still retained the authority to regulate, revoke and enforce them, unlike with the Stationers in England. Each work or category of works could be licensed to more than one printers, for the aim was that of controlling the press and not of incentivizing their activities through strong monopolies, and there was no registry to track the attribution and circulation of the titles[91]. Both circumstances did not offer ground to conceptualize the privileges as exclusive rights, but only as discretional royal concessions. Even when the Crown reinstated it centralized power to enact privileges with features that favoured the Parisians, against the Paris Parliament's attempt to limit the exclusivity only to unpublished works and the renewal to original modifications[92] – two measures helping provincial printers –, the move was not influenced by the lobbying of Paris booksellers, but rather by the Crown's interest to retain its regulatory monopoly[93]. Authors were also still in the shade and, even if often holders of personal privileges, having too weak a market power and no political influence[94].

Some points of contact with the English experience may nevertheless be found in the early 18th century when, as a reaction to the *Conseil du Roi*'s new restriction of the power of local parliaments to grant privileges, confirmed in the *Code de la Libraire* (1723)[95], provincial printers complained against the move on the basis of arguments taken

du droit de la propriété littéraire en France et en Grande-Bretagne: une convergence publiée, Aix-Marseille, 2004, p. 118.

[91] As underlined by A.C. Renouard, *op. cit.*, pp. 58-61, 123, and M.C. Dock, *op. cit.*, pp. 65-75.

[92] The clash is amply reported by A.C. Renouard, *op. cit.*, p. 142, B. Edelmann, *op. cit*., p. 168, and E. Laboulaye, G. Guiffrey, *op. cit.*, pp. 551-4.

[93] In fact, unlike the Stationers, Parisian printers did not feel pressured to defend their rights as independent from privileges, since they long enjoyed the protection of the Crown. On this point see H. Falk, *Les privilèges de libraire sous l'ancien régime. Etude historique du conflit des droits sur l'œuvre littéraire,* Genève, 1970, pp. 79-88.

[94] On the weak market power of authors, proven by the fact that they generally assigned their economic rights to publishers forever, and against the payment of a mere lump sum, see in this sense H.J. Martin, *L'édition parisienne au XVIIe siècle: quelques aspects économiques*, in *Annales Economies, Sociétés, Civilisations*, 67, 1952, p. 313 ff.

[95] The Code, in fact, attributed full discretion to the *Conseil* on the renewal of the privilege, and abandoned the augmentation doctrine introduced by the Paris Parliament. See M.C. Dock, *op. cit.*, pp. 74-5, and A.C. Renouard, *op. cit.*, pp. 148-52.

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from Locke's *Memorandum*[96]. The protest had only the limited effect to reach, two years later, the imposition on privilege holders of the obligation to prove the effective publication of the work(s), and the sanction of seizure for bad quality copies, both directed to prevent anticompetitive behaviors, common among Paris booksellers[97]. Later pro-competition amendments shortened the duration of the exclusivity, triggering the reaction of Parisians, who imitated the Stationers' Company and commissioned from the famous natural law jurist Louis d'Héricourt a legal report to support their stances[98].

Legal historians define the *Mémoire de d'Héricourt* (1725) as the scientific debut of the concept of *propriété litteraire*[99]. *Its arguments are staggeringly similar to those advanced by the Stationers to accompany the bill preceding the enactment of the Statute of Anne: the privilege does not confer a new right, but is a recognition of a preexisting natural law right,* based on Lockean tenets, perpetual due the link between the author's personality and her work, and because only perpetuity is enough to incentivize their creative effort[100]. The *Mémoire* was later followed by several similar contributions[101], like Diderot's *Lettre historique et politique sur le commerce de la librairie* (1763), according to whom the author should have been recognized as the owner of her work, since the latter was «the most precious part of himself, that part which […] immortalizes him», and this made literary property sacred, inviolable and necessarily perpetual[102]. Here, as in England, the propertization of authors' rights is a rhetorical weapon used in the context of a political battle for market dominance[103].

[96] The text of the letter to the Chancery is in H. Falk, *op. cit*., pp. 89-90. See also F. Rideau, *op. cit.*, p. 80.

[97] Arrêt du Conseil portant règlement sur le fait de la librairie et imprimerie, www.gallica.bnf.fr/ark:/12148/bpt6k6452483t [last accessed 15 December 2019].

[98] The parallel between the French and the English experiences here is also drawn by L. Pfister, *L'auteur, propriétaire de son œuvre? La formation du droit d'auteur du XVIe siècle à la loi de 1958*, Strasbourg, 1999, p. 207 ff.

[99] Such as B. Edelmann, *op. cit.*, p. 239, and H. Falk, *op. cit.*, p. 96. The observation is also shared by A. Strowel, *op. cit.*, p. 84.

[100] The *Mémoire* is reported in its entirety in E. Laboulaye, G. Guiffrey, *op. cit.*, pp. 21, 23-27.

[101] Id., pp. 53-120, who analyze them in detail.

[102] The same applied, of course, to the right of the printer once transferred from the author. D. Diderot, *Lettre sur le commerce de la libraire* (1763), Paris, reprint 2003, esp. p. 71. For a critique see B. Edelmann, *op. cit*., pp. 254-5.

[103] As noted also by H. Falk, *op. cit.*, pp. 94-95.

While utilitarian arguments, justifying authors' rights as stimulus for the production and distribution of new works, inspired a number of *arrêts* of the *Conseil du Roi*[104], provincial printers answered to their Paris competitors by hiring another jurist, Flusin, to help them shaping with sound legal arguments their petition to the Crown. Flusin's contribution strongly challenged the natural law definition of literary property, opting for its positivist definition as entitlement descending from a royal concession[105], limited in time and scope in order to reduce the social cost of the copyright monopoly to what necessary for it to perform its utilitarian function, and to strike a balance between incentivizing function and the need to preserve access to knowledge and a flourishing public domain. Along the same lines, other pamphlets advocated for the limitation of the privilege to the author's lifetime, in order to leverage on the positive effects of a competitive market (lower barriers to entry, cheaper book prices, more diffusion of culture) without prejudicing the incentivizing function of the privilege[106]. In their view, copyright represented a social contract granting a temporary monopoly in exchange for the publication and distribution of a work that enhanced public well-being. The ultimate consequence of such an approach was the definition of the privilege as temporary monopoly with a utilitarian inspiration, as opposed to the natural law property right advocated by the Parisians. Not by accident, this dichotomy and the radical denial of the proprietary qualification of authors' rights can be clearly found in utilitarian pieces such as the *Fragments sur la liberté de la presse*, written by the young physiocrat Marquis de Condorcet[107].

[104] Like the *affaire Crébillon*, reported by M.C. Dock, *op. cit*., pp. 118-9 and A.C. Renouard, *op. cit.*, p. 349.

[105] The text of Flusin's *Requête adressée au Roi et à Nosseigneurs de son Conseil par les libraires et imprimeurs de Lyon* (Mss. Fr. 22073, n. 141, Bibliothèque Nationale de France), is in H. Falk, *op. cit.,* pp. 107-110.

[106] See C. Geiger, *The influence (past and present) of the Statute of Anne in France*, in L. Bently, U. Suthersanen, P. Torremans, *op. cit.*, p. 127, and L. Pfister, F. Rideau, *'National Report – France'*, ALAI Congress 2009 www.blaca.org/alai2009/Alai2009France.doc [last accessed 15 December 2019], who refer, as an example, to the *Mémoire* of Gaulthier of 1786.

[107] J.A.N. De Caritat, Marquis De Condorcet, *Fragments sur la liberté de la presse*, in A. Condorcet O'Connor, F. Arago (eds.), *Œuvres de Condorcet*, XI, Paris, 1847, pp. 255-314. Cordorcet denied the admissibility of a property over ideas, and defined the privileges in terms of monopoly, finalized to reward authors and thus to stimulate the production of new knowledge.

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It was exactly the strong influence exercised by the physiocrats on the Crown that led to the rejection of the thesis of d'Héricourt in favour of utilitarian arguments in the *Arrêts réglementaires* of 1777[108], which limited the duration of the printer's right to the author's lifetime, as opposed to the perpetual nature of the author's right before publication, and allowed multiple contemporary privileges over the same work after the author's death[109]. Again like in England, Cochu[110] and Linguet[111] defended the Paris booksellers' interests by advocating a *propriété litteraire* as the most sacred natural law property right, only recognized and not vested by the privilege, which consequently could not shorten its perpetual duration. The departure of the two models originated, in fact, from the different political and institutional factors that triggered the abandonment of privileges and censorship – in France, the Revolution and the new order set by the National Constituent Assembly, which abolished privileges and censorship shortly after 1789[112].

The regulatory vacuum opened the floodgates for the conflicting centers of interests to exercise their pressure and present their own proposals and pleas to the legislator.[113] The first bill, drafted by Emmanuel Sieyès in support of Paris booksellers, was characterized by a mix of natural law and utilitarianism, where a sacred *propriété litteraire*, rooted in Article 17 of the new *Déclaration des droits de l'homme et du citoyen*[114], *was not perpetual but limited to ten years post mortem auctoris*

[108] A year defined the *annus terribilis* for the advocates of the *propriété litteraire*, as emphasized by P. Recht, *Le droit d'auteur, une nouvelle forme de propriété. Histoire et théorie*, Paris, 1969, p. 33.

[109] The *Arrêts* are reported and commented on by E. Laboulaye, G. Guiffrey, *op. cit*., p. 123 ff. As to their importance for the introduction of utilitarian arguments in the French *droit d'auteur*, see the comments of J.C. Ginsburg, *A Tale of Two Copyrights: Literary Property in Revolutionary France and America*, in *Tulane Law Review* 64, 1991, pp. 1010-2.

[110] The *Mémoire* of Cochu is in E. Laboulaye, G. Guiffrey, *op. cit*., pp. 211-6 and 219.

[111] E. Laboulaye, G. Guiffrey, *op. cit*., p. 240 ff.

[112] K.M. Baker (ed.), *The Old Regime and the French Revolution*, Chicago, 1987, p. 226 ff.

[113] K.M. Baker (ed.), *op. cit.*, p. 238 ff.

[114] The proposal is extensively commented on by C. Hesse, *Enlightenment Epistemology and the Laws of Authorship in Revolutionary France*, 1777-1993, in *Representations*, 30, 1990, pp. 117-21.

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(*p.m.a.*) and not inheritable. The poorly drafted and too rhetorical text was soon rejected[115], and immediately substituted by the much more technical proposal advanced by François Hell, who construed a perpetual literary property sharing several features with ordinary proprietary entitlements, chiefly with regard to its circulation and inheritability[116]. Its extreme positions found the resolute opposition of utilitarians[117], which caused a standstill that was overturned only by the dissolution of the Paris booksellers' association, and the entrustment of the task to draft the new law to a committee headed by Condorcet[118].

The results were two decrees. The first (*Décret relatif aux spectacles*, 1791[119]) granted to authors of theatrical pieces an exclusive right lasting for five years after their death. Despite the fact that authors used utilitarian arguments linked to their cultural and social role to advocate the adoption of the law[120], the legislative report to the decree drafted by Le Chapelier presented the *Décret* as protecting «the most sacred, the most inviolable and (…) the most personal of all forms of property»[121] – a statement cited from this moment on as the epitome of the natural law character of the French *propriété litteraire*. It is true, however, that the report justifies the protection of authors' rights as a reward for their social service, and specifies that the author's original property right[122] gets extinguished after publication – both elements that, according to some part of the doctrine, prove the close connec-

[115] C. Hesse, *op.cit.*

[116] F. Hell, *Rapport fait à l'Assemblée nationale sur la Propriété des Productions Scientifiques ou Littéraires*, Paris, 1791, pp. 10-15.

[117] As reported in C.J. Panckoucke, *Sur l'état actuel de l'imprimerie*, in *Mercure de France*, 6 March 1790, pp. 32-38.

[118] C. Hesse, *op. cit*., p. 125.

[119] Loi du 13 janvier 1791 relative aux spectacles, Loi et Actes du gouvernement, t. II, 343. After decades of conflict between theatre writers and the management of the *Comédie Française*, which had the monopoly over theatre shows for more than a century, in 1790 the National Assembly recognized the freedom to establish new theatres, and the 1790 decree followed suit. See A.C. Renouard, *op. cit.*, p. 304.

[120] This is what is testified of by the proposal prepared by Mirabeau on their behalf, reported by C. Hesse, *op. cit.*, p. 126.

[121] In Le Moniteur universel, 15 January 1791, 117. See also J.G. Locré, *La Lègislation civile, commerciale et criminelle de la France ou commentaire et complément des codes française*, XI, Paris, 1832, p. 236 ff.

[122] Defined as «une propriété d'un genre tout à fait différent des autres propriétés». See A.C. Renouard, *op. cit.*, p. 309.

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tion between the English and French models, and the almost complete overlap of their underlying rationales[123].

The second decree (*Décret relatif aux droits de propriété des auteurs d'écrits en tous genres, compositeurs de musique, peintres et dessinateurs*, 1793[124]), which can be considered as the first authors' rights statute in history, was introduced by the report of Lakanal, who defined as "surprising" that literary property, which «of all forms of property» is «the least contestable (…)», «should have had to be recognized, and its exercise guaranteed by positive law»[125]. The rhetorical use of the proprietary qualification was directly connected to the revolutionary meaning attributed to property, as pillar of the new private law order, and the most fundamental tool to assert the newly acquired freedom of the citizen against the chains of the *Ancien Régime*. In this sense, the use of the proprietary label was essential to give legitimacy to authors' rights, and to underline their central importance as break point with the old royal privileges, for they represented a vehicle of freedom of expression, and not a censorship tool anymore[126]. The merely rhetorical nature of the French propertization emerged also clearly from the introduction of rules incompatible with the proprietary qualification (and particularly with its natural law version), such as the provision of formalities as requirement for protection, and the territorial and temporal limitations of the right[127]. In addition, the very short text of the decree – only sever articles – did not use any language or definition that

[123] This is the opinion of, *inter alia*, J. Hughes, *Copyright and Incomplete Historiographies*, *op. cit.*, p. 303; A. Kerever, *Révolution française et droit d'auteur*, in *RIDA*, 141, 1989, p. 4; J.C. Ginsburg, *op. cit.*, p. 1023; C.D. Peeler, *From the Providence of Kings to Copyrighted Things (and French Moral Rights)*, in *Indiana International and Comparative Law Review*, 9, 1999, p. 435.

[124] Loi du 19 juillet 1793 relatif aux droits de propriété des auteurs d'écrits en tout genre, compositeurs de musique, peintres et dessinateurs, Recueil Duvergier, 35. The text can also be found in A.C. Renouard, *op. cit.*, pp. 325-8.

[125] Reported by J.G. Locré, *op.cit*., pp. 7-8.

[126] A conclusion drawn also by J. Escarra, J. Raul, F. Hepp, *La doctrine française du droit d'auteur*, Paris, 1937, p. 12, and C. Geiger, *The influence (past and present) of the Statute of Anne in France*, *op. cit*., p. 127.

[127] On the incompatibility of the proprietary qualification with the content of the statute, see A. Strowel, *Droit d'Auteur and Copyright: Between History and Nature*, in B. Sherman, A. Strowel, (eds.), *Of Authors and Origins. Essays on Copyright Law*, Oxford, 1994, pp. 246-8; see also W. Nordemann, *Le Principe du traitement national et la définition des œuvres littéraires et artistiques*, in *Droit d'auteur*, 1989, p. 319.

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could hint to a technically meditated qualification of authors' rights as property rights, while utilitarian aims still prevailed[128].

Albeit confusing, the overlaps of normative theories may be easily explained with the fluid post-revolutionary environment and the fast pace of the legislative reforms, influenced by different forces. The same can be said for private law institutions, characterized by a contamination of Roman law dogmas and Germanic customs, and still far from shining for conceptual and systematic purity[129]. Property represented the epitome of such hybridity: compared to other continental legal systems developed on Roman law principles, it showed – and to a certain extent still shows – high flexibility and openness to intangible goods and entitlements lacking basic proprietary features, like perpetuity and absoluteness. Against this background, it is not surprising that the link between philosophical justifications and legal solutions presented inconsistencies and flaws, and that asymmetries between the declamatory use of legal qualifications and the actual content of the related discipline were accepted as ordinary course of business.

These features also played a role in differentiating the English and French experiences and the effects of their apparently similar propertization[130], enhancing the particularities of their distinct interplay between normative theories and proprietary qualifications. The Statute of Anne offered only a cursory proprietary definition of copyright, and the battle of the booksellers separated the natural law and utilitarian rationales in the construction of the copyright model, attributing to the propertization different consequences depending on its common/natural law or utilitarian/statutory basis, with the ultimate predominance of the latter. In France the post-revolutionary *milieu* left the two normative theories closely bound, so that the proprietary rheto-

[128] The particular interplay of normative theories in the background of the French decree is emphasized by S. Strömholm, *op. cit.*, p. 113, J.C. Ginsburg, *op. cit.*, p. 994; and already E. Pouillet, *Traité théorique et pratique de la propriété littéraire et artistique et du droit de représentation*, 3rd ed., Paris, 1908, p. 11.

[129] On the mixed nature of the French property model see, *inter alia*, F. Zenati, *Essai sur la nature juridique de la propriété, Contribution à la théorie du droit subjectif*, Lyon, 1981, p. 169 ff.

[130] It is difficult, in fact, to confute that the similar mix of natural law and utilitarianism and the non-technical use of the property label may suggest a *de facto* convergence of the copyright and the *droit d'auteur* systems, as argued in A. Strowel, *Droit d'auteur et copyright. Divergences et convergences*, cit., p. 116.

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ric remained unitary and not dichotomic, and merged natural law and utilitarian inspirations[131]. The sacred link between the author's personality and her work could therefore inject personalistic elements into the *propriété litteraire*, which resulted in the judicial creation of moral rights – something akin to a parthenogenesis of personality rights from a property right[132].

This evolution was not without bumps, though. Trying to bring more clarity in a field tainted by controversial court interpretations, a much more articulated Napoleonic statute (51 articles) introduced several technical specifications, adding utilitarian rationales to justify the limited duration of the right, but still using a proprietary qualification[133]*. This triggered further doctrinal debates, which either contested the classification or argued, instead, in favour of a complete assimilation of the propriété litteraire to tangible property*[134]*. On this basis, in the 19th centuries several legislative proposals tried either to extend the duration of the right to* perpetuity[135], or to clear the statute from any proprietary reference, the latter facing the opposition of those scholars who argued that no other right but property was able to embed at the same time economic and personality elements[136]. Also the *Cour de Cassation* long oscillated between a classification of authors' rights as property and as monopoly, testifying to the difficulties in providing univocal systematic answers[137].

Scholars tried to come out from the standstill. The most successful attempt was made by *Jean-Marie Pardessus, whose theory laid*

[131] Similarly O. Laligant, *La Révolution française et le droit d'auteur ou pérennité de l'objet de la protection*, in *RIDA*, 147, 1991, p. 4.

[132] S. Strömholm, *op.cit.*, p. 41, but contrarily Peeler (n. 123), p. 435.

[133] Décret-loi du 5 février 1810, relatif à l'imprimerie et à la propriété littéraire, JORF 21.8.1944, 24. Both the legislative background and the proprietary qualification are explained in the verbalization reported by M. Dumas Hinard, *Napoléon. Ses opinions et jugements sur les hommes et sur le choses, recueillis par ordre alphabétique* (II, Dufey, 1838), pp. 364-5.

[134] As reported in J.C. Ginsburg, *op. cit.*, p. 1015 ff.

[135] This was the case of the proposal for a *Code de la propriété litteraire*, rejected by the *Conseil d'Etat*. More details are discussed in T. Amar, *Dei diritti degli autori di opere dell'ingegno*, Milan, 1874, p. 10.

[136] This was the opinion of Portalis jr, as reported by J. Sfetea, *De la nature personnelle du droit d'auteur*, Paris, 1923, p. 31.

[137] In the famous *arrêt Masson*, Cass 16 August 1880, in *Sirey* 1881, I, p. 25, and the opposite Cass 25 July 1887, in *Sirey* 1888, I, p. 17.

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the groundwork for the development of the dualist model, which still characterizes the French system vis-à-vis other continental solutions[138]*. Through a stretched analogy with real property as bundle of rights, Pardessus argued that also the propriété litteraire was composed of alienable economic rights (reproduction and distribution) and non-transferable personality rights (paternity and integrity)*[139]*, independent from each other. The assignment of the former did not entail the transfer of the latter, which remained – as nude property – on the author also after her death*[140]*. Unlike in other experiences, moral rights stemmed out from the ownership relationship between author and work, and not – as it would have been more intuitive – from the implementation of civil liability remedies against the violation of* personality rights[141].

The theory found easy way in courts[142], but the development of moral rights challenged the roots of the propertization of the French *droit d'auteur.* This could have led to the systematic ousting of the notion of *propriété litteraire*, were it not for the reordering intervention of scholars like Morillot[143]. His work built on the German personality theory of authors' rights to separate the (now called) *droits moraux* from the *droits pecuniaires*, linking the latter to the property framework and protecting the formed through tort remedies[144]. By underlining the different nature and regulation of the two types of rights[145], the French

[138] J.M. Pardessus, *Cours de droit commercial*, Paris, 1831.

[139] CA Paris, 2 January 1828, in *Sirey*, 1828-30, 2, p. 5, *arrêt Vergne;* Trib Lyon, 17 July 1845, in *Sirey*, 1845, 2, p. 469, *arrêt Lacordaire.*

[140] Id., and Trib Seine, 24 April 1837, in A.C. Renouard, *op. cit.*, p. 329; Trib Seine 6 April 1842, in S. Strömholm, *op. cit.*, p. 125, and Cass., 21 August 1867, in *Dalloz*, 1867 I, p. 369, *arrêt Delprat*.

[141] S. Strömholm, *op. cit.*, pp. 327-333.

[142] And also in doctrinal treaties, which enthusiastically adopted it. Among others, see A.J. Gastambide, *Traité théorique et pratique des contrefaçons en tous genres, ou de la propriété en matière de littérature, théâtre, musique et peinture*, Paris, 1837, p. 136 ; A.C. Renouard, *op. cit.*, p. 327; E. Blanc, *Traité de la contrefacon et de sa poursuite en justice*, Paris, 1854, p. 97; A. Nion, *Droits civils des auteurs, artistes et inventeurs*, Paris, 1846, p. 298; E. Calmels, *De la propriété et de la contrefaçon des œuvres de l'intelligence*, Paris, 1856, p. 395.

[143] A. Morillot, *De la protection accordée aux œuvres d'art, aux photographies, aux dessins et modèle industriels et au brevets d'inventions dans l'empire d'Allemagne*, Paris, 1878, p. 29 ff.

[144] See S. Strömholm, *op. cit.*, p. 256 ff.

[145] S. Strömholm, *op. cit.*

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model could maintain its double personalist-proprietary nature, and ensure the dogmatic alignment of its rhetoric, revolutionary *propriété litteraire* to its property system[146].

Whereas the evolution of the copyright and *droit d'auteur* models prove how the different interplay of normative theories may lead to highly varied results, particularly where a vague legislative text gives ample room to teleological interpretations, the gap opened between the two traditions finds its roots in the concurrent operation of several variables. Among them, the most visible are the balance between different centers of interests, their influence on the political power, the relationship and equilibria between legal formants, the characteristics of private law institutions, and the interference/interplay of private law doctrines with the normative theories and rationales inspiring the construction of the discipline. The relevance of these factors appears particularly visible in the evolution of the Italian and the German systems, whose second-generation nature renders the role played by normative theories less important than in France and England, to the benefit of other elements.

In this sense, Germany and Italy represent perfect *tertium comparationis* – the first for its very influential scholarship and aversion against the notion of intangible property, the second for the hybrid characteristics of its legal system, born and developed at the crossroad of German and French influences. In the impossibility of providing an overview of the plethora of local legal systems featuring German and Italian history, the focus of the next pages will be on those experiences which brought a fundamental contribution to the construction of contemporary German and Italian copyright laws.

3.4. In light of the role it played in the context of the Italian unification in 1861 and the influence its laws had on the newly formed Kingdom of Italy, the focus on the Kingdom of Sardinia is a necessitated choice for the analysis of the evolution of the Italian *diritto d'autore*[147].

[146] On the consolidation of the dualist theory see Cass, 14 March 1900, in *Dalloz*, 1900, I, p. 497, *arret Whistler*, and Cass., 25 June 1902, in *Dalloz*, 1903, I, 5, *arret Lecocq*, and the comments of S. Strömholm, *op. cit.*, p. 439.

[147] A more detailed analysis can be found in L.C. Ubertazzi, *I Savoia e gli autori*, in *Quaderni di AIDA*, 3, Milan, 2000. For a focus on the diffusion of the French model in Italy see M. Borghi, *La manifattura del pensiero. Diritti d'autore e mercato delle opere in Italia (1801-1869*), Milan, 2003, pp. 25-54.

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Its origins are similar to that of other national copyright systems: royal privileges were granted to printers to control the press, managed in a centralized fashion with no delegation, and heterogeneous in content and duration[148]. The first general regulation on the matter traces back to 1826, when the Royal Patents 1899/1826 of Carlo Felice introduced harmonizing rules[149] and distinguished printing privileges from the exclusive right attributed to authors «of books and drawings (…) to print and sell their works for 15 years»[150]. This prototypical author's economic right was subject to deposit, modelled on privileges, but not subordinated to the royal assent; another embryonal form of moral right of paternity was protected through the provisions of sanctions in the case of false or omitted information on the identity of the author[151], while the right of integrity and the right to withdraw the work from the market found enforcement through the proprietary remedies provided by the Royal Patents[152].

Unlike England and France, the Savoy Kingdom did not experience any battle among booksellers, so that one had to wait the drafting process of the civil (Albertine) code to witness the first debate on the nature of authors' rights. The royal commission in charge of the draft tabled a definition of the work as literary property[153], which did not pass the scrutiny of the *Consiglio di Stato*[154], whose objections reflected the contemporary conceptualization of authors' rights in the first half of the 19th century. The Consiglio agreed with the proprietary qualification of the entitlement, grounding it on natural law, but maintained that such right got extinguished after publication, thus requiring a statutory renewal. This circumstance rendered the definition proposed by the

[148] One of the most evident examples are the Letter Patents n. 13/1833 of Carlo Alberto, in *Raccolta degli atti del governo di S.M. il Re di Sardegna*, I, Turin, 1833, p. 101.

[149] Republished in their entirety by L.C. Ubertazzi, *op. cit*., p. 154 ff.

[150] Id., Article 18 [my translation].

[151] Albertine Penal Code, Article 394.

[152] The notion of moral rights and the dualist model will make their debut in Italy only in the early 20th century, thanks to the work of E. Piola-Caselli, *Del diritto di autore*, Turin, 1907.

[153] The proposal can be found in *Motivi dei codici per gli Stati sardi*, II, Turin, 1856, p. 61.

[154] The Consiglio di Stato had to approve the text together with the *Camera dei Conti* and the various Senates of the Kingdom. Its report is in *Motivi*, *op. cit.*, pp. 448-449.

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royal commission useless, for it was implicitly absorbed in the general property clause of the Albertine Code, and improper, since the positivist, post-publication granting of the right would have needed a special statute, as common in other national experiences[155].

With an interesting mix of natural law and legal positivism, the ministerial report to the bill explained that the property label was used to distinguish authors' rights from old privileges, and not, as in France, as rhetorical tool to legitimize them[156]. The departure from the French model was crystallized in Article 440 of the Albertine Code (1838), which stated that «the products of human mind are property of their authors according to the related laws and regulations»[157], in contrast to the absence of literary property from the *Code Napoleon.*

Before the next legislative intervention in 1865[158], the evolution of the Savoy authors' rights system proceeded along the lines of several bilateral international treaties on the non-discrimination of foreign authors and the mutual recognition of authors' rights[159], the most relevant one being the Austro-Sardinian Convention of 1840, advocated by printers from the Savoy Piedmont and the Italian-speaking Kingdom of Lombardy-Venetia, still under the Austrian domain, who wanted to obtain a uniform protection of their literary property across the internal borders of the fragmented Italian peninsula[160]. The aim of the Sardinian delegation was to «guarantee the property rights of authors»[161], already defined as such in the preamble of its first draft proposal. The Austrian,

[155] Id.

[156] Id.

[157] [My translation]. For a comment see L. Franchi, *Leggi e convenzioni sui diritti d'autore*, 2nd ed., Milan, 1902, p. 78.

[158] Although also the 1839 Albertine Criminal Code (Arts. 394-396) intervened in the field, sanctioning the falsification of paternity and the violation of authors' economic rights. See L. Franchi, *op. cit.*, p. 86.

[159] For an overview of the bilateral treaties entered into by the Savoy Kingdom, see L.C. Ubertazzi, *op. cit.*, pp. 37-38. The Savoy wanted to limit the unauthorized reprints and parallel import of works of its authors, triggered by the fact that several states explicitly excluded the protection of non-nationals. See the governmental dispatches of Sambuy cited in M. Degli Alberti, *La politica estera del Piemonte sotto Carlo Alberto (1835-1846)*, in *Regia Deputazione sovra gli studi di storia patria per le antiche province e la Lombardia*, Turin, 1913, p. 11 ff.

[160] M. Degli Alberti, *op. cit*., p. 7 ff.

[161] Dispatch of Sambuy n. 606, 3 January 1839, in M. Degli Alberti, *op. cit.*, p. 1; Dispatch of Sambuy n. 906, 9 June 1840, Id., *op. cit*., p. 283.

instead, strongly opposed the proprietary classification of the right after publication[162], judging it incompatible with tangible property due to its time and scope limitation[163], and irreconcilable with a protection granted for "reasons of equity", "a principle of strict justice"[164], and utilitarian goals such as the creation and dissemination of knowledge. In fact, they favoured the privilege system, for it allowed a stricter governmental control and a more effective link with censorship, and looked with skepticism at property, which both for the Savoy and in France was a sign of severance from the feudal past. At no surprise, the Sardinians maintained the point, rejecting the Austrian compromising proposal of exchanging the term "property" with "exclusive possession"[165].

The clash reproduced at an international level the common national debate opposing the proprietary/natural law and the monopolistic/utilitarian qualification of authors' rights. Similarly, the text of the Convention featured the typical contemporary presence of proprietary qualification and utilitarian definition of author's rights as incentive for the generation of new creative works[166], and contained provisions theoretically incompatible with the notion of absolute tangible property, such as the time limitation (30 years *p.m.a.*[167]). The Convention described analytically the rights granted, including also translation and public performance, provided specific rules on exceptions, subordinated the national treatment of foreign authors to the publication of the work in the country[168], and specified the distinction between copyright protection and censorship, the latter remitted to the discretion of national governments[169].

Soon after its entry into force, in a number of Italian States the Convention was applied directly by courts in private controversies, not only

[162] Cited by L.C. Ubertazzi, *op. cit.*, p. 48.

[163] Dispatch of Sambuy n. 824, 1 March 1840, in M. Degli Alberti, *op. cit.*, p. 185.

[164] M. Degli Alberti, *op. cit.*

[165] In fact, the Austrian tried also to obtain the abandonment of the notion of exclusive right, as reported in the Dispatch of Sambuy n. 842, 21 March 1849, in M. Degli Alberti, *op. cit.*, p. 195.

[166] Austro-Sardinian Convention for the protection and against the counterfeiting of scientific, literary and artistic works, Preamble, in *Raccolta degli atti del governo di S.M. il Re di Sardegna*, VIII, Turin, 1840, p. 77 ff.

[167] Id., Article XVIII.

[168] Id., Article I.

[169] Id., Article XXVI.

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to interpret local rules but also, and mostly, to substitute them and initiate a bottom-up harmonization of the *Italian diritto d'autore* even before the Convention itself was opened to their adhesion in 1840[170]. When a retroactive application was needed, judges grounded it on the proprietary nature of authors' rights, as in the famous controversy between Le Monnier and Alessandro Manzoni, whose arguments recalled in many instances those used during the battles of the booksellers in France and England[171].

Several conventional rules were reproduced in the first Italian copyright statute of 1865, drafted by a commission guided by Antonio Scialoja, the only scholar – apart from Sclopis – who dedicated a study to the analysis of the nature of authors' rights, privileging the proprietary qualification and supporting his opinion with elaborated systematic arguments[172]. Despite the French influence[173], Scialoja's work presented a number of original traits, and preferred the analytical and positivist approach and the support of economic theories to the reference to natural law[174]. Thanks to his direction, the Italian statute featured clearer terms and definitions than the French model it built upon, described in detail the author's "exclusive rights" (*diritti esclusivi*), and envisioned the utilitarian notion of "paying public domain" (*dominio pubblico pagante*) to allow the transformation of exclusivity into a right to fair compensation after a certain timeframe[175]. Traces of German personal-

[170] L.C. Ubertazzi, *op. cit.*, pp. 51-56, provides a detailed overview of the process. See also L. Firpo, *Vita di Giuseppe Pomba da Torino*, Turin, 1976, pp. 150-151.

[171] CA Firenze, 25 April 1860, in *Giur.it*, 1860, II, 505, and Cass Toscana, 20 December 1861, in *Giur.it*, 1861, II, 781. The case is reported by and commented on by L. Moscati, *Sul caso Manzoni-Le Monnier*, in Id., *Dialettica tra legislatore e interprete. Dai codici francesi ai codici dell'Italia unita*, Naples, 2013, p. 142 ff.

[172] On Scialoja's contribution, see L. Moscati, *Sul diritto d'autore tra Codice e leggi speciali*, in *Iuris Vincula Studi in onore di Mario Talamanca*, V, Naples, 2001, p. 521, and Id., *Tra le carte di Antonio Scialoja avvocato e legislatore dei diritti sulle opere dell'ingegno*, in *Rassegna Forense*, 3-4, 2014, p. 1039.

[173] L. Moscati, *op. cit*., p. 1041, and this despite his main inspirations were declared to be Pardessus and Renouard.

[174] The reference is A. Scialoja, *Su la proprietà de' prodotti d'ingegno e sua pegnorazione*, Naples, 1845, esp. p. 56.

[175] Legge 25 giugno 1865 n. 2337 sui diritti spettanti agli autori delle opere dell'ingegno, Gazzetta Ufficiale 5.7.1865, n. 162, Article 9. The text of the report can be found in G. Galletti, P. Trompeo, *Relazione fatta al Senato il 24 ottobre 1864 dall'Ufficio centrale del Senato…, Scialoja relatore*, in *Atti del Parlamento italiano, sess. 1863-64, (VIII Legislatura)*, Rome, 1885, p. 849 ff.

ity theory emerged, instead, in the protection of the right to integrity of the work[176].

The mix of theories and inspirations, operated while still maintaining a high degree of systematic precision, was made possible by the greater involvement of scholars, who could focus on conceptual sophistication more than on rhetorical arguments thanks to the less conflictual institutional background – an established monarchy and no market battles. The same traits characterized the Italian Civil Code of 1865, which reproduced almost slavishly the *Code Napoleon*, but still retained a modified version of the Albertine Code's definition of authors' rights, stating that «intellectual works belong to their authors according to the provisions set by special laws»[177] in a provision that immediately followed the general definition of property (Article 437). The semantic choice of the neutral term "belong" stood as evidence of the ongoing doctrinal debate which, influenced by the German doctrine, was already challenging the notion of literary property on dogmatic grounds[178]. Back in 1865, the legislator avoided taking a stand on the interpretative question, remitting it to the judiciary, which, however, would never really intervene on the matter with any clarificatory *dictum*.

Despite the similarities with the French model, the absence of a strong property rhetoric allowed the Italian propertization of authors' rights to be more technical and systematic, and the property framework to operate as systematic guidance for the construction and evolution of the discipline. This feature emerges clearly in those judicial decisions that often resorted to property rules to fill up legislative gaps, as in the case of the regulation of the publishing agreement, qualified as sale contract[179]. Only in the first decades of the 20th centuries will Italian scholars lean more towards German doctrines, and "purify" the Italian *diritto d'autore* and its doctrinal analysis of any trace of propertization. In spite of that, however, the different genesis of the Italian system will

[176] Legge n. 2337/1865, Article 35.

[177] My translation.

[178] The critiques against the notion of literary property are common in several European states in the second half of the 19th century. See N. Stolfi, *La proprietà intellettuale*, Turin, 1915, pp. 218-219.

[179] See, eg., the Neapolitan court reports edited by F. Albissinni, *Giurisprudenza civile ossia raccolta con ordine cronologico delle decisioni emesse dalla Corte Suprema di Giustizia in Napoli*, Naples, 1849.

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inevitably impact on the interpretation that courts will give of the 1941 Italian copyright statute, with frequent references to property concept and rules[180]. This phenomenon will happen parallel to the "cleansing" of the private law foundations of copyright propertization – a circumstance that will create substantial theoretical asymmetries, and have a weakening effect on the dogmatic development and sophistication of the discipline.

3.5. The term *Verlagseigentum* (publisher's property) to identify the printer's exclusive right of reproduction and distribution after the first publication appeared for the first time in German-speaking territories in the 16th century, when German booksellers used it to demand the official recognition of their letters patent against unauthorized reprints or other privileges granted later in other *Länder*[181]. Subsequent doctrinal contributions supported the qualification with Lockean and Hegelian arguments, leveraging natural law to overcome the problems created by the territorial limitation of the exclusive[182]. Up to the late 18th century, a number of local ordinances recognized the *Verlagseigentum* from the first edition[183], followed by a number of scholars who built up a doctrine of literary property based on legislative data and their comparison with the French post-revolutionary experience. Already at this stage, however, the German care for dogmatic details was visible in the distinction made between the narrow, corporeal civil law notion of property and its broader natural law counterpart, and in the specification that the notion of literary property should have been better understood as conceptual model (*Arbeitsbegriff*), rather than as a technical definition[184].

[180] Reported and heavily criticized by P. Rescigno, *Per uno studio sulla proprietà*, in *Riv. dir. civ.*, I, 56, 1972, p. 68 ff.

[181] As in the cases cited by W. Bappert, *Wege zum Urheberrecht – Die geschichtliche Entwicklung des Urheberrechtsgedankens*, Jena, 1962, p. 221 ff.

[182] See, eg, L. Gieseke, *Die geschichtliche Entwicklung des deutschen Urheberrechts*, Göttingen, 1957; W. Bappert, *op. cit.*

[183] Reported by M. Vogel, *Deutsche Urheber- und Verlagsrechtsgeschichte zwischen 1450 und 1850*, in *Archiv für Geschichte des Buchwesens,* 19(1), 1978, pp. 36, 72.

[184] K.E. Schmid, *Der Büchernachdruck aus dem Gesicht des Rechts, der Moral und Politik*, Jena, 1823; W.T. Krug, *Schriftstellerei, Buchhandel und Nachdruck, rechtlich, sittlich und klüglich*, Mannheim, 1823, and W.A. Kramer, *Die Rechte der Schriftsteller und Verleger*, Jena, 1827, commented on by M. Vogel, *op. cit*., p. 141.

Despite this clarification, it is not rare to find state legislative reports directly connecting the *Verlagseigentum* to traditional property, in order to mark its distinction from the more limited state privileges, and explain the extension of its scope to cover not only the work, but also its expressive content[185]. In fact, the notion of property was used as unitary and unifying concept among *Länder*, to overcome the territoriality of privileges, with a solution made possible by a legal system whose dogma were still flexible enough to accept the idea of immaterial property.

Since the ordinances were not enough to solve the problem of territoriality, publishers strongly expressed their concerns in front of the newly formed federal power, and reached the introduction in the German Federal Act of 1815 of a programmatic provision that planned the enactment of harmonized rules on the reproduction right of authors and publishers[186]. The first bill presented by the federal commission in charge of the drafting of the law proposed the introduction of a unified right, defined as property but limited in time and scope, and inspired to public interest goals, so much that overpricing of a book could have led to the termination of the right[187]. The overlap of jusnaturalism and utilitarianism which, as already noted, is one of the most common traits of early copyright statutes, emerges also in the more favourable treatment reserved to authors compared to publishers, who saw the authors' transfer of economic rights limited by law to only one edition[188].

The debate among *Länder* and the related doctrinal pamphlets galore that followed is particularly interesting for the meaning they attributed to the propertization of authors' rights. Member states with a strong printing industry opposed the new restrictions, claiming their incompatibility with the traditional property paradigm, and the need for the owners – *id est* the author and the printer – to be free to dis-

[185] Like in the Prussian civil code (see L. Gieseke, *op. cit.*, p. 133), and in the Baden civil code (J.N.F. Brauer, *Erläuterungen über den Code Napoléon und die Großherzogliche Badische bürgerliche Gesetzgebung*, Erlangen, 1809, p. 467).

[186] F. Kawohl, *Commentary on Directive for reciprocal copyright protection within the German Confederation (1837)*, in L. Bently, M. Kretschmer (eds.), *Primary Sources on Copyright (1450-1900)*, www.copyrighthistory.org/cam/tools/request/showRecord?id=commentary_d_1837b [last accessed 15 December 2019], note 1, and L. Gieseke, *op. cit*., pp. 203-20.

[187] The debate is analyzed and commented on by F. Kawohl, *op. cit.*, §4.

[188] Similarly, see L. Gieseke, *op. cit.*, pp. 145-149.

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pose and determine the price of the work. Member states with a strong reprinting industry, or no printing industry, fervently supported the proposed limitations, preferring the utilitarian classification of the right as *sui generis* and functionalized to the public interest[189]. From another angle, Austria opposed the proprietary qualification – here as during the negotiation of the Austro-Sardinian Convention – arguing that «there cannot be an absolute freedom of the press, since there is a literary private property which, like every other kind of private property, cannot subsist without the protection of civil law»[190]. Due to Metternich's strong influence, it was the rejection of the Austrian proposal which ultimately caused the proposal to founder, and territorial privileges to remain the only option available to print and distribute literary works[191-192].

Pressured by rampant piracy and by one of the tightest censorship in Europe, German printers and authors joined forces to advocate for the legislative process to finally result in the enactment of a unitary copyright statute[193], and used the proprietary qualification to challenge the legitimacy of the administrative control over the press. This led to the introduction of bills which explicitly equated literary and tangible property, arguing for the perpetuity of authors' rights[194]. Nothing really moved, however, until the Prussian power within the federation became dominant, and its intervention convinced the federal parliament to introduce basic harmonized provisions recognizing the exclusive right of reproduction to authors and printers, and the principle of national treatment to avoid discrimination of foreign authors[195]. Later

[189] On the issue see C.A.G. Eberhard, *Die deutschen Schriftsteller: was sie thaten was sie für Unrecht leiden, und was ihnen für ein Lohn gebührt*, Munich, 1814, p. 24 ff.

[190] These are words of Chancellor Metternich, thorugh is ambassador in Leipzig, as reported by F. Kawohl, *op. cit.*, §5.

[191] F. Kawohl, *op. cit*.

[192] Ibid. As epitome of the problems created by the territoriality of privileges, contemporary chronicles report the adventure of Goethe, who asked the Frankfurt Diet for a federal exclusivity over his works in 1825, obtaining instead – and this was already an exceptional concession – the issuance of a bundle of 39 local privileges. See M. Rehbinder, *150 Jahre modern Uhreberrechtsgesetzgebung in Deutschland,* in *ZUM*, 1989, p. 353.

[193] F. Kawohl, *op. cit.*, §6.

[194] F. Kawohl, *op. cit.*

[195] The key role played by Prussia for the harmonization of German authors' rights is broadly emphasized by L. Gieseke, *op. cit*., p. 231.

on, in 1837, the Prussian copyright act "for the protection of property over scientific and artistic works against reprint and counterfeiting" became the model law used by the federal parliament to proceed to the first harmonization of German authors' rights, setting a minimum standard of protection for all the member states, much like today's EU directives[196].

The Prussian statute shows all the typical signs of continental 19th century authors' rights act, except for a more visible scholarly contribution in provisions such as the abstract definition of work, distinct from the material support and the qualification of authors' rights as exclusive rights, albeit with the permanent reference to property in the title of the Act[197], exactly as in the legislation of the Kingdom of Sardinia. The doctrinal *milieu*, however, was about to change. The Historical School of Jurisprudence, led by von Savigny, anchored to the purity of Roman law its absolute rejection of the notion of intangible property, thus also denying the admissibility of literary property. At the same time, the greater attention devoted to the role of authors against publishers and the rising influence of the personality theory pushed to challenging the proprietary classification of authors' rights from its roots. When the abandonment of privileges and the achievement of a legislative harmonization made the need for property fade away, scholars could fully take the lead, and proceed to a systematic reordering of German authors' rights.

The effects of this shift appeared already in the 1870 Copyright Act, where the proprietary label disappeared for good[198], and so did the references to normative theories[199]. Yet, the right remained still essentially

[196] A detailed analysis of the Act is in J. Hitzig, *Das Königlich Preußische Gesetz vom 11. Juni 1837 zum Schutz des Eigentums an Werken der Wissenschaft und Kunst,* Akademie der Wissenschaften, 1907, esp. p. 110 ff.

[197] Gesetz zum Schutze des Eigentums an Werken der Wissenschaft und der Kunst gegen Nachdruck und Nachbildung, Gesetz-Sammlung fur die koniglich-preussischen Staaten 1837, 165. The text of the law is available at www.copyrighthistory.org/cam/tools/request/showRecord.php?id=record_d_1837a [last accessed 15 December 2019] and commented on by F. Kawohl, *op. cit.*

[198] Gesetz, betreffend das Urheberrcht an Schriftwerken, Abbildungen, musikalischen Kompositionen und dramatischen Werken. Vom 11. Juni 1870, *Bundesgesetzblatt des Norddeutschen Bundes* 19 (1870): pp. 339-353, adopted by the North German Confederation, and then by the German Empire on January 1, 1871 – the date of its constitution.

[199] Id., p. 231 ff. In fact, the absence of jusnaturist claims is coupled with the ab-

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economic in nature and centered on the prohibition of unauthorized reprinting[200], with only a cursory mention to moral rights, in line with the 1837 Prussian Act[201]. On the contrary, courts showed much more sensitivity towards systematic precision. A set of original judicial decisions contributed to the construction of a positive notion of author's exclusive right, overarching but not proprietary[202]. The solution was then embedded in the 1901 Act[203], which brought the author to the center of the stage and eliminated any formality as requirement for protection. The strict effects of the BGB and the analytical purity of its *Allgemeiner Tail* had yet to unfold, though, leaving the copyright statute presenting mixed traits of German personalism and French dualism. The author's right of reproduction and distribution (*Das Recht des Urhebers* – singular) could be transferred and inherited, while cases of joint ownership were regulated with a direct reference to the BGB rules on co-ownership[204]. Moral rights still remained a side matter, mentioned only in a provision that prohibited the assignee to modify the work or misattribute its paternity[205], and this despite the influence of the German personalist theory could already reach the judicial development of paternity and integrity rights in France. The delay could be explained, quite paradoxically, by the early disappearance of copyright propertization – a setting that did not force the doctrine, as in France, to justify the otherwise doubtful compatibility of a proprietary qualification with the personalist traits of authors' rights. The divide between the two continental experiences in this respect is also motivated by the different attitude of German courts, which never hesitated to exclude that authors' rights could be defined as property[206]. It is enough to

sence of any hint to the public interest as utilitarian justification for the provision of exceptions.

[200] They were conferred to authors, subordinated to registration formalities, but freely transferable and inheritable as purely economic entitlements. The act is cited and commented on by E. Wadle, *Geistiges Eigentum*, II, Munich, 2003, p. 226 ff.

[201] E. Wadle, *op. cit*.

[202] Reported and contextualized by M. Vogel, *op. cit*., p. 191 ff.

[203] Gesetz betreffend das Urheberrecht an Werken der bildenden Künste und der Photographie (KUG), 9 January 1907, in *Deutsches Reichsgesetzblatt*, 27, 1901, pp. 227-239.

[204] Id., §6.

[205] Id., §9.

[206] Although it is necessary to mention that also in Germany courts recurred to property concepts and rules in the 1950s, challenged by the advent of new technologies

mention, as paradigmatic case, a 1926 decision of the *Bundesgerichtshof*, which ruled that the scope of authors' rights was defined by law and could not be expanded as an open-ended clause[207], reaching the opposite conclusions of French courts, which would instead use the propertization of copyright to theorize the all-encompassing, absorbing nature of the rights, covering every use not explicitly excluded from its scope[208]. As a consequence, the German monist theory crystallized in law only in 1965, in a statute which offered definitions and a level of analytical details reaching the same level of abstraction and scientific precisions of the BGB, and provided so thorough rules to construe a stand-alone discipline, which did not require anymore the support of external sources and principles to fill up gaps and assist its implementation.

The evolution of German copyright law testifies to a use of property concepts as vehicle to oppose censorship, modernize the discipline, and create a level playing field to harmonize the laws of several states. Due to the particular institutional and socio-economic characteristics of the *Länder* in the 16th-19th century, the role played by normative theories and the rhetorical use of property had been more circumscribed, and allowed the doctrine to play a much more influential role. This circumstance, coupled with the dominant traits of the German private law system, as construed before and after the enactment of the BGB, have allowed the German authors' rights system to merge in a consistent fashion legal dogmas and philosophical inspirations, and to consciously develop a self-supporting body of rules, well-embedded in its systematic background, which rejected – and did not even need, in fact – the propertization of copyright to properly operate.

and the advent of new forms of exploitation. See A. Strowel, *Droit d'Auteur and Copyright: Between History and Nature*, *op. cit.*, pp. 250-1.

[207] Reichsgericht (RG), 12 May 1926, cited by O. Von Gamm, *Zur Lehre vom geistigen Eigentum*, in *UFITA* 94, 1982, p. 73 ff.

[208] The theory will lead to the development of the so-called *droit de destination*, defined as the rightholder's power "to prevent one or more uses of the copies of the work", even beyond the scope of the rights formally granted by law, on the basis of their interpretation as overarching, comprehensive and absorbing clauses (F. Polland-Dulian, *Le droit de destination. Le sort des exemplaires en droit d'auteur*, Paris, 1989, p. 193). For an historical reconstruction of its judicial evolution, see S. Strömholm, *op. cit.*, p. 287 ff. and, more recently, A. Lucas, H.J. Lucas, A. Lucas-Schloetter, *Traite de la propriété littéraire et artistique*, 4th ed., Paris, 2012, p. 262 ff.

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4. Despite its conciseness, this brief historical overview has offered the opportunity to identify key processes and mechanisms which led identical proprietary concepts and labels to generate fairly diverging results in different legal systems, even among those belonging to the same legal family. The factors influencing the effects of copyright propertization in the four national experiences analyzed in this paper are numerous, and often interplaying. Non-technical variables range from the dominant normative theories supporting the propertization – Hegelian, Lockean or utilitarian – to the economic and political meanings attributed to the use of the property label, and the institutional background in which such arguments operate. Among the legal factors, key importance vests in the role of legal formants, the content and features of property and other private law institutions, the adaptability of local dogmas, and the compatibility and interaction between the latter and normative theories, particularly relevant in light of the polysemy of property across the centuries. England and France, with their remarkably similar paths and hidden overlaps, both experienced a strong copyright propertization, ending up in the generation of two distinct models, so different to become the inspiring archetypes of two separate traditions. Germany and Italy represented two additional, useful test beds both for the second-generation nature of the *Urheberrecht* and the *diritto d'autore,* and for the different factors intervening in their historical propertization, which justify the different features of the two experiences compared to their most direct originating model, the *French droit d'auteur/propriété litteraire.*

Far from being a mere theoretical *divertissement*, these results prove how wrong any doctrinal oversimplification (and generalization) of the effects of copyright propertization may be. At the same time, they provide tools to approach and try to understand, with a deconstructed analysis, the roots, meaning and implications of the contemporary epiphanies of the phenomenon, with particular regard to the alleged propertization of copyright in the EU harmonization.

Abstract

Scholars from both side of the Atlantic Ocean converge on the assumption that the qualification of copyright as a property right has always led to the expansion of scope and duration of authors' exclusive rights to the detriment of exceptions and the public interest. According to this narrative, the shift from monopoly-based to property-based structures implies

the abandonment of utilitarian principles in favour of a natural law model of absolute ownership protection. This contribution aims at confuting this argument as an oversimplification, through a de-structured analysis of genesis, rationales and impact of the epiphanies of propertization in copyright history, with a focus on the two main models of copyright (England) and authors' rights (France), and using as complementary test beds Germany and Italy. The analysis identifies the factors influencing the emergence of the phenomenon, sheds light on their interaction, and explains how and why apparently similar national "copyright propertizations" could roduce often radically different regulatory outputs.

Tanto la dottrina anglosassone quanto quella continentale convergono nell'imputare alla proprietarizzazione del diritto d'autore l'espansione del suo ambito oggettivo e della sua durata a danno di eccezioni e limitazioni e, quindi, del bilanciamento tra esclusiva, interesse pubblico ed interessi e diritti privati confliggenti. Lo spostamento da una struttura fondata sul monopolio ad una fondata su regole e concetti proprietari avrebbe comportato il progressivo abbandono degli originari principi utilitaristi ispiranti la disciplina in favore di un modello giusnaturalista di protezione proprietaria assoluta delle prerogative autoree. Il presente contributo confuta tale tesi attraverso un'analisi destrutturata di genesi, rationes ed effetti delle epifanie storiche della proprietarizzazione del diritto d'autore, guadando al copyright anglosassone ed al droit d'auteur francese, ed utilizzando quale tertium comparationis sistemi ibridi derivati quali il tedesco e l'italiano. Lo studio identifica ed analizza i fattori influenzanti l'emergere del fenomeno e le loro interazioni, illustrando le ragioni per cui l'adozione di simili logiche e terminologie proprietarie nelle legislazioni nazionali in materia di diritto d'autore abbia prodotto soluzioni giuridiche spesso radicalmente differenti.

Keywords

Droit d'auteur, copyright, *Urheberrecht,* property, propertization.

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