

The digital end-user in the eyes of the CJEU: An interlegal perspective in EU copyright law

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Abstract

Striking a solid fair balance of rights and interests in the digital environment is key to the ongoing process of modernization of copyright rules at EU level. The objectives of safeguarding right holders as well as end-users, and of promoting the Internet and the plethora of market opportunities embedded in it, have traced a clear policy direction towards a recalibration of the rights and interests at stake. However, the question of how to concretely achieve a new equilibrium remains mostly unanswered. Recent developments in the EU copyright legal framework unveil two consolidating patterns, which may help qualify this process of legal reform: on the one hand, a growing focus on end-users' needs, and, on the other, a rooted sensitivity towards the rules and functioning of the Internet. Combining these two features, the analysis sheds light on the evolution of EU copyright law through the lenses of the digital end-user. To do so, it retraces the role of the end-user in the legal and digital landscapes, focusing on the intertwined nature of these two environments. In this vein, the essay explores the most mature perspective of the digital end-user within the EU copyright legal framework, which is offered by the CJEU. By accounting for both legal and technological norms, the Court seems to adopt a composite understanding of EU copyright rules in a considerable number of cases. The significance of this peculiar approach stands out in the arduous process of recalibration of rights and interests, paving the way towards a context-sensitive protection of end-users and a sustainable EU digital copyright legal framework.

Keywords: EU copyright law, exceptions and limitations, CJEU, digital single market, end-user, interlegality.

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1. Introduction

In 14th century Florence, poet and philosopher Dante Alighieri thought that “a twofold directive” was necessary to mankind in order to achieve a “twofold end”, namely terrestrial and eternal happiness.¹ By doing so, he passionately endorsed the so-called theory of the two suns, according to which the State and the Church enjoyed separate and equally legitimate power to govern society. Looking at today’s digital world, Dante’s imagery is inspiring, to say the least. Within a staggering number of transactions and activities moving online, it is not hard to notice how the Internet is illuminated by “two suns”: law and technology. Legal rules and technological rules represent the key normative orders governing today’s digital environment, not without frictions.²

The creation and consumption of cultural content online is a great example to showcase the joint dominance of these two dimensions. For the last three decades the field of law that most directly and comprehensively regulates creative works – i.e., copyright law – has faced the need to adapt and re-state its validity in an increasingly Internet-dominated world.³ At the same time, digital technologies have evolved, solidly building the space of interconnection and communication among individuals known as the Internet, and consolidating its capacity to self-regulate via private and technological norms, practices, and mechanisms.⁴

Against this backdrop, Dante’s words become even more insightful. Both copyright legislations and the operating rules of the Internet pursue a “twofold end”, that is, on the one hand, to protect right holders and, on the other, to enable the wide dissemination of their works. However, this objective does not correspond to a “twofold guidance”: rather than complementing each other, both legal and technological norms tend to focus on right holders and their needs, thus leaving end-users in the penumbra. Aware of this asymmetry and witnessing a growing polarization in the copyright debate, the European Union (EU) legislator has put forward an agenda of copyright modernization, aiming, among others, at taking end-users’ interests more seriously. How the EU copyright legal system will eventually accomplish this epochal task remains yet to be seen. Thus far, what emerges as a distinctive feature of this paradigmatic shift is the growing attention dedicated to how the Internet operates, and how end-users interact with it.

In this vein, this essay sets forth a theoretical framework to understand the recent developments of EU copyright law that move towards a more sensible recognition of the role of end-users. After retracing the evolution of the relevant legislation (Section 2) and digital context (Section 3), it explores the interplay between the two, seeking response to the question: how is EU copyright law protecting the *digital* end-user? The study unveils how the notion of interlegality offers a promising framework to answer this question. The interlegal approach stands for any composite interpretation of the law that is permeated by the presence of concurrent normative orders, which typically lie beyond the scope

¹ See Aurelia Henry (ed and transl), *The De Monarchia of Dante Alighieri* (Houghton Mifflin Company 1904), available at https://oll.libertyfund.org/title/reinhardt-de-monarchia#lf1477_label_694 (31/3/2021).

² E.g., Tim Wu, “When Code Isn’t Law” (2003) *Virginia Law Review* 89(4) 103-170. Recurrent and highly meaningful examples can be found in the everyday life of the Internet. See e.g., Adam Liptak, “Can Twitter Legally Ban Trump?”, *New York Times*, 9 January 2021, available at <https://www.nytimes.com/2021/01/09/us/first-amendment-free-speech.html> (31/3/2021).

³ See Marco Ricolfi, “Intellectual Property Rights and Legal Order” (2002) *Global Jurist* 2(1) 3.

⁴ *Inter alia*, Luciano Floridi, *The Fourth Revolution. How the Infosphere is Reshaping Human Reality* (Oxford University Press 2004); Matthias C. Kettman, *The Normative Order of the Internet. A Theory of Rule and Regulation Online* (Oxford University Press 2020).

of the hierarchy of legal sources and conflict of law rules⁵ - as, for instance, national legislation of neighboring countries or, indeed, Internet rules. This essay demonstrates how an interlegal conception of the protection of the digital end-user is arising within the EU copyright legal framework, promoted in particular by the Court of Justice of the European Union (CJEU) in several of its recent decisions (Section 4).

2. The role of the end-user in EU copyright law

What Julie Cohen pointed out investigating the US legal system⁶ can be said also for the European scenario: until very recently, the end-user has been the great absentee in copyright law. Since the first national legislative experiences, the consumer of creative content has mostly remained an implicit stakeholder. From the undefined dimension of the “encouragement of learning” evoked in the Statute of Anne of 1710⁷ to the hints to the “social utility” of protected works in the French Revolutionary Decrees of 1791 and 1793,⁸ the pursuit of a greater good has long remained the elephant in the room both in the common law and civil law copyright traditions.

Along these lines, the copyright paradigm has consolidated over the centuries in the form of a bundle of exclusive rights, whose limited duration and limited scope serve the fundamental aim to strike a balanced protection of right holders and end-users. Even though the definition of these boundaries has been a key constitutive moment of national, supranational, and international copyright systems,⁹ the limitations to the growing scope of copyright protection have been progressively weakened. Not only the duration of copyright exclusive rights has been significantly stretched over time,¹⁰ but also their expansive interpretations,¹¹ the recognition of sui generis and related rights,¹² and the dominance

⁵ See Jan Klabbers and Gianluigi Palombella (eds), *The Challenge of Inter-legality* (Cambridge University Press 2019); Gianluigi Palombella, “Interlegalità. L’interconnessione tra Ordini Giuridici, il Diritto, e il Ruolo delle Corti” (2018) *Diritto e Questioni Pubbliche* 18, 318-342.

⁶ Julie Cohen, “The place of the user in copyright law” (2005) *Fordham Law Review* 74, 347-374.

⁷ An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, During the Times therein mentioned, 1710, 8 Anne, c.19 (Statute of Anne) available at Lionel Bently and Martin Kretschmer (eds), “Primary Sources on Copyright (1450-1900)” www.copyrighthistory.org (31/3/2021). See also Mark Rose, “The Public Sphere and the Emergence of Copyright: Areopagitica, the Stationers’ Company and the Statute of Anne” in Ronan Deazley, Martin Kretschmer and Lionel Bently (eds), *Privilege and property: Essays on the history of copyright* (Open Book Publishers 2010) 67-88.

⁸ Report of Le Chapelier accompanying the Decree of 1791, and Report of Lakanal accompanying the Decree of 1793, both available at Bently and Kretschmer, “Primary Sources on Copyright (1450-1900)” (fn 7).

⁹ See Maurizio Borghi, “A Venetian Experiment on Perpetual Copyright” in Ronald Deazley, Martin Kretschmer and Lionel Bently (eds), *Privilege and Property: Essays on the History of Copyright* (Open Book Publishers 2010) 137-156; Gustavo Ghidini, *Rethinking Intellectual Property. Balancing Conflicts of Interest in the Constitutional Paradigm* (Edward Elgar 2018) 177-183.

¹⁰ It has been argued that the current duration, internationally harmonized to a minimum of 50 years *post mortem auctoris* and crystallized in the EU to 70 years *post mortem auctoris*, virtually corresponds to a perpetual protection. E.g., Lior Zemer, *The Idea of Authorship in Copyright* (Ashgate 2007) 224; James Boyle, *The Public Domain: Enclosing the Commons of the Mind* (Yale University Press 2008) 11; Deven R. Desai, “The Life and Death of Copyright” (2011) *Winsconsin Law Review* 2, 219.

¹¹ A phenomenon often described as a “second strand of protection” or “second enclosure”, characterized by a “persistent hegemony of the exclusionary model”. See, respectively, Ricolfi, “Intellectual Property Rights and Legal Order” (fn 3); James Boyle, “The Second Enclosure Movement and the Construction of the Public Domain” (2003) *Law and Contemporary Problems*, 66, 33; Ghidini, *Rethinking Intellectual Property* (fn 9) 219.

¹² See, among others, the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations of 1961 (Rome Convention).

of the three-step-test as a restrictive clause to copyright exceptions and limitations¹³ have significantly promoted an author-centric perspective, de facto disfavoring end-users.¹⁴

The role of end-users has remained marginalized also with the advent of the EU harmonization of national copyright rules, initiated in 1991 with the first Computer Programs Directive¹⁵. Besides exceeding the international minimum duration of exclusive rights,¹⁶ this process has addressed only to a minimal extent the provisions relating to their limited scope. The most important provision in this regard is Article 5 InfoSoc Directive, which limits itself to provide a list from which the Member States can discretionally decide which exceptions and limitations to implement in their territories.¹⁷ This provision has caused a substantial fragmentation across the EU with regards to copyright flexibilities. Moreover, the numerus clausus list set in Article 5 InfoSoc Directive is exhaustive, thus preventing national Parliaments from promoting a user-friendly legal culture beyond its enumerated exceptions. For two decades, this provision has been the problematic fulcrum of the protection of end-users under EU copyright law. In fact, the scant amount of other harmonized limitations – from the private use of non-electronic databases¹⁸ to the exceptions for software interoperability¹⁹ up to the public lending exception²⁰ – are of very narrow and minor relevance and either of optional nature or overridable by way of contractual agreements.²¹

However, more recently the EU legislator seems to have set sails towards a new policy direction. Since the adoption of the 2012 Orphan Works Directive,²² the EU legislator has showed a growing sensitivity towards the needs of end-users, strategically intervening on copyright exceptions and

¹³ See Martin Senftleben, “From Flexible Balancing Tool to Quasi-Constitutional Straitjacket. How the EU Cultivates the Constraining Function of the Three-Step Test” forthcoming in Tuomas Mylly and Jonathan Griffiths (eds), *The Transformation of Global Intellectual Property Protection* (Oxford University Press); Tanya Aplin and Lionel Bently, “Displacing the Dominance of the Three-Step-Test: The Role of Global Mandatory Fair Use” in Shyamkrishna Balganes, Ng-Loy Wee Loon and Haochen Sun (eds), *The Cambridge Handbook of Copyright Limitations and Exceptions* (Cambridge University Press 2021) 37-58; João Pedro Quintais, “Rethinking Normal Exploitation: Enabling Online Limitations in EU Copyright Law” (2017) 37-58; João Pedro Quintais, “Rethinking Normal Exploitation: Enabling Online Limitations in EU Copyright Law” (2017) 37-58; João Pedro Quintais, “Rethinking Normal Exploitation: Enabling Online Limitations in EU Copyright Law” (2017) 37-58.

¹⁴ Ricolfi, “Intellectual Property Rights and Legal Order” (fn 3) (“The delicate balance of copyright is tilted; and is tilted in favor of holders and to the detriment of users.”).

¹⁵ Council Directive 91/250 on the legal protection of computer programs [1991] OJ L122/42. See also Green Paper of the European Commission (EC) “Copyright and the Challenges of Technology - Copyright Issues Requiring Immediate Action” [1988] 172final.

¹⁶ See Art.9 Berne Convention for the Protection of Literary and Artistic Works of 1886 (Berne Convention), and Art.1 Directive 2006/116/EC on the term of protection of copyright and certain related rights [2006] OJ L372/12 (Term Directive). See also Recital 11 of the Term Directive, which counterintuitively justifies the enhancement of the protection of right holders listing also consumers and the whole society as beneficiaries (“The level of protection of copyright and related rights should be high, since those rights are fundamental to intellectual creation. Their protection ensures the maintenance and development of creativity in the interest of authors, cultural industries, consumers and society as a whole.”).

¹⁷ With the sole exception of transient or incidental temporary acts of reproduction of no economic significance, which are integral and essential to a technological process. See Art.5 Directive 2001/29 on the harmonization of certain aspects of copyright and related rights in the information society [2001] OJ L167 (InfoSoc Directive).

¹⁸ Artt.6(2) and 9 Directive 96/9/EC on the legal protection of databases [1996] OJ L77 (Database Directive).

¹⁹ Artt. 5 and 6 Directive 2009/24/EC on the legal protection of computer programs [2009] OJ L111 (Computer Programs Directive).

²⁰ Artt.6(1) and 10 Directive 2006/115 on rental right and lending right and on certain rights related to copyright in the field of intellectual property [2006] OJ L376 (Rental Directive).

²¹ E.g., Art.6(2)(c) Database Directive.

²² Directive 2012/28/EU on certain permitted uses of orphan works [2012] OJ L299 (Orphan Works Directive). See also EC Communications “Copyright in the Knowledge Economy” COM(2009) 532final.

limitations to promote the use of orphan works, out-of-commerce content, and the public domain,²³ as well as to facilitate access to works by persons with visual impairments and other disabilities,²⁴ support cultural heritage institutions,²⁵ and foster education and scientific research across the Union.²⁶ The most recent 2019 DSM Directive represents the most explicit and advanced recognition of the role of end-users within the EU copyright legal framework, with strong emphasis being put on the pressing need to strike a fair balance of rights in the online environment and provide legal certainty to right holders of creative content as well as its users.²⁷

By introducing new mandatory exceptions and limitations in the EU copyright legal system, the Orphan Works Directive and the DSM Directive not only overcome the problem of legal fragmentation, but they point at a deeper paradigmatic shift in the discipline. Looking at its evolution from 1991 until today – as highlighted by Dusollier – the EU’s approach towards copyright exceptions has “mutated from mere limitations of exclusive rights to proper enabling devices sustaining socially-benefiting uses of works and creations”.²⁸ The policy intention of recalibrating the rights and interests at stake can be said to be manifest and consolidating. This prompts the question of how this is and will continue transforming EU copyright law and its interpretation.

3. The digital user at the juncture between law and technology

The two main drivers of reform of the EU copyright legal framework can be identified in international legal obligations and the digital environment. Whereas the former places the European process of copyright harmonization within a wider frame of coordinated trade, advancement of democratic values and social inclusivity,²⁹ the latter necessarily brings the discipline to face changes occurring outside the realm of blackletter law.

The focus on digital technologies has strongly characterized the EU’s path towards copyright modernization in the past decade.³⁰ One could argue that the push towards a “more modern, more European” and more balanced copyright framework³¹ directly stems from the general dissatisfaction towards the (dis)equilibrium struck by the legislation in the online world. Evidence of such frustration comes from the polarization that animates today’s copyright debate: on the one side, right holders seek stronger protection from digital piracy, while, on the other side, end-users advocate their rights and freedoms to access, communicate, receive information and education, participate to the cultural

²³ Respectively, Art.6 Orphan Works Directive, and Artt.8, 9, and 14 Directive EU 2019/790 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L130 (DSM Directive).

²⁴ Regulation 2017/1563 on the cross-border exchange between the Union and third countries of accessible format copies of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled [2017] OJ L242/1; Directive 2017/1564 on certain permitted uses of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print disabled [2017] OJ L242/6.

²⁵ Art.6 DSM Directive.

²⁶ *ibid* Artt.3-5 *ibid*.

²⁷ *ibid* Recitals 3 and 6.

²⁸ Séverine Dusollier, “The 2019 Directive on Copyright in the Digital Single Market: Some Progress, a Few Bad Choices, and an Overall Failed Ambition” (2020) *Common Market Law Review* 57, 981.

²⁹ E.g., World Intellectual Property Organization (WIPO) Copyright Treaty of 1996; WIPO Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled of 2013.

³⁰ E.g., Regulation 2017/1128 on cross-border portability of online content services in the internal market; DSM Directive; EC Communication “A Digital Agenda for Europe” COM(2010) 245 final/2.

³¹ EC Communication “Towards a more modern, more European copyright framework” COM(2015) 626 final.

life now that technology unprecedently enables to do so.³² Easing the tensions proves a particularly arduous endeavor. Besides enjoying a stronger legal protection, copyright holders plead their causes relying on a decisive apparatus of collective representation. On the side of end-users, efforts are inevitably more fragmented, and the scholarship has lagged behind in the conceptualization of end-user theories, with a few pioneering attempts³³ and some proposals jointly looking at the copyright and consumer protection legal landscapes.³⁴

Counterintuitively enough, also the Internet, despite embodying the openness of information at an unprecedented global scale, relies on operative rules that tend to favor right holders. In this regard, a line should be drawn between what we experience or perceive as common practice in the online environment, and its inner normative skeleton: for instance, the fact that some or many right holders are willing to share their works online for free should not be misleadingly understood as the Internet requiring them to do so.³⁵

The Internet's ability to self-regulate – notoriously epitomized by the expression “code is law”³⁶ – unveils three main elements favoring right holders, thus unveiling a similar asymmetry to the one detected in EU copyright legislation: (i) a protectionist approach in the vast majority of the terms and conditions of online services and platforms;³⁷ (ii) a system of enforcement via technological protection measures and lock-up mechanisms that more often than not fails to secure adequate room for the

³² See Katarina Gracz and Primavera De Filippi, “Regulatory Failure of Copyright Law Through the Lenses of Autopoietic Systems Theory” (2014) *International Journal of Law and Information Technology*, 1-33.

³³ *Inter alia*, Zohar Efroni, *Access-Right: The Future of Digital Copyright Law* (Oxford University Press 2011); Maurizio Borghi, “Exceptions as Users’ Rights in EU Copyright Law” (2020) CIPPM Jean Monnet Working Papers 06-2020. See also Cohen, “The place of the user in copyright law” (fn 6); Jane C. Ginsburg, “Authors and Users in Copyright” (1997) *Journal of the Copyright Society of the USA* 1, 45; Lyman R. Patterson and Stanley W. Lindberg, *The Nature of Copyright: A Law of Users’ Rights* (University of Georgia Press 1991).

³⁴ Natali Helberger and Bernt P. Hugenholtz, “No place like home for making a copy: Private copying in European copyright law and consumer law” (2007) *Berkeley Technology Law Journal* 22, 1061-1098; Natali Helberger and Lucie Guibault, “Clash of cultures. Integrating copyright and consumer law” (2012) 14:6 *Info* 23 available at https://digitalcommons.schulichlaw.dal.ca/scholarly_works/60/ (31/3/2021); Jens Schovsbo, “Integrating Consumer Rights into Copyright Law: From a European Perspective” (2008) *Journal of Consumer Policy* 31(4) 393-408; Yochai Benkler, “From Consumers to Users: Shifting the Deeper Structures of Regulation Toward Sustainable Commons and User Access” (2000) *Federal Communications Law Journal* 52, 561.

³⁵ See Katarina Gracz, “Bridging the Gaps Between Social and Legal Norms Concerning Protection of Intellectual and Artistic Creations: On the Crisis of Copyright Law in the Digital Era” (2013) *The Journal of World Intellectual Property* 16(1-2) 39-57.

³⁶ Lawrence Lessig, *Code and Other Laws of Cyberspace* (Basic Books 1999); Lawrence Lessig, “Code Is Law. On Liberty in Cyberspace” (2000) *Harvard Magazine*, 1 January 2000.

³⁷ See Séverine Dusollier, “Sharing Access to Intellectual Property Through Private Ordering” (2007) *Chicago-Kent Law Review* 82, 1393 (“Generally, use of private ordering mechanisms has been a way to expand the monopoly granted by the law and to constrain or prevent the free use of resources by the public.”); Ricolfi, “Intellectual Property Rights and Legal Order” (fn 3) (“What are the terms or conditions which are accepted under a click-wrap license? [...] You accept that you cannot re-sell or even lend for free the accessed material. Therefore you give up the benefits conferred on you by the first sale doctrine. That you give up also any fair use defence you may have: you can neither reuse it in whole or in part, not even for the purpose of teaching nor you may quote from it, even for the purpose of discussion and criticism. The prohibition concerns protected as well as unprotected material and therefore concerns not only the form of representation of the work but its contents; it extends to the facts, to the ideas.”); Liliia Oprysk, “Limitations in End-User Licensing Agreements: Is There a Lack of Conformity Under the New Digital Content Directive?” (2020) *International Review of Intellectual Property and Competition Law* 51, 594-623.

exercise of copyright limitations;³⁸ and (iii) the enabling of a pay-for-access and on-demand culture,³⁹ which de facto excludes segments of society who cannot afford access to content, even when it would be authorized by law.⁴⁰

Setting a strong focus on the online environment, the modernization of EU copyright law cannot depart from these specific structural characteristics of the Internet. The EU legislator acknowledges the need to take into consideration the digital context and “reassess” harmonized copyright rules, especially those related to copyright exceptions and limitations, in order to ensure their effectiveness.⁴¹ Adding to this general intention to shape a context-sensitive legal framework, the CJEU moves a step further looking at the Internet not only as a new ground for application of legal rules, but as a regulated ecosystem on its own.

In this light, the CJEU proves to be the real engine behind the rise of a composite, or interlegal, approach that embraces the structural and operative rules of the Internet as integral part of the interpretation of EU copyright law.⁴² The idea of interlegality well captures the intertwined nature of concurrent normative orders that mutually limit each other in the pursuit of their objectives⁴³ and, not less importantly, offers an “emancipatory opportunity” in the legal interpretation, allowing to reflect existing influences of other legal regimes, technological rules, or other normative rationalities.⁴⁴ The following Section is a detour into the Court’s reasoning, investigating how the interlegal approach unfolds in selected landmark decisions.

³⁸ Séverine Dusollier, “Technology as an Imperative for Regulating Copyright: From the Public Exploitation to the Private Use of the Work” (2005) *European Intellectual Property Review* 27, 201; Niva Elkin-Koren and Maayan Perel, “Accountability in Algorithmic Copyright Enforcement” (2016) *Stanford Technology Law Review* 19, 473; Matej Myška, “The True Story of DRM” (2009) *Masaryk University Journal of Law and Technology* 2, 267-278.

³⁹ Enrico Lucchi, *Digital Media and Intellectual Property. Management of Rights and Consumer Protection in a Comparative Analysis* (Springer 2006) 22 (“Owners of the old technology, transnational corporation and policy makers have privatized the access to digital content using a combination of technological and contractual instruments.”).

⁴⁰ See Bernd J. Jütte, “Coexisting Digital Exploitation for Creative Content and the Private Use Exception” (2015) *International Journal of Law and Information Technology*, 1-21; Léo Pascault et al, “Copyright and Remote Teaching in the Time of Coronavirus: A Study of Contractual Terms and Conditions of Selected Online Services” (2020) *European Intellectual Property Review* 42, 548-555.

⁴¹ Recital 31 InfoSoc Directive (“The existing exceptions and limitations to the rights as set out by the Member States have to be reassessed in the light of the new electronic environment. Existing differences in the exceptions and limitations to certain restricted acts have direct negative effects on the functioning of the internal market of copyright and related rights. Such differences could well become more pronounced in view of the further development of transborder exploitation of works and cross-border activities.”).

⁴² On the theoretical affinity between the concept of interlegality and EU copyright law, see Giulia Priora, “Dall’armonizzazione all’interlegalità: la tutela dell’utente finale nella disciplina europea del diritto d’autore” forthcoming in Edoardo Chiti, Alberto di Martino and Gianluigi Palombella (eds), *L’era della interlegalità* (Il Mulino 2021).

⁴³ See Andreas Fischer-Lescano and Gunther Teubner, “Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law” (2004) *Michigan Journal of International Law* 25.

⁴⁴ Palombella, “Interlegalità” (fn 5) 324 (“(...) the notion of interlegality represents an emancipatory opportunity as it stems from the mutual recognition, among external and concurrent legalities, of the normative character of each of these legalities. It does not necessarily lead to the unconditioned acceptance of the respective claims: instead, it requires a pondered consideration of each and every one of the involved rationalities, thus favoring an equilibrium based on the critical thinking”) (translation by the author). See also Fischer-Lescano and Teubner, “Regime-Collisions” (fn 43) 1022 (“Transnational substantive norms are created, within a form of mixed law approach, with an eye both to one’s own and to the other legal regime, but also with an eye to third party legal orders”).

4. The CJEU's take: the rise of an interlegal perspective

The CJEU's commitment to filling legislative gaps and enhancing the harmonization of copyright rules has solidly consolidated over the past two decades.⁴⁵ Regularly addressed with preliminary ruling requests concerning digital scenarios, the Court is developing patterns in its judicial reasoning, among which a strong reliance on the notion of fair balance,⁴⁶ and a growing focus on the effectiveness of EU copyright rules, in particular with regards to copyright exceptions and limitations.⁴⁷

The recurring notion of effectiveness evoked in cases related to end-users' rights and interests is expressly linked to the need to "safeguard and permit observance of the exception's purpose".⁴⁸ This teleological twist acquires a dual connotation. On the one hand, it highlights how transnational and digital exploitation of works call for *regulatory consistency* across the Union, overcoming the legal fragmentation among Member States.⁴⁹ This has led the Court to reiterate the exhaustive nature of the numerus clausus list of copyright exceptions⁵⁰ as well as to exhort national Parliaments to align their efforts in regulating fair compensations due to copyright owners.⁵¹ On the other hand, the notion of effectiveness translates into a more pragmatic criterion of *technological feasibility*. The need to achieve the objectives pursued by copyright exceptions and limitations urge the Court to reflect on their concrete application in the digital context, thus leading it to markedly interlegal considerations.

4.1. *GS Media*

One of the pivotal topics in the CJEU case law on digital copyright is hyperlinking. Building on a few precedents,⁵² the Court has put forward an exhaustive reasoning about it in the *GS Media* case,⁵³ according to which the act of hyperlinking to creative content that is already freely available online shall not require authorization by the copyright owner. To reach this conclusion, the Court recalls that, according to Art.3 InfoSoc Directive, hyperlinking would duly require authorization if (i) it amounted to an act of communication by the user, (ii) to a fairly large number of people who had not

⁴⁵ The so-called third phase of EU copyright case law is characterized by a steep increase in preliminary ruling requests and what has been described as an activist approach by the Court. See, *inter alia*, Christophe Geiger, "The Role of the Court of Justice of the European Union: Harmonizing, Creating and Sometimes Disrupting Copyright Law in the European Union" (2016) Centre for International Intellectual Property Studies Research Paper No. 3, 8; Jonathan Griffiths, "Taking Power Tools to the Acquis. The Court of Justice, the Charter of Fundamental Rights and European Union Copyright Law" in Christophe Geiger, Craig Allen Nard and Xavier Seuba (eds), *Intellectual Property and the Judiciary* (Edward Elgar 2018).

⁴⁶ Marcella Favale, Martin Kretschmer and Paul Torremans, "Is There a EU Copyright Jurisprudence? An Empirical Analysis of The Workings of The European Court of Justice" (2015) *Modern Law Review* 79, 64.

⁴⁷ E.g., Joint Cases C-403/08 *Football Association Premier League Ltd v QC Leisure* and C-429/08 *Karen Murphy v Media Protection Services Ltd* [2011] ECR I-09083 (*FAPL*), para 163; C-145/10 *Eva-Maria Painer v Standard VerlagsGmbH* [2013] EU:C:2013:138, para 133; C-476/17 *Pelham GmbH v Ralf Hütter* [2019] EU:C:2019:624, para 63; C-201/13 *Johan Deckmyn v Helena Vandersteen* [2014] EU:C:2014:2132, para 23; C-469/17 *Funko Medien NRW GmbH v Federal Republic of Germany* [2019] EU:C:2019:623, para 51.

⁴⁸ *FAPL*, para 163. See also Caterina Sganga, "New Era for EU Copyright Exceptions and Limitations? Judicial Flexibility and Legislative Discretion in the Aftermath of the Directive on Copyright in the Digital Single Market and the Trio of the Grand Chamber of the European Court of Justice" (2020) *ERA Forum* 21, 317 ff.; Tito Rendas, "Copyright, Technology and the CJEU: An Empirical Study" (2018) *International Review of Intellectual Property and Competition Law* 49, 153.

⁴⁹ Recital 31 InfoSoc Directive.

⁵⁰ E.g., C-466/12 *Nils Svensson et al c. Retriever Sverige AB* [2014] EU:C:2014:76 (*Svensson*), paras 6-7; *Pelham*, paras 63-64; *Spiegel Online*, paras 47-48.

⁵¹ C-572/13 *Hewlett-Packard Belgium SPRL v Reprobel SCRL* [2015] EU:C:2015:750, paras 38-39.

⁵² *Svensson* paras 28-30; C-348/13; *BestWater International GmbH v Michael Mebes* [2014] EU:C:2014:2315.

⁵³ C-160/15 *GS Media BV v Sanoma Media Netherlands BV* [2016] EU:C:2016:644 (*GS Media*).

been addressed by the first publication of the work by the copyright owner, and (iii) if it had a for-profit commercial purpose.⁵⁴ It then draws a fundamental distinction between hyperlinks to works that had been lawfully made available online, as opposed to works that were published on the Internet without the authorization of the copyright owner. If the right holder consented to the publication of the work on one webpage, no new “public” would be addressed by the act of hyperlinking to it on other webpages,⁵⁵ whereas if the first online publication was not authorized, such hyperlinking would amount to a communication to the public, as gaining access to the work would be users, whom the right holder did not intend to reach.⁵⁶

However, the CJEU proceeds with the reasoning softening this distinction and asserting that requiring users to seek authorizations from right holders for hyperlinking shall never be the golden rule, for three main reasons: first of all, because the Internet is made of hyperlinks, and it is no intent of the EU legislator to stifle the communication and immense amount of information flowing onto it;⁵⁷ second, because Internet users hardly know or could possibly know whether the content they access online and hyperlink to was published with or without the consent of all copyright holders;⁵⁸ third, because the user hyperlinking to an unlawfully published work communicates it to an audience that, de facto, has already potential access to it.⁵⁹

Aware of the fact that determining the scope of the exclusive right of communication to the public requires an assessment based on “several complementary criteria, which are not autonomous and are interdependent”,⁶⁰ the CJEU offers not only a pragmatic take on the functioning of the Internet, but proper recognition of the role and needs of digital users.⁶¹ Without emphasizing the relevance of fundamental rights, the Court aims to internalize their interests and better define this category of stakeholders. As a result, a line is drawn between commercial digital users, who are presumed to know about the unlawful nature of the content they hyperlink to and might be found liable of copyright infringement, and digital users who do not pursue for-profit purposes and are hence shielded by a presumption of bona fide.⁶² Following the judgement, this favorable approach towards hyperlinking by non-commercial Internet users has been further expanded by the EU legislator to all information society service providers with regards to their hyperlinking to press publications.⁶³

⁵⁴ *ibid* paras 35-38.

⁵⁵ *ibid* para 42.

⁵⁶ *ibid* para 43.

⁵⁷ *ibid* para 45 (“(...) the internet is in fact of particular importance to freedom of expression and of information, safeguarded by Article 11 of the Charter, and that hyperlinks contribute to the its sound operation as well as to the exchange of opinions and information in that network characterised by the availability of immense amounts of information”). See also *C-161/17 Land Nordrhein-Westfalen v Dirk Renckhoff* [2018] EU:C:2018:634, para 40. The point was eloquently developed also by Advocate General in the Opinion in *GS Media*, paras 54, 77-78 (“It is a matter of common knowledge that the posting of hyperlinks by users is both systematic and necessary for the current internet architecture. (...) If users were at risk of proceedings for infringement of copyright under Article 3(1) of Directive 2001/29 whenever they post a hyperlink to works freely accessible on another website, they would be much more reticent to post them, which would be to the detriment of the proper functioning and the very architecture of the internet, and to the development of the information society.”).

⁵⁸ *GS Media* paras 46-47.

⁵⁹ *ibid* para 48.

⁶⁰ *ibid* para 34.

⁶¹ *ibid* para 35 (“(...) in the first place, the indispensable role played by the user and the deliberate nature of its intervention. The user makes an act of communication when it intervenes, in full knowledge of the consequences of its action, to give access to a protected work to its customers, and does so, in particular, where, in the absence of that intervention, its customers would not, in principle, be able to enjoy the broadcast work”).

⁶² *GS Media* para 49-51.

⁶³ Art.15(1) third sentence DSM Directive.

4.2. *Ulmer and Vereniging Openbare Bibliotheken (VOB)*

Cultural heritage institutions and, in particular, publicly accessible libraries have always played a key role in promoting the public interest and the dissemination of knowledge.⁶⁴ In two CJEU judgements, the importance of such institutions as liaisons in the protection of end-users' interests in the digital world emerges with particular emphasis. In *Ulmer*,⁶⁵ the Court tackles the question of the digital access to library collections. According to Art.5(3)(n) InfoSoc Directive, Member States can decide to authorize libraries to make the works in their collections available for the users to access for private study purposes.⁶⁶ To safeguard the effectiveness of said exception, the CJEU explains that libraries are additionally entitled to digitize such works to make digital copies available for consultation, even though this would amount to a separate act of reproduction.⁶⁷ Interesting to note is that the Advocate General (AG) in his Opinion further stretches the scope of the copyright exception, suggesting that end-users should be also permitted to print parts of the digital books accessed in the libraries,⁶⁸ based on the fact that today's photocopying machines operate by way of digitization systems.⁶⁹ Even though this argument was not explored by the Court, as it exceeded the *thema decidendum*,⁷⁰ it sheds some light on the introduction of technological considerations in the assessment of rights and interests at stake.

Along similar lines, in *VOB*,⁷¹ the CJEU's interpretation is asked to determine whether the public lending exception may include the digital lending of e-books. The Court takes into account both international law, which excludes digital books from the reach of rental rights,⁷² and EU law that nevertheless would allow for an exclusive right to authorize the lending of e-books.⁷³ Once again, the Court opts for a teleological twist in its reasoning, as it focuses on the effectiveness of the public lending exception⁷⁴ and extends its scope to e-books in light of the great importance that these have acquired in the digital society.⁷⁵ Also in this case the inputs provided by the AG's Opinion are

⁶⁴ E.g., Recital 40 InfoSoc Directive.

⁶⁵ C-117/13 *Technische Universität Darmstadt v Eugen Ulmer KG* [2014] EU:C:2014:2196 (*Ulmer*).

⁶⁶ *ibid* para 42.

⁶⁷ *ibid* paras 37, 43 ("Such a right of communication of works enjoyed by establishments such as publicly accessible libraries covered by Article 5(3)(n) of Directive 2001/29, within the limits of the conditions provided for by that provision, would risk being rendered largely meaningless, or indeed ineffective, if those establishments did not have an ancillary right to digitise the works in question.")

⁶⁸ *Ulmer* AG Opinion para 57 ("(...) [j]ust as a user of a library may within the limits laid down by national legislation, photocopy pages of physical works").

⁶⁹ *ibid* paras 53-54.

⁷⁰ The argument was built on the interpretation of Artt.5(2)(a) and (b) InfoSoc Directive, which were not included in the request for preliminary ruling.

⁷¹ C-174/15 *Vereniging Openbare Bibliotheken v Stichting Leenrecht* [2016] EU:C:2016:856 (*VOB*).

⁷² *ibid* paras 31-34 referring to Art.7 WIPO Copyright Treaty.

⁷³ *ibid* paras 38-39, 44-45.

⁷⁴ *ibid* para 50.

⁷⁵ *ibid* para 51. See also *Ulmer*, para 32 ("(...) the limitation would apply, as *Ulmer* has maintained, only to those increasingly rare works of which an electronic version, primarily in the form of an e-book, is not yet offered on the market"); *VOB* AG Opinion, para 2 ("The introduction of electronic books has significantly altered both the publishing sector and readers' habits, and this is just the beginning. While electronic books may never replace printed books, the fact remains that, for certain categories of book and on certain markets, the volume of electronic book sales equals or surpasses the volume of printed book sales and some works are published only in digital format. Similarly, some readers, and they are ever more numerous, are leaving aside printed books and turning to electronic reading devices. Very young readers may never have accustomed themselves to printed books.").

particularly evocative, emphasizing on the vital and, thus, imperative task to reflect the habits of the contemporary digital society and foster cultural dissemination.⁷⁶

In both cases, the CJEU stresses the need to adapt EU copyright rules to the evolving digital context in which public libraries operate,⁷⁷ and does so by internalizing technological norms and practices in its interpretation of the law. The result is a pondered recalibration of the interests at stake – libraries can digitize books, but this, in principle, does not allow users to store copies thereof on their USB devices,⁷⁸ they can enable the digital lending of e-books, as long as obtained from lawful sources⁷⁹ – a fair balance that reflects the functioning of the digital environment and its users’ behaviors.

4.3. *Spiegel Online*

Most recently, the CJEU has been consulted upon the interpretation of other two exceptions, i.e., Art.5(3)(c) and (d) InfoSoc Directive, to assess whether the non-authorized online publication of the full version of a politician’s essay may fall within the scope of the informatory purpose exception.⁸⁰ In *Spiegel Online*,⁸¹ the right to copyright protection clashes with the fundamental freedom of information, with particular emphasis on the crucial role of the press in the democratic society.⁸² From the end-user’s perspective, this decision represents the most favorable interpretation, as it expressly recognizes that “[copyright] exceptions or limitations do themselves confer *rights* on the users of works or of other subject matter”.⁸³

Instructing national Courts on how to strike a fair balance in the online environment, the CJEU touches upon four different normative rationalities: national law, as said exceptions are not subject to full harmonization;⁸⁴ EU law, its objectives and effectiveness, for its unity, primacy and fundamental rights regime shall be preserved;⁸⁵ the European Convention of Human Rights, which requires to qualify the information at stake based on its importance for the public and political debate;⁸⁶ and, most relevantly for the purpose of this analysis, the Internet, in particular its structural necessity to make available and circulate information rapidly via the web. The speed of the transmission of press content becomes integral part of the assessment of the fundamental right to information in the balancing exercise against copyright protection: if the authorization of the copyright holder were required to

⁷⁶ *VOB* AG Opinion, paras 2-3, 23, 27-28 (“If libraries are unable to adapt to this trend they risk marginalisation and may no longer be able to fulfil the task of cultural dissemination which they have performed for thousands of years” (...) [T]echnological progress today is so rapid that it easily outstrips the legislative process, such that attempts to adapt legal provisions by that means are often defeated, with legal acts becoming obsolete the moment they are adopted or shortly thereafter. (...) [O]nly an adjusted judicial interpretation will be able to ensure the effectiveness of the legislation in question in a sector experiencing such rapid technological and economic development.”).

⁷⁷ *ibid* para 45 referring to Recital 4 Rental Directive.

⁷⁸ *Ulmer*, para 54.

⁷⁹ *VOB* paras 67-68 (“(...) To accept that a copy lent out by a public library may be obtained from an unlawful source would amount to tolerating, or even encouraging, the circulation of counterfeit or pirated works and would therefore clearly run counter to [the] objective [of combating piracy].”).

⁸⁰ Art.5(3)(c) InfoSoc Directive.

⁸¹ C-516/17 *Spiegel Online GmbH v Volker Beck* [2019] EU:C:2019:625 (*Spiegel Online*).

⁸² *ibid* para 72.

⁸³ *ibid* para 54 (emphasis added).

⁸⁴ *ibid* paras 27-29.

⁸⁵ *ibid* paras 20-21, 37-48.

⁸⁶ *ibid* paras 44, 57-58 (“As is clear from the case-law of the European Court of Human Rights, for the purpose of striking a balance between copyright and the right to freedom of expression, that court has, in particular, referred to the need to take into account the fact that the nature of the ‘speech’ or information at issue is of particular importance, inter alia in political discourse and discourse concerning matters of the public interest.”).

publish content about current events, the information would be provided to readers and society at large with a significant delay, thus jeopardizing the effectiveness of the related copyright exception.⁸⁷ In line with the approach embraced in the decisions above, the CJEU confirms the need to strike an interlegal fair balance of rights, capable of calibrating the interests at stake with contextual awareness and regulatory effectiveness in today's digital scenario, and opening towards an inclusive understanding of the notion of current events⁸⁸ to safeguard information flows and public discussion.⁸⁹

5. Conclusion

The judicial reasoning in the selected cases illustrated above hints at an emerging conception of EU copyright law. The explicit awareness of the interference of technological rules and widespread practices over the Internet is becoming part of the balancing exercise between copyright protection and other fundamental rights and freedoms. By this token, the CJEU not only advances a creative interpretation that favors copyright harmonization, but also a composite perspective that is embedded in the discipline. The aim to preserve the Internet as we know it leads the Court to construe copyright exceptions in light of the structural importance of hyperlinks, the vast availability of e-books, and the rapidity of online information streams. This take is emblematic of two fundamental developments currently occurring in the realm of EU copyright law: the shift from an “analogue-” to a “digital-oriented” legal framework, and the quest for a recalibration of rights and interests that can prove sustainable in the online environment.

Against this background, the move towards interlegality should neither be overly surprising nor overlooked. In fact, what is often emerging from the European copyright debate are glaring manifestations of a composite understanding of copyright as a legal and technological matter. Suffice to think of the currently heated discussions on the implementation of Article 17 DSM Directive, which pivot on its possible “technological translation” into a system of automated filtering. Virtually unanimously, the scholarship is advocating for a cautious implementation of this provision by Member States, to avoid that the legal protection of copyright owners culminates into a technological disadvantage for end-users.⁹⁰ Simply put, the interrelation between law and technology is not something radically new in the eyes of copyright policymakers, scholars, and stakeholders.

The perspective of a structured integration of this interlegal approach into the legislative evolution of the discipline should neither be reason for concern nor categorically dismissed. The EU legislator's emphasis on the notions of fair balance and modernization of EU copyright rules online suggests that the future of the discipline is likely to move towards a re-conceptualization of the author-centric dependence – an arduous endeavor that would require an even more challenging theorization of the

⁸⁷ *ibid* para 71 (“When a current event occurs, it is necessary, as a general rule, particularly in the information society, for the information relating to that event to be diffused rapidly, which is difficult to reconcile with a requirement for the author's prior consent, which would be likely to make it excessively difficult for relevant information to be provided to the public in a timely fashion, and might even prevent it altogether.”)

⁸⁸ *ibid* para 67.

⁸⁹ An interpretation that has indeed followed course before the German Supreme Court. See Giulia Priora and Bernd J. Jütte, “No copyright infringement for publication by the press of politician's controversial essay” (2020) *Journal on Intellectual Property Law and Practice* 15(8) 583-584.

⁹⁰ E.g., João Pedro Quintais et al, “Safeguarding Users' Freedom in Implementing Article 17 of the Copyright in the Digital Single Market Directive: Recommendations from European Academics” (2019) *Journal of Intellectual Property, Information Technology and E-Commerce Law* 10(3) 277-282; Christophe Geiger and Bernd J. Jütte, “Platform liability under Article 17 of the Copyright in the Digital Single Market Directive, Automated Filtering and Fundamental Rights: An Impossible Match” forthcoming in *GRUR International*.

role of end-users. The interlegal framework offers a potential valid starting point in this direction. Acknowledging the coexistence and interplay of legal and technological norms not only reflects the context in which blackletter law applies, it also helps building a functional approach responsive towards the social needs involved in the pursuit of EU copyright's objectives.⁹¹ Echoing the romanticism of Dante's words, a solid "twofold guidance" regulating both the creation of and the access to digital content seems to eventually require the radiance of both "suns" illuminating today's Internet, in a synergic policy discourse on law and technology.

⁹¹ For a specific analysis of the functional approach entangled with the interlegality perspective see, *inter alia*, Fischer-Lescano and Teubner, "Regime-Collisions" (fn 43) 1008, 1023; Boaventura de Sousa Santos, "State Transformation, Legal Pluralism and Community Justice" (1992) *Social and Legal Studies* 1, 131 ff.