**Copyright in CJEU case of law: what legacy?**

by Eleonora Rosati[[1]](#footnote-1)\*

Compared to other areas of intervention at the EU level, copyright harmonization is relatively recent. Yet, two phenomena may be observed: one the one hand, policy and legislative initiatives have intensified; on the other hand, the several references to the Court of Justice of the European Union (CJEU) over the past twenty years or so have substantially shaped the EU copyright framework and, with it, also the copyright framework of individual EU Member States.

The role of the CJEU in shaping EU copyright has been indeed a central one. A number of factors have been decisive. First, despite the lack of formal specialization within the CJEU, as a matter of fact a subject matter specialization has occurred through the selection of relevant Judges-Rapporteur and Advocates General from rather a narrow pool. The other key factor has been the employment, by the CJEU, of a set of standards that have served to address copyright issues from a certain perspective, and – admittedly – to achieve certain results. In this sense, the Court’s action has been informed by an overarching internal market goal, through the extraction and application of the primary rationale of EU harmonization: removing those differences that amount to barriers to the free movement of copyright works and protected subject matter across the EU.

The result has been an arguably profound impact of CJEU case law on individual EU Member States, to the point that it seems possible to speak of a EU approach to copyright that has rendered the traditional dichotomy continental Europe *droit d’auteur*/common law copyright less acute than what was the case before the EC/EU harmonization process began. CJEU case law rather – rather than the transposition of EU copyright directives alone – has contributed to re-shaping key copyright concepts and approaches to copyright protection. The legacy of CJEU case law is also apparent in the context of the current EU copyright reform debate: the review of EU copyright rules requires consideration consider of (formally rich but substantially thin) legislative framework and also –possibly above all – the CJEU interpretation of existing sets of rules.

It is difficult, if at all possible, to think how EU copyright law will look like over the next couple of decades. On the one hand, the process of legislative harmonization would loose the input of EU Member States like the UK. This might have the effect of creating the conditions for a closer approximation between the continental European understanding of the role of copyright protection and the progression of EU harmonization. On the other hand, it is anticipated that the role of the Court will remain central: this may be due to a number of factors, including increasingly complex legislation, progressive EU enlargements, and technological advancement and related legal challenges.

An issue that is often raised concerns how the Court works, notably its alleged lack of specialization in copyright matters. According to a criticism often made, the CJEU should envisage specialist chambers and a system of dissenting judgments, on the model of common law countries. Is this something that is needed? Probably not, and this may be so essentially for two reasons. The first relates to the role of the Court in preliminary rulings, which is providing guidance to national courts on how certain EU law provisions are to be interpreted: would dissenting judgments improve the clarity of CJEU rulings? The second reason relates to something that has been already discussed, and is that a *de facto* specialization has occurred within the CJEU. In the particular context of preliminary rulings, the role of the Court remains that of interpreting EU law provisions, also in light of the rationale for which a process of EU integration began in the first place. In this sense, EU copyright is not and should probably not become just something for copyright lawyers.

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