**Data-based case law applied to EU copyright (1998-2018):**

**A quantitative assessment[[1]](#footnote-1)\***

**by Eleonora Rosati and Carlo Maria Rosati[[2]](#footnote-2)\*\***

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# Abstract

This contribution proposes a novel approach, which combines traditional legal analysis with the use of a quantitative method, to analyze the standards employed in case law in a given area. The goal of our Data-Based Case Law (DBCL) is determining the meaning of relations between standards (considered in couples) and appreciating the statistical significance of the resulting relations. We submit that this combined approach may be employed in any area of the law where there is a substantial body of judicial decisions.

We demonstrate the functioning of our DBCL in relation to copyright law in the European Union (EU). Copyright has been subject to a limited harmonization of the laws of individual EU Member States. Compared to other areas of intervention at the EU level, copyright harmonization is both a relatively recent phenomenon and has not been as complete as with other intellectual property rights. Yet, the large number of references to the Court of Justice of the European Union (CJEU) has substantially shaped the EU copyright framework and, with it, also the copyright framework of individual EU Member States.

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# 1. The EU copyright framework (*acquis*)

Over the past thirty years or so, copyright reform in Europe has been based on two ‘pillars’: harmonization at the EU level and modernization at the EU and national levels. Harmonization has been prompted by internal market concerns, but also by concerns regarding the overall competitiveness and appropriateness of the EU copyright regime. Similarly, individual EU Member States have undertaken copyright reforms that would render their systems better suited to accommodate technological change and also make them more attractive to investments.

Besides a number of directives that are relevant to copyright and its enforcement – of which the Directive on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (E-commerce Directive)[[3]](#footnote-3) deserves particular mention –, the EU copyright framework (*acquis*) is composed of the following:

* Directive on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission[[4]](#footnote-4) (Satellite and Cable Directive);
* Directive on the legal protection of databases[[5]](#footnote-5) (Database Directive);
* Directive on the harmonisation of certain aspects of copyright and related rights in the information society[[6]](#footnote-6) (InfoSoc Directive);
* Directive on rental right and lending right and on certain rights related to copyright in the field of intellectual property[[7]](#footnote-7) (Rental and Lending Rights Directive);
* Directive on the term of protection of copyright and certain related rights[[8]](#footnote-8) (Term Directive);
* Directive on the resale right for the benefit of the author of an original work of art[[9]](#footnote-9) (Resale Right Directive);
* Directive on the enforcement of intellectual property right[[10]](#footnote-10) (Enforcement Directive or IPRED);
* Directive on the legal protection of computer programs[[11]](#footnote-11) (Software Directive);
* Directive on the term of protection of copyright and certain related rights amending the previous 2006 Directive[[12]](#footnote-12) (Performers and Sounds Recordings Term Directive);
* Directive on certain permitted uses of orphan works[[13]](#footnote-13) (Orphan Works Directive);
* Directive on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market[[14]](#footnote-14) (Collective Rights Management Directive);
* Directive 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[[15]](#footnote-15) (Directive implementing the Marrakesh Treaty in the EU);
* Regulation 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[[16]](#footnote-16) (Regulation implementing the Marrakesh Treaty in the EU);
* Regulation on cross-border portability of online content services in the internal market[[17]](#footnote-17) (Portability Regulation);
* Directive on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC[[18]](#footnote-18) (DSM Directive).

EU intervention in the area of copyright has been traditionally linked mostly – though not exclusively – to internal market concerns, on belief that certain differences in the laws of EU Member States would raise barriers to the free movement of goods and services based on or incorporating copyright works and other protected subject matter. The legislative basis for initiatives in this area of the law has thus been mostly what are currently the provisions contained in Articles 26 and 114 of the Treaty on the Functioning of the European Union[[19]](#footnote-19) (TFEU). The former clarifies EU competence to adopt measures with the aim of establishing or ensuring the functioning of the internal market (which is defined at paragraph 2 thereof as comprising an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured), in accordance with the relevant provisions of the EU Treaties. The first paragraph of the latter stipulates that the European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.

Unlike EU regulations, which are directly applicable and do not require transposition at the level of individual EU Member States, EU directives bind EU Member States as regards the achievement of their underlying objectives. Article 288(3) TFEU allows national authorities to determine the form and methods to achieve the result mandated by a certain EU directive, and usually EU Member States are given a 2-year period to take the appropriate measures to transpose a certain EU directive into their own legal systems.

# 2. The CJEU and the referral mechanism

In parallel to the EU policy and legislative agenda, the construction of the EU copyright framework owes a great deal to the role undertaken by the CJEU. By hearing references for a preliminary ruling from national courts, the Court has – as of today (until the end of 2018) – decided several cases (see further below, *sub* §3) by means of which it has provided its own interpretation of relevant provisions and standards. All this has resulted, on the one hand, in a reduction of the perceived divide between *droit d’auteur* continental copyright traditions and common law copyright regimes and, on the other hand, in the development and establishment of a EU copyright system.

The role of the CJEU is to ‘ensure that in the interpretation and application of the Treaties the law is observed’ (Article 19(1) of the Treaty on European Union[[20]](#footnote-20) – TEU). The CJEU may be involved in different types of actions, including preliminary rulings, infringement proceedings, actions for annulment, actions for failure to act, and actions for damages. For the sake of the present analysis, attention will focus solely on preliminary rulings.

The system of references for a preliminary rulings is a fundamental mechanism of EU law and is meant to ensure the uniform interpretation and application of EU law, by offering courts and tribunals of the EU Member States a means of bringing before the CJEU for a preliminary ruling questions concerning the interpretation of EU law or the validity of acts adopted by the institutions, bodies, offices or agencies of the EU.[[21]](#footnote-21) Article 267 TFEU vests the CJEU with jurisdiction to give preliminary rulings concerning both the interpretation of the EU Treaties (early copyright cases focused especially on free movement provisions under what was at that time the EC Treaty[[22]](#footnote-22)) and the validity and interpretation of acts of the institutions, bodies, offices or agencies of the EU, including EU directives. A court in a Member State has the discretion to raise questions of interpretation, and hence make a reference for a preliminary ruling, of EU law if it considers that a decision on the question is necessary to enable it to give judgment. If, however, the court or tribunal in question is one against whose decisions there is no judicial remedy under national law, then that court or tribunal is under an obligation to bring the matter before the CJEU.

As clarified by the Rules of Procedure of the CJEU[[23]](#footnote-23) (Article 94), when referring a case to the CJEU the national court shall provide: the text of the questions referred to the Court for a preliminary ruling; a summary of the subject matter of the dispute and the relevant findings of fact as determined by the referring court or tribunal, or, at least, an account of the facts on which the questions are based; the tenor of any national provisions applicable in the case and, where appropriate, the relevant national case-law; a statement explaining why the referring court or tribunal is to inquire about the interpretation or validity of certain provisions of EU law, and the relationship between those provisions and the national legislation applicable to the main proceedings.

As soon as possible after the document initiating proceedings has been lodged, the President of the Court shall designate a Judge to act as Rapporteur (Article 15 of the Rules of Procedure), while the First Advocate General of the Court shall assign the relevant case to an Advocate General (AG, Article 16 of the Rules of Procedure). In case of exceptional importance, the Court may also sit as a full Court.

The procedure before the Court consists of a written and an oral part (Article 20 of the CJEU Statute[[24]](#footnote-24)). The former consists of the communication to the parties to the national proceedings and the EU institutions whose decisions are in dispute, of any applications, statements of case, defenses and observations, replies, as well as of all papers and documents in support or of certified copies of them. The latter envisages the reading of the report prepared by the Judge-Rapporteur, the hearing by the Court of agents, advisers and lawyers and of the submissions of the AG (who shall act with complete impartiality and independence), as well as the hearing, if any, of witnesses and experts. During this phase, the Court may decide not to seek an Opinion of the appointed AG if, after hearing him/her, it concludes that the case at issue raises no new point of law. In such cases, the Court decides by means of an order, rather than a judgment. If the Court, instead, requests the appointed AG to submit an Opinion, this will address the substance of the questions referred by the national court and will conclude with recommendations to the Court on how the questions referred should be answered. The Opinion of an AG is in any case not binding on the Court.

There are two possible outcomes of a reference for a preliminary ruling: the Court may decide by means of an order or a judgment. The former is issued when, as mentioned, the questions referred raise no new points of law. This might be the case where (Article 99 of the Rules of Procedure):

* A question referred to the Court for a preliminary ruling is identical to a question on which the Court has already ruled;
* The reply to such a question may be clearly deduced from existing case law; or
* The answer to the question referred for a preliminary ruling admits of no reasonable doubt.

The Court may decide to issue a reasoned order at any time, on a proposal from the Judge-Rapporteur having heard the appointed AG. In these cases, the order must be reasoned and, besides the operative part, must contain a summary of the facts and the grounds for the decision (Article 89 of the Rules of Procedure). Somewhat similarly (at least structure-wise) to a reasoned order, following a summary of the facts, also judgments contain the grounds for the decision and the operative part, including, where appropriate, a decision as to costs (Article 87 of the Rules of Procedure).

A characteristic of the procedure before the CJEU is that its deliberations ‘shall be and shall remain secret’ (Article 32 of the Rules of Procedure). Following the relevant hearing, only the Judges who participated in that hearing shall take part in the deliberative procedure. Each and every Judge taking part in the deliberations shall state their reasoned opinion and that the conclusion reached by the majority of the Judges after final discussion shall be the decision of the Court (Article 32 of the Rules of Procedure). In the CJEU system there is no room for dissenting opinions/judgments.

Another feature is that there is no formal system of binding precedent. The reason underlying this choice was consideration that a system of *stare decisis* would be inappropriate for an institution acting as court of first and last resort. Envisaging binding precedent would mean that, to challenge a certain decision, a review of the Treaties would be necessary.[[25]](#footnote-25) However, the very fact that the Court would issue an order, in lieu of a judgment, in cases that contain questions identical to those on which the Court has already ruled or the reply to which may be clearly deduced from existing case law is indicative that earlier decisions have in fact a value which, if not akin to that of a binding precedent, is at least one in which earlier decisions matter. According to authoritative commentators this system, which is now codified but what first initiated by the Court in its seminal decision in *Da Costa*, C-28 to 30/62[[26]](#footnote-26), may be regarded as akin to a system of precedent under EU law.[[27]](#footnote-27)

# 3. CJEU case law considered

This contribution is limited to understanding how the Court has interpreted relevant copyright legislation, what standards have guided its action, whether it is possible to discern any unifying lens(es) in resulting case law, and what the statistical relevance of the relations between various standards is. For this reason, the CJEU judgments covered are those issued between 1998 (when the first decisions concerning interpretation of the 1992 Rental and Lending Rights Directive were issued) and the end of 2018.

The table below includes 101 decisions, displayed in reverse chronological order.[[28]](#footnote-28) They have been selected according to the following criteria:

* The decisions interpret provisions *within* the EU copyright framework (as defined above *sub* §1) or relevant conflict of laws provisions in Regulation 1215/2012[[29]](#footnote-29) (Brussels I Regulation recast), formerly Regulation 44/2001[[30]](#footnote-30) (Brussels I Regulation);
* The decisions *directly* concern copyright provisions. This means that, although relevant to certain aspects of copyright, notably enforcement and remedies, cases concerning, eg, the interpretation of provisions in directives like the Enforcement Directive, which is part of the EU *acquis*, that do not directly and specifically apply also to copyright have been left outside the scope of the analysis;
* Pending cases as of 31 December 2018 have not been included (this means that also cases for which an AG Opinion was issued but not also the CJEU decision were excluded).

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| Judgment | Year |
| *Syed*, C-572/17, EU:C:2018:1033 | 2018 |
| *Levola Hengelo*, C-310/17, EU:C:2018:899 | 2018 |
| *Bastei Lübbe*, C-149/17, EU:C:2018:841 | 2018 |
| *SNB-REACT*, C-521/17, EU:C:2018:639 | 2018 |
| *Renckhoff*, C-161/17, EU:C:2018:634 | 2018 |
| *VCAST,* C-265/16, EU:C:2017:913 | 2017 |
| *Stichting Brein*, C-610/15, EU:C:2017:456 | 2017 |
| *Stichting Brein*, C-527/15, EU:C:2017:300 | 2017 |
| *AKM,* C-138/16, EU:C:2017:218 | 2017 |
| *ITV Broadcasting*, C-275/15, EU:C:2017:144 | 2017 |
| *Verwertungsgesellschaft Rundfunk*, C-641/15, EU:C:2017:131 | 2017 |
| *Stowarzyszenie Oławska Telewizja Kablowa*, C-367/15, EU:C:2017:36 | 2017 |
| *NEW WAVE CZ*, C-427/15, EU:C:2017:18 | 2017 |
| *Tommy Hilfiger*, C-494/15, EU:C:2016:528 | 2016 |
| *Soulier and Doke*, C-301/15, EU:C:2016:878 | 2016 |
| *Vereniging Openbare Bibliotheken*, C-174/15, EU:C:2016:856 | 2016 |
| *Montis Design*, C-169/15, EU:C:2016:790 | 2016 |
| *Ranks and Vasiļevičs*, C-166/15, EU:C:2016:762 | 2016 |
| *Microsoft Mobile Sales International and Others*, C-110/15, EU:C:2016:717 | 2016 |
| *Mc Fadden*, C-484/14, EU:C:2016:689 | 2016 |
| *GS Media*, C-160/15, EU:C:2016:644 | 2016 |
| *United Video Properties*, C-57/15, EU:C:2016:611 | 2016 |
| *EGEDA and Others*, C-470/14, EU:C:2016:418 | 2016 |
| *Reha Training*, C-117/15, EU:C:2016:379 | 2016 |
| *Austro-Mechana*, C-572/14, EU:C:2016:286 | 2016 |
| *Liffers,* C-99/15, EU:C:2016:173 | 2016 |
| *SBS Belgium*, C-325/14, EU:C:2015:764 | 2015 |
| *Hewlett-Packard Belgium*, C-572/13, EU:C:2015:750 | 2015 |
| *Verlag Esterbauer*, C-490/14, EU:C:2015:735 | 2015 |
| *Coty Germany*, C-580/13, EU:C:2015:485 | 2015 |
| *Diageo Brands*, C‑681/13, EU:C:2015:471 | 2015 |
| *Sociedade Portuguesa de Autores CRL*, C-151/15, EU:C:2015:468 | 2015 |
| *Dimensione Direct Sales and Labianca*, C-516/13, EU:C:2015:315 | 2015 |
| *C More Entertainment*, C-279/13, EU:C:2015:199 | 2015 |
| *Copydan Båndkop*i, C-463/12, EU:C:2015:144 | 2015 |
| *Christie’s France*, C-41/14, EU:C:2015:119 | 2015 |
| *Hejduk,* C-441/13, EU:C:2015:28 | 2015 |
| *Art & Allposters International*, C-419/13, EU:C:2015:27 | 2015 |
| *Ryanair,* C-30/14, EU:C:2015:10 | 2015 |
| *BestWater*, C-348/13, EU:C:2014:2315 | 2014 |
| *Eugen Ulmer*, C-117/13, EU:C:2014:2196 | 2014 |
| *Deckmyn and Vrijheidsfonds*, C-201/13, EU:C:2014:2132 | 2014 |
| *Public Relations Consultants Association*, C-360/13, EU:C:2014:1195 | 2014 |
| *ACI Adam and Others*, C-435/12, EU:C:2014:254 | 2014 |
| *Hi Hotel HCF*, C-387/12, EU:C:2014:215 | 2014 |
| *UPC Telekabel Wien*, C-314/12, EU:C:2014:192 | 2014 |
| *OSA,* C-351/12, EU:C:2014:110 | 2014 |
| *Svensson and Others*, C-466/12, EU:C:2014:76 | 2014 |
| *Blomqvist,* C-98/13, EU:C:2014:55 | 2014 |
| *Nintendo and Others*, C-355/12, EU:C:2014:25 | 2014 |
| *Innoweb,* C-202/12, EU:C:2013:850 | 2013 |
| *Pinckney,* C-170/12, EU:C:2013:635 | 2013 |
| *Amazon.com International Sales and Others*, C-521/11, EU:C:2013:515 | 2013 |
| *VG Wort*, C-457/11, EU:C:2013:426 | 2013 |
| *ITV Broadcasting*, C-607/11, EU:C:2013:147 | 2013 |
| *Football Dataco and Others*, C-173/11, EU:C:2012:642 | 2012 |
| *UsedSoft*, C-128/11, EU:C:2012:407 | 2012 |
| *Donner,* C-5/11, EU:C:2012:370 | 2012 |
| *SAS Institute*, C-406/10, EU:C:2012:259 | 2012 |
| *DR and TV2 Danmark*, C-510/10, EU:C:2012:244 | 2012 |
| *Bonnier Audio and Others*, C-461/10, EU:C:2012:219 | 2012 |
| *Phonographic Performance (Ireland)*, C-162/10, EU:C:2012:141 | 2012 |
| *SCF,* C-135/10, EU:C:2012:140 | 2012 |
| *Football Dataco and Others*, C-604/10, EU:C:2012:115 | 2012 |
| *SABAM,* C-360/10, EU:C:2012:85 | 2012 |
| *Luksan,* C-277/10, EU:C:2012:65 | 2012 |
| *Infopaq International*, C-302/10, EU:C:2012:16 | 2012 |
| *Painer,* C-145/10, EU:C:2011:798 | 2011 |
| *Circul Globus Bucureşti*, C-283/10, EU:C:2011:772 | 2011 |
| *Scarlet Extended*, C-70/10, EU:C:2011:771 | 2011 |
| *Airfield and Canal Digitaal*, C-431/09, EU:C:2011:648 | 2011 |
| *Football Association Premier League and Others*, C-403/08 and C-429/08, EU:C:2011:631 | 2011 |
| *Cassina,* C‑198/10, EU:C:2011:570 | 2011 |
| *VEWA,* C-271/10, EU:C:2011:442 | 2011 |
| *Stichting de Thuiskopie*, C-462/09, EU:C:2011:397 | 2011 |
| *Flos,* C-168/09, EU:C:2011:29 | 2011 |
| *Bezpečnostní softwarová asociace*, C-393/09, EU:C:2010:816 | 2010 |
| *Padawan,* C-467/08, EU:C:2010:620 | 2010 |
| *Fundación Gala-Salvador Dalí and VEGAP*, C-518/08, EU:C:2010:191 | 2010 |
| *Organismos Sillogikis Diacheirisis Dimiourgon Theatrikon kai Optikoakoustikon Ergon*, C-136/09, EU:C:2010:151 | 2010 |
| *Infopaq International*, C-5/08, EU:C:2009:465 | 2009 |
| *Apis-Hristovich*, C-545/07, EU:C:2009:132 | 2009 |
| *LSG-Gesellschaft zur Wahrnehmung von Leistungsschutzrechten*, C-557/07, EU:C:2009:107 | 2009 |
| *Sony Music Entertainment*, C-240/07, EU:C:2009:19 | 2009 |
| *Directmedia Publishing*, C-304/07, EU:C:2008:552 | 2008 |
| *Peek & Cloppenburg*, C-456/06, EU:C:2008:232 | 2008 |
| *Promusicae,* C-275/06, EU:C:2008:54 | 2008 |
| *SGAE,* C-306/05, EU:C:2006:764 | 2006 |
| *Laserdisken,* C-479/04, EU:C:2006:549 | 2006 |
| *Uradex,* C-169/05, EU:C:2006:365 | 2006 |
| *Lagardère Active Broadcast*, C-192/04, EU:C:2005:475 | 2005 |
| *Fixtures Marketing*, C-444/02, EU:C:2004:697 | 2004 |
| *Fixtures Marketing*, C-338/02, EU:C:2004:696 | 2004 |
| *The British Horseracing Board and Others*, C-203/02, EU:C:2004:695 | 2004 |
| *Fixtures Marketing*, C-46/02, EU:C:2004:694 | 2004 |
| *SENA,* C-245/00, EU:C:2003:68 | 2003 |
| *Ricordi,* C-360/00, EU:C:2002:346 | 2002 |
| *EGEDA,* C-293/98, EU:C:2000:66 | 2000 |
| *Butterfly Music*, C-60/98, EU:C:1999:333 | 1999 |
| *FDV,* C-61/97, EU:C:1998:422 | 1998 |
| *Metronome Musik*, C-200/96, EU:C:1998:172 | 1998 |

# 4. Standards employed in selected CJEU case law

This section identifies the policies and principles (cumulatively, standards) that the CJEU has relied upon in its copyright cases and explores their meaning. This will serve as a basis to subsequently perform (*sub* §5) a statistical analysis with the objective of appreciating how certain standards are used in combination with others, and what the statistical relevance thereof is. It will be shown that the Court has relied consistently on certain standards in relation to specific areas, and that trends similar to those occurred in the past may be also expected in the future. In this sense, reliance on certain standards has been assisting the Court in building its own framework for EU copyright rules.

As mentioned, we refer to those below as *policies* and *principles*, in accordance with Dworkin’s terminology. The former are standards that set out a goal to be reached, while the latter are standards that are to be observed, not because they will advance or secure an economic, political, or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality.[[31]](#footnote-31) Reliance on such standards has helped the Court define the content of the *rules* included in relevant EU legislation.[[32]](#footnote-32)

In its case law that CJEU has employed several policies and principles that have arguably helped it shape the EU framework. Some of the standards relied upon by the CJEU have been derived from the language of EU copyright legislation, while others may be regarded as general principles of EU law, standards derived from fundamental rights as enshrined in the Charter of Fundamental Rights of the European Union[[33]](#footnote-33) (EU Charter), or developed by the CJEU itself.

The analysis of CJEU case law has resulted in the detection and extraction of the following standards, which are analyzed below (for mere convenience) in an order that lists, first, generally applicable standards (G) and, secondly, standards that have been applied more frequently (though not necessarily exclusively) in specific areas of copyright (S), eg economic rights or exceptions and limitations.

* High level of protection (G);
* Autonomous concepts of EU law (G);
* Effectiveness (G);
* Proportionality (G);
* Fair balance of different rights and interests (G);
* Interpretation in light of international instruments (G);
* Interpretation in light of wording and context of provisions (G);
* Interpretation in light of objectives pursued by legislation at issue (G);
* Interpretation in light of fundamental rights as granted by the EU Charter (G);
* Preventive nature of economic rights (S);
* Strict interpretation of exceptions and limitations (S).

The one above is not an exhaustive list, as the CJEU has also referred to other standards in its decisions, including:

* The need for an evolutionary interpretation of relevant legislation;
* Consideration of preparatory works (*travaux preparatoires*);
* Review of different language versions of a certain piece of legislation;
* Need to attribute the same meaning to same concepts in different pieces of legislation;
* Interpretation in light of general EU law principles.

By means of a necessary simplification, the following figure[[34]](#footnote-34) displays what principles the CJEU has referred to or relied upon in the decisions listed above, *sub* §3:

## 4.1. Guarantee of a ‘high level of protection’

Guaranteeing a ‘high level’ of protection’ is a standard that the CJEU has relied upon almost invariably every time when deciding a case concerning economic rights and enforcement/remedies, with the result that the outcome of the relevant case would favor an expansive approach to the scope of copyright protection. The principle that protection must be at a high level is stated explicitly in both the InfoSoc Directive (Recitals 4 and 9) and the Enforcement Directive (Recital 10), while it is only implied in Recital 5 of the Rental and Lending Rights Directive.[[35]](#footnote-35) The Enforcement Directive (Recital 32) links the duty of guaranteeing the full respect of intellectual property to the obligation of protecting it as stemming from Article 17(2) of the EU Charter.

From the analysis of relevant CJEU case law, as mentioned, what appears is that each and every time that the Court has referred to this standard, the resulting decision has favored a broad understanding of economic rights and remedies. The first case in which the Court referred to it is *Laserdisken*, C-479/04. In interpreting the content of relevant provisions concerning Member States’ cultural policy and educational policy, the CJEU considered that the content thereof is reflected – expressly or in essence – in a number of recitals in the preamble to the InfoSoc Directive.[[36]](#footnote-36) In particular, as is apparent from Recitals 9 and 11,

any harmonisation of copyright and related rights must take as a basis a high level of protection, since such rights are crucial to intellectual creation and a rigorous, effective system for their protection is one of the main ways of ensuring that European cultural creativity and production receive the necessary resources and of safeguarding the independence and dignity of artistic creators and performers.[[37]](#footnote-37)

This, together with consideration that adequate protection by means of copyright and related rights is ‘of great importance from a cultural standpoint’ and that the InfoSoc Directive – through its system of exceptions and limitations – allows Member States to exercise their powers, *inter alia*, in the fields of education and teaching, led the CJEU to conclude that the cultural and educational aspects specific to EU Member States have been taken into account fully by EU legislature when adopting the InfoSoc Directive.[[38]](#footnote-38)

In *Laserdisken*, C-479/04 the ‘high level of protection’ that needs to be guaranteed was referred to copyright and related rights.[[39]](#footnote-39) There are in fact decisions that relate the ‘high level of protection’ to copyright and related rights (Recitals 4 and 9 in the preamble to the InfoSoc Directive refer, respectively, to ‘intellectual property’ and ‘copyright and related rights’), while another group of decisions refers to rightholders[[40]](#footnote-40), and a third group to authors.[[41]](#footnote-41)

In relation to the InfoSoc Directive, this lack of consistency is likely attributable to the very language of Recitals 9, 10 and 11 in the preamble thereof, which refer to a heterogeneous group, by mentioning authors, performers, producers and culture industry alike, as well as consumers and the public at large, while also affirming that intellectual property has been recognized as an integral part of property. In relation to enforcement of copyright under the umbrella of the Enforcement Directive, what is deserving of a high level of protection is intellectual property.[[42]](#footnote-42) The objective of that piece of legislation is in fact to approximate the legislative systems of the EU Member States with regard to the means of enforcing intellectual property rights so as to ensure a high, equivalent and homogeneous level of protection in the EU internal market (Recital 10).[[43]](#footnote-43) It is in order to realize that objective, which may be also discerned in the wording of Recital 17 and 26 in the preamble thereof, that this piece of legislation concerns all the measures, procedures and remedies necessary to ensure the enforcement of intellectual property rights.[[44]](#footnote-44) The objective to ensure a high level of protection of intellectual property is in line with Article 17(2) of the EU Charter.[[45]](#footnote-45)

## 4.2. Autonomous concepts of EU law

When a certain provision in a EU directive makes no reference to national legislation, relevant concepts are not to be defined at the level of individual EU Member States, but are rather to be intended as autonomous concepts of EU law. As such, they are to be given a uniform application throughout the EU. This is an expression of the principle of autonomy of EU law:

The need for a uniform application of Community law and the principle of equality require that the terms of a provision of Community law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an independent and uniform interpretation throughout the Community; that interpretation must take into account the context of the provision and the purpose of the relevant regulations.[[46]](#footnote-46)

The CJEU has often employed this standard in its copyright case law, with the practical effect of strengthening harmonization of copyright laws across the EU. In one of the first decisions concerning the 1992 Rental and Lending Rights Directive, *SENA*, C-245/00, the Court addressed the concept of ‘equitable remuneration’ in Article 8(2) thereof. It noted that, since that provision makes no reference to the laws of EU Member States, pursuant to the principle of the autonomy of EU law, equitable remuneration is ‘a concept that must be interpreted uniformly in all Member States.’[[47]](#footnote-47) However, lacking any EU criteria for determining what constitutes uniform equitable remuneration, it is for the Member States alone to identify, in their own territory, the most relevant criteria for ensuring, within the limits imposed by EU law and the 1992 Rental and Lending Rights Directive, adherence to that EU concept.[[48]](#footnote-48) The same reasoning may be discerned in *VEWA*, C-271/10, with reference to the notion of ‘remuneration’ in Article 5(1) of the 1992 Rental and Lending Rights Directive.[[49]](#footnote-49) Over time the Court has applied the principle of autonomous interpretation and uniform application in relation to different concepts.

In relation to its construction of economic rights, the CJEU referred to the need of considering the notion of ‘public’ within Article 3(1) of the InfoSoc Directive as an autonomous concept of EU law in its first decision on the right of communication to the public.[[50]](#footnote-50) It achieved a similar conclusion with regard to the notions of ‘reproduction’ and ‘reproduction in part’ within Article 2 of the InfoSoc Directive and the notions of ‘distribution’ within Article 4 of the same directive.[[51]](#footnote-51) With reference to the right of distribution, in *UsedSoft*, C-128/11 the Court clarified that also the notion of ‘sale’ within Article 4(2) of the Software Directive is to be regarded an autonomous concept of EU law.[[52]](#footnote-52) Similarly, in *ITV Broadcasting*, C-275/15 the CJEU found that also the notion of ‘access to cable of broadcasting services’ within Article 9 of the InfoSoc Directive is an autonomous concept of EU law.[[53]](#footnote-53) Recently, in *Levola Hengelo*, C-310/17, the Court also held that the notion of ‘work’ under the InfoSoc Directive is an autonomous concept of EU law.[[54]](#footnote-54)

A similar pattern may be discerned with reference to exceptions and limitations. The CJEU has referred to the following as autonomous concepts of EU law: ‘fair compensation’ for private copying within Article 5(2)(b) of the InfoSoc Directive; the concept of ‘by means of its own facilities’ within Article 5(2)(d) of the InfoSoc Directive; and ‘parody’ under Article 5(3)(k) of the InfoSoc Directive.[[55]](#footnote-55)

## 4.3. Effectiveness

The principle of effectiveness has been often employed together with other standards, including proportionality and fair balance and, to a lesser extent, interpretation of provisions in EU directives in a way that is compatible with fundamental rights as envisaged in the EU Charter. These correlations are not surprising when reference to effectiveness is found in cases concerning enforcement and remedies: it is Article 3 of the Enforcement Directive (read in light of Recitals 3 and 10 in the preamble thereof) that imposes on EU Member States to provide that measures, procedures and remedies necessary to ensure the enforcement of the intellectual property rights are fair, equitable, not unnecessarily complicated or costly or such as to entail unreasonable time-limits or unwarranted delays, effective, proportionate and dissuasive and applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse.[[56]](#footnote-56)

In *Promusicae*, C-275/06, the CJEU was asked whether EU law allows EU Member States to limit to certain specific contexts the duty of operators of electronic communications networks and services, providers of access to telecommunications networks and providers of data storage services to retain and make available connection and traffic data generated by the communications established during the supply of an information society service. The CJEU acknowledged that the purpose of EU law is ensuring, especially in the information society, effective protection of industrial property, in particular copyright. However, the protection afforded under such legislation is without prejudice to other types of protection, including personal data.[[57]](#footnote-57) As regards the EU Charter, while this recognizes both intellectual property as a fundamental right within the right to property and the right to effective judicial protection, it also mandates protection of personal data and private life. Effective protection of copyright should not be considered in isolation, but rather as part of a mechanism that requires the balancing of different rights and interests. This is so because EU law requires Member States, when transposing those EU directives and national courts and authorities when interpreting them, that a fair balance be struck between the various fundamental rights protected by the EU legal order. This also requires due consideration be paid to the general EU principle of proportionality.[[58]](#footnote-58) Consequently, EU law does not impose such a duty of disclosure. Nonetheless it cannot be concluded that EU law forbids Member States from envisaging such duty.[[59]](#footnote-59)

Interpretation of the Enforcement Directive has required consideration of the principle of effectiveness on a number of occasions. For instance, the right to information within Article 8(1) of the Enforcement Directive has been considered aimed at benefitting the copyright holder in the context of proceedings concerning an infringement of their right to property and, more generally, as an application and implementation of the fundamental right to an effective remedy as guaranteed in Article 47 of the EU Charter. Thus, its recognition ensures the effective exercise of the fundamental right to property, which includes the intellectual property right protected in Article 17(2) of the EU Charter.[[60]](#footnote-60)

The context of enforcement is not the only one in which effectiveness has been considered. The Court has also referred to it: in the broader context of interpretation of national law in light of EU law; with regard to economic rights and exceptions and limitations; and application of EU law to acts committed in third countries but targeting the EU.[[61]](#footnote-61)

With particular regard to exceptions and limitations, in *Football Association Premier League and Others*, C-403/08 and C-429/08, with regard to the temporary copies exemption within Article 5(1) of the InfoSoc Directive, the Court noted how the interpretation of relevant conditions therein ‘must enable the effectiveness of the exception thereby established to be safeguarded and permit observance of the exception’s purpose’.[[62]](#footnote-62) An identical reasoning may be discerned in other cases, including in relation to: digitization of works in library collections, parody, and quotation.[[63]](#footnote-63)

By contrast, in other cases effectiveness of the limitation or exception has taken a back seat to other goals. For example, in a number of rulings the Court has noted how Articles 5(2)(b) (read in light of Recital 35 in the preamble) and 5(5) (in particular the three-step test requirement that the legitimate interests of a rightholder are not unduly prejudiced) of the InfoSoc Directive require that effective recovery of the fair compensation must be guaranteed to compensate the authors harmed by the making of unauthorized acts of reproduction pursuant to a private copying limitation.[[64]](#footnote-64)

## 4.4. Proportionality

The Court has referred to the principle of proportionality as both a general principle of EU law, whose protection is also mandated on a fundamental rights basis by Article 52 of the EU Charter, and a principle enshrined in relevant EU copyright directives. The latter is for instance the case of Articles 3 and 14 of the Enforcement Directive, as well as of the InfoSoc Directive with regard to the legal protection of technological measures as per Recital 48 and Article 6 thereof.

Article 3 of the Enforcement Directive requires that measures referred to in that directive be fair and proportionate and not excessively costly. The Court has considered proportionality within the meaning of this provision to rule out that EU law would allow the enactment of national provisions requiring an intermediary provider to actively monitor all the data of each of its customers in order to prevent any future infringement of intellectual property rights.[[65]](#footnote-65) Still in the context of injunctions, the CJEU has reiterated that the requirement of an injunction be proportionate requires that it does not create barriers to legitimate trade. While an intermediary may not be required to exercise general and permanent oversight over its customers, it may be forced to take measures, which contribute to avoiding new infringements of the same nature, by the same market-trader from taking place.[[66]](#footnote-66) The Court also referred to proportionality in Article 3 of the Enforcement Directive, though without particular elaboration, in relation to costs and damages.[[67]](#footnote-67)

As mentioned, the Court has also referred to proportionality as a general principle of EU law, which also finds its application in the field of copyright and does so irrespective of positive references in relevant directives. Proportionality is also referred to in the EU Charter. Article 52 therein states that any limitation on the exercise of the rights and freedoms recognized by that instrument must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be only made if they are necessary and genuinely meet objectives of general interest recognized by the EU or the need to protect the rights and freedoms of others. In this sense, proportionality would serve to achieve a fair balance of contrasting rights and interests (see further below, *sub* §4.5).[[68]](#footnote-68)

The proportionality assessment has been identified as relevant, on the one hand, to the evaluation of the appropriateness of national transpositions of EU directives and, on the other hand, to the restriction to free movement principles as resulting from copyright protection.[[69]](#footnote-69) According to the Court, the test of proportionality is a two-pronged one: it requires consideration of whether, on the one hand, the national provision at issue is appropriate for attaining the objective pursued by the national law and, on the other hand, whether it is also necessary for that purpose. In the case at issue, ie one concerning the lawfulness of a national transitional period, this translates into ensuring that ‘a balance is struck between, on the one hand, the acquired rights and legitimate expectations of the third parties concerned and, on the other, the interests of the rightholders. Care must also be taken to make sure that the measure does not go beyond what is needed to ensure that that balance is struck.’[[70]](#footnote-70)

In *UPC Telekabel*, C-314/12, the CJEU specifically conducted an assessment in light of fundamental rights and the principle of proportionality. In considering whether a particular type of intermediary injunction, ie blocking injunctions, would be compatible with EU law, the CJEU noted that the rights at issue in a context of this kind would be copyright protection (Article 17(2) of the EU Charter); freedom to conduct a business (Article 16 of the EU Charter) and freedom of expression and information (Article 11 of the EU Charter). When the addressee of an injunction chooses the measures to be adopted in order to comply with that injunction, they must ensure compliance with the fundamental right of internet users to freedom of information. This requires that the measures adopted be strictly targeted: they must serve to bring an end to a third party’s infringement of copyright or of a related right but without thereby affecting internet users who are using the provider’s services in order to lawfully access information. Failing that, the provider’s interference in the freedom of information of those users would be unjustified in the light of the objective pursued, and it should be possible for a court to repress any abuses thereof.[[71]](#footnote-71)

## 4.5. Fair balance of different rights and interests

Another principle that the CJEU has employed in its case law, often in combination with or as an expression of the principle of proportionality to reflect the constitutional dimension of fundamental rights after the Treaty of Lisbon[[72]](#footnote-72), and also – according to some commentators – to lend rhetorical coherence to the Court’s harmonizing ‘agenda’[[73]](#footnote-73), is that of striking a fair balance between different, conflicting rights.

The first reference in a CJEU judgment to the need of balancing different and potentially conflicting rights and interests may be discerned in *SENA*, C-245/00. Noting that it is for the Member States – rather than EU judicature – to determine what constitutes equitable remuneration under the 1992 Rental and Lending Rights Directive, the CJEU also recalled that Member States must exercise this discretion within the limits set by that directive. By requiring such remuneration be equitable (meaning ‘fair’), EU law mandates Member States to lay down rules for equitable remuneration that enable a proper balance be achieved between the interests of performers and producers in obtaining remuneration for the broadcast of a particular phonogram and the interests of third parties in being able to broadcast the phonogram on terms that are reasonable. This requires the remuneration for the use of a commercial phonogram to reflect the value of that use in trade. For broadcasting purposes, this means taking into account the criteria set in Recital 17 in the preamble to the Satellite and Cable Directive, including the actual audience, the potential audience, and the language version of the broadcast at issue.[[74]](#footnote-74) It is therefore with regard to Member States’ duties when *transposing* relevant EU legislation and national authorities and courts when *interpreting* resulting national provisions that a duty of balancing, fairly, different rights and interests arises.[[75]](#footnote-75)

At times the Court has appeared to conflate the fair balance and proportionality assessments. For instance, in *Flos*, C-168/09 fulfillment of the requirements proper to proportionality – these being necessity and appropriateness of the measure at issue – would lead to a finding that an appropriate balance has been struck:

the legislative measure adopted by the Member State concerned must be appropriate for attaining the objective pursued by the national law and necessary for that purpose – namely ensuring that a balance is struck between, on the one hand, the acquired rights and legitimate expectations of the third parties concerned and, on the other, the interests of the rightholders. Care must also be taken to make sure that the measure does not go beyond what is needed to ensure that that balance is struck.[[76]](#footnote-76)

A ‘fair balance’ requirement is also present with regard to exceptions and limitations in the InfoSoc Directive. Recital 31 in the preamble thereof states that: ‘A fair balance of rights and interests between the different categories of rightholders, as well as between the different categories of rightholders and users of protected subject matter must be safeguarded’. Reference to this principle has occurred on a number of occasions. At times the Court has highlighted how striking a fair balance is expression of the more general principle of effectiveness.[[77]](#footnote-77) In relation to private copying, the need to maintain a fair balance has been considered by the Court when determining who should be responsible to pay the fair compensation for private copying and how fair compensation mechanisms ought to work.[[78]](#footnote-78)

On other occasions, the Court has referred to certain choices made by EU legislature to conclude that the fair balance had been set at the legislative level. For instance, in *Painer*, C-145/10 the CJEU observed how quotation within Article 5(3)(d) of the InfoSoc Directive ‘is intended to strike a fair balance between the right to freedom of expression of users of a work or other protected subject matter and the right of reproduction conferred on authors. That fair balance is struck, in this case, by favoring the exercise of the users’ right to freedom of expression over the interest of the author in being able to prevent the reproduction of extracts from his work which has already been lawfully made available to the public, whilst ensuring that the author has the right, in principle, to have his name indicated.’[[79]](#footnote-79) A similar reasoning may be discerned in *Eugen Ulmer*, C-117/13 in relation to Article 5(3)(n) of the InfoSoc Directive, and in *Ryanair*, C-30/14 with regard to the general scheme of the Database Directive (‘that directive sets out to achieve a balance between the rights of the person who created a database and the rights of lawful users of such a database, that is third parties authorised by that person to use the database’).[[80]](#footnote-80)

While reference to fundamental rights to ensure that a fair balance be struck has been made since *Promusicae*, C-275/06 it is arguably with *Scarlet Extended*, C-70/10 that the Court has begun scrutinizing the interplay, in the copyright field, between different fundamental rights in a more material fashion. This has been particularly true in relation to injunctions against intermediaries. In the seminal decision in *L’Oréal and Others*, C-324/09 (concerning injunctions under the third sentence of Article 11 of the Enforcement Directive) the CJEU stated that an injunction against an intermediary needs to ensure the protection of intellectual property without posing obstacles to legitimate trade.[[81]](#footnote-81) In *Scarlet Extended*, C-70/10 the Court gave substance to the requirement of taking fundamental rights into account: moving from the need of balancing copyright protection with other rights, it made it clear that, as regards the fundamental rights at stake in a case like the one at issue (filtering obligations of internet service providers, ISPs) a fair balance is to be struck not between fundamental rights in general but, specifically, ‘between the protection of the intellectual property right enjoyed by copyright holders and that of the freedom to conduct a business enjoyed by operators such as ISPs pursuant to Article 16 of the EU Charter.’[[82]](#footnote-82) A similar approach has been also employed in *UPC Telekabel*, C-314/12 and *Mc Fadden*, C-484/14 (both cases concerning injunctions against intermediaries). There the Court observed how the rights at stake, and for which a fair balance would be needed, are copyright protection, freedom to conduct a business, and freedom of expression/information.[[83]](#footnote-83)

Similarly, in *GS Media*, C-160/15 the CJEU highlighted the fundamental rights dimensions of the notion of ‘fair balance’, when it stated that:

it follows from recitals 3 and 31 of Directive 2001/29 that the harmonisation effected by it is to maintain, in particular in the electronic environment, a fair balance between, on one hand, the interests of copyright holders and related rights in protecting their intellectual property rights, safeguarded by Article 17(2) of the Charter of Fundamental Rights of the European Union (‘the Charter’) and, on the other, the protection of the interests and fundamental rights of users of protected objects, in particular their freedom of expression and of information, safeguarded by Article 11 of the Charter, and of the general interest.[[84]](#footnote-84)

A similar approach may be discerned in *Renckhoff*, C-161/17, although the Court relied on it to exclude that the unauthorized online re-posting of copyright works or protected subject-matter already available, freely and with the permission of the rightholder on a third-party website, should be treated in the same way as linking to lawful and freely accessible content.[[85]](#footnote-85)

## 4.6. Interpretation in light of international instruments

The Court has often relied on international instruments to undertake the proper interpretation of EU law. This is not surprising, considering legislation such as the InfoSoc Directive was adopted to implement the WIPO Internet Treaties (Recital 15). Article 1(2) of the WIPO Copyright Treaty requires compliance with Articles 1 to 21 of the Berne Convention, and the Court has indeed often referred to the provisions contained in the Convention. This has allowed the Court to achieve important, yet at times controversial, outcomes: in *Infopaq International*, C-5/08, it helped the Court *de facto* harmonize the standard of originality beyond the legislative harmonization occurred for software, databases and photographs in the Software Directive, Database Directive and Term Directive[[86]](#footnote-86); in *Levola Hengelo*, C-310/17, it helped the Court define the EU concept of work.[[87]](#footnote-87) In *SGAE*, C-306/05, the Court introduced the concept of a ‘new public’ in relation to the right of communication to the public.[[88]](#footnote-88)

The first reference to international law may be found in *SENA*, C-245/00, a case concerning the 1992 Rental and Lending Rights Directive. In order to provide guidance on the correct interpretation of the concept of ‘equitable remuneration’, the Court found the source of inspiration for Article 8(2) of that directive in Article 12 of the 1961 Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations. Article 12 provides that the payment of equitable remuneration and the conditions for sharing that remuneration are, absent an agreement between the various parties concerned, to be established by domestic law. As a result, the role of the Court may only be to call upon the Member States to ensure the greatest possible adherence to equitable remuneration.[[89]](#footnote-89)

Overall, references to international law may be said to have performed three different tasks: first, they have helped the Court interpret relevant EU provisions; second, they have served to appreciate the freedom left to EU legislature with regard to the regulation of certain issues; finally, they have helped define the freedom left to individual Member States in respect of areas harmonized at the EU level.

The first group of decisions is expression of the settled principle that EU legislation must, as far as possible, be interpreted in a manner that is consistent with international law, in particular where its provisions are intended specifically to give effect to an international agreement. The Court has referred to this obligation in a number of decisions, notably those on: the construction of the scope of copyright protection; economic rights like the rights of reproduction within Article 2 of the InfoSoc Directive, communication to the public within Article 3(1) of the InfoSoc Directive, and distribution within Article 4 of the InfoSoc Directive; exceptions and limitations within Article 5 of the InfoSoc Directive; and copyright protection in databases.[[90]](#footnote-90)

With regard to the second group, it may be recalled that in *Laserdisken*, C-479/04, reference to the WIPO Internet Treaties led the Court to rule out the possibility that international law would pose any constraints on the choice of specific rules of exhaustion for the right of distribution within Article 4(2) of the InfoSoc Directive.[[91]](#footnote-91)

An example of the third kind of situation is *Luksan*, C-277/10, in which the Court was called to address whether an individual EU Member State could exclude that the principal director from being recognized as the author of a cinematographic work. Article 14*bis* of the Berne Convention allows national legislation to deny the principal director certain rights to exploit a cinematographic work, such as the reproduction right and the right of communication to the public. However, Article 2(1) of the Term Directive sets out, under the heading ‘Cinematographic or audiovisual works’, the general rule that the principal director of a cinematographic work is to be considered its author or one of its authors, Member States being free to designate other co-authors. This led to the conclusion that:

In providing that the principal director of a cinematographic work is to be considered its author or one of its authors, the European Union legislature exercised the competence of the European Union in the field of intellectual property. In those circumstances, the Member States are no longer competent to adopt provisions compromising that European Union legislation. Accordingly, they can no longer rely on the power granted by Article 14*bis* of the Berne Convention.[[92]](#footnote-92)

## 4.7. Interpretation in light of the wording and context of provisions

It is settled case law that, in interpreting a provision of EU law, it is necessary to consider not just its wording, but also the surrounding context and the objectives pursued by the rules of which it is part.[[93]](#footnote-93) It is therefore not surprising that, in parallel with the requirement of a teleological interpretation of relevant EU provisions (see below, *sub* §4.8), the Court has referred to the need of interpreting EU norms in light of their wording and context. This principle of legal interpretation is a basic one and in fact the Court has referred to it on several occasions.[[94]](#footnote-94) At times the CJEU has considered the context in which a certain provision appears.[[95]](#footnote-95)

Corollaries enunciated by the Court, which are arguably part of the standard discussed in this section are, first, that the same concepts found in different directives should have the same meaning and, secondly, that different language versions of the same piece of EU legislation should be considered. Examples of the former include the decisions in *Luksan*, C-277/10 (presumption of transfer mechanisms), *Football Association Premier League*, C-403/08 and C-429/08 (communication to the public), *UsedSoft*, C-128/11 (exhaustion of the right of distribution), and *Mc Fadden*, C-484/14 (information society service providers).[[96]](#footnote-96) Examples of the latter are the judgments in *DR and TV2 Danmark*, C-510/10 (Recital 41 of the InfoSoc Directive), *Eugen Ulmer*, C-117/13 (Article 5(3)(n) of the InfoSoc Directive), and *Christie’s France*, C-41/14 (Article 1(4) of the Resale Right Directive).[[97]](#footnote-97) The Court has clarified that where there is divergence between two language versions of a EU legal text, the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms part.[[98]](#footnote-98)

## 4.8. Interpretation in light of the objectives pursued by the piece of legislation at issue

Teleological interpretation of legal provisions is another basic legal interpretation method. The CJEU has employed it in close connection with the need to interpret norms in light of their wording and context. At times, in order to discern the objectives pursued by a certain piece of EU legislation, the Court has not only considered the relevant text at issue (notably the recitals in the preamble to a certain directive), but also preparatory works (*travaux*), notably the original EU Commission’s proposal (and its Explanatory Memorandum) for a certain legislation that was eventually adopted.[[99]](#footnote-99)

## 4.9. Interpretation in light of fundamental rights as granted by the EU Charter

The Court has also increasingly referred to the need of interpreting relevant provisions in EU directives in light of fundamental rights as protected in the EU Charter. Since the 2007 Treaty of Lisbon the EU Charter has had status of primary EU law source, on the same foot as the Treaties. Article 6(1) TEU states in fact that ‘The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union […] which shall have the same legal value as the Treaties.’ Article 6(3) also clarifies that fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) – to which the EU has expressly acceded (Article 6(2) TEU) – and as they result from the constitutional traditions common to the EU Member States, constitute general principles of EU law.

The result has been arguably a process of constitutionalization carried out by the CJEU also in the field of copyright, although some critics have considered such process merely cosmetic and underlying a *de facto* harmonizing agenda on the side of the Court instead.[[100]](#footnote-100) The EU Charter rights that have been considered more often are copyright protection within the right to property (Article 17(2)); freedom of expression/information (Article 11); freedom to conduct a business (Article 16); and protection of personal data (Article 8). It would be however parochial to think of these fundamental rights and freedoms as inherently dichotomic to each other, also because any balancing exercise is not just carried out externally: balancing mechanisms are also present internally.[[101]](#footnote-101) So, within copyright itself there are safeguards in the interest of third parties, including – just to name a few – the idea/expression divide, originality (which should not be intended as a mundane requirement), limited term of protection, standard of infringement, and exceptions and limitations.

The first reference to a fundamental rights-oriented interpretation of EU copyright norms may be found, although the Court did not really elaborate upon it, in *Laserdisken*, C-479/04. There, the CJEU held that a restriction on the freedom to receive information pursuant to Article 10 ECHR (the decision does not contain any reference to the EU Charter, despite the fact that this was adopted in 2000) is justified in light of the need to protect intellectual property rights, including copyright, because these form part of the right to property.[[102]](#footnote-102)

A more meaningful consideration of fundamental rights, also in light of the questions referred by the national court and with specific reference to the EU Charter, was undertaken in *Promusicae*, C-275/06. There the CJEU had to consider the interplay between copyright protection, Article 17(2) of the EU Charter and the right to an effective remedy within Article 47 of the EU Charter (copyright and the right to an effective remedy being considered general principles of EU law), and the rights to private life within Article 7 of the EU Charter and protection of personal data within Article 8 of the EU Charter. The Court considered that balancing mechanisms are already envisaged in the directives subject to the reference for a preliminary ruling. However, EU Member States, when transposing relevant EU legislation into their own national laws and national authorities and courts when interpreting resulting provisions, are under an obligation to rely on an interpretation of the directives which allows a fair balance to be struck between the various fundamental rights protected by the EU legal order, as well as general principles of EU law, including proportionality and the respect of legitimate expectations and acquired rights.[[103]](#footnote-103)

A concrete application of the balancing of different fundamental rights, prompted by the questions referred by national courts, may be discerned in cases like *Scarlet Extended*, C-70/10 and *SABAM*, C-360/10. There, the Court applied the principles expressed in *Promusicae*, C-275/06 to the scenarios at issue (filtering injunctions), holding that it is indeed for national courts, when considering adoption of the measures requested by rightholders, to strike a fair balance between the protection of the intellectual property right enjoyed by these, freedom to conduct a business enjoyed by operators such as ISPs pursuant to Article 16 of the Charter and, also, freedom of expression/information and personal data enjoyed by customers of the ISPs under, respectively, Article 11 and 8 of the EU Charter.[[104]](#footnote-104) The need for a similar balancing exercise was reiterated and further elaborated in *UPC Telekabel Wien*, C-314/12, a case in which the CJEU considered the compatibility with the EU legal order of an injunction that would require an ISP to block access to an infringing website. The Court noted that whether a blocking injunction, taken on the basis of Article 8(3) of the InfoSoc Directive, is consistent with EU law, requires indeed consideration of the requirements that stem from the protection of the applicable fundamental rights, also including Article 51 of the EU Charter.[[105]](#footnote-105) While an injunction of this kind would restrict an ISP’s freedom to conduct its business, it would not infringe the very substance of such freedom, in that it would allow it to determine the specific measures to be taken in order to achieve the result sought; proving that the ISP has taken all reasonable measures would exonerate it from liability. In any case, the ISP must also respect its customers’ freedom of expression and information.[[106]](#footnote-106) This requires that the measures adopted be strictly targeted: they must serve to bring an end to a third party’s infringement without affecting use of the service to access lawful information.[[107]](#footnote-107) Even if the EU Charter does not mandate copyright protection be absolute, the measures which are taken by an ISP in the context of implementing an injunction must be sufficiently effective to ensure genuine protection of this fundamental right at issue, and must have the effect of preventing unauthorized access to the protected subject matter or, at least, of making it difficult to achieve, as well as seriously discouraging the ISPs’ customers from accessing the subject matter made available to them in breach of that fundamental right.[[108]](#footnote-108)

The decision in *UPC Telekabel Wien*, C-314/12 remains arguably one in which the Court has undertaken the most sophisticated and meaningful consideration of different fundamental rights. In other decisions, the CJEU has referred to fundamental rights without particular elaboration. This has been, for instance, the case of: freedom of the press (Article 10 ECHR and Article 11 of the EU Charter) in relation to public security in *Painer*, C-145/10; lack of recognition of the director of a cinematographic work as an author as deprivation of intellectual property protection in relation to Article 17(2) in *Luksan*, C-277/10; parody as part of freedom of expression within Article 11 of the Charter and the principle of non-discrimination within Article 21(1) of the EU Charter in *Deckmyn and Vrijheidsfonds*, C-201/13.[[109]](#footnote-109)

In relation to the fair compensation requirement for private copying and the right to equal treatment under Article 20 of the EU Charter, the CJEU dealt with it briefly in *VG Wort*, C-457/11, but engaged with it more substantially in *Copydan Båndkopi*, C-463/12. The Court noted that this right, which is also a general principle of EU law, requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified. In relation to the fair compensation requirement, this means that Member States cannot lay down detailed fair compensation rules which would discriminate, without any justification, between the different categories of economic operators marketing comparable goods covered by the private copying exception or between the different categories of users of protected subject matter.[[110]](#footnote-110)

## 4.10. Preventive nature of economic rights

This is a standard that has not appeared too frequently, though the frequency with which the Court has referred to it has increased recently. The first reference may be seen in *SCF*, C-135/10. In that case, the Court contrasted the nature of the rights harmonized by the InfoSoc Directive (right of communication to the public) with those harmonized by the 1992 Rental and Lending Rights Directive (notably broadcasters’ rights). While the right under Article 8(2) of the 1992 Rental and Lending Rights Directive is compensatory in nature and may not be exercised before a phonogram is published for commercial purposes, or before a reproduction of such a phonogram has been used for communication to the public by a user, the right of communication to the public under Article 3(1) of the InfoSoc Directive is preventive in nature and allows authors to intervene between possible users of their work and the communication to the public which such users might contemplate making, in order to prohibit such use.[[111]](#footnote-111) The preventive nature of the right of communication to the public has been also reiterated in more recent case law.[[112]](#footnote-112) Over time, however, the CJEU has refined this principle further, and used it to define the nature of the rights harmonized under the InfoSoc Directive and the nature of consent that authors are to grant for the use of their works or subject matter. Consideration of economic rights as preventive in nature has allowed the Court to clarify that any reproduction or communication to the public of a work by a third party requires the prior consent of its author.[[113]](#footnote-113) The preventive nature of economic rights is such that authors have a right that allows them to intervene, between possible users of their work and the communication to the public which such users might contemplate making, in order to prohibit such use. Consent, however, does not necessarily need to be explicit all the time.[[114]](#footnote-114)

## 4.11. Strict interpretation of exceptions and limitations

It is settled CJEU case law that the provisions of a EU directive, which derogate from a general principle established by EU legislation, must be interpreted strictly.[[115]](#footnote-115) In the field of copyright, the Court has given effect to this principle in relation to both the special rule of jurisdiction in Article 7(2) of the Brussels I Regulation recast (previously, Article 5(3) of the Brussels I Regulation) – contrasted to the general rule applicable to all causes of action encompassed in the regulation – and exceptions and limitations.[[116]](#footnote-116)

The principle according to which exceptions and limitations are to receive strict interpretation is linked to consideration of them as derogation from the general rule that authors’ original creations are deserving of protection. In the context of the InfoSoc Directive, this is also linked to the objective of that directive, ie granting a high level of protection. A significant engagement with the principle of strict interpretation of exceptions and limitations may be found in *Infopaq International*, C-5/08 in relation to the temporary copies exception in Article 5(1) of the InfoSoc Directive. The Court noted that such provision must be interpreted strictly in that it derogates from the general principle established by that directive, namely that authorization from the rightholder is required for any reproduction of a protected work.[[117]](#footnote-117) In addition, the three-step test in Article 5(5) of the InfoSoc Directive mandates that exceptions and limitations be applied only in certain special cases, which do not conflict with a normal exploitation of the work or other subject matter and do not unreasonably prejudice the legitimate interests of the rightholder.[[118]](#footnote-118)

In any case, the Court has also clarified that, with particular regard to the exemption for temporary copies, that provision must allow and ensure the development and operation of new technologies, and safeguard a fair balance between the rights and interests of rightholders and users of protected works who wish to avail themselves of those technologies.[[119]](#footnote-119) More generally, exceptions and limitations must be interpreted in such a way that their effectiveness is safeguarded and its purpose may be observed.[[120]](#footnote-120)

#  5. Data-based case law (DBCL)

The analysis above has focused on the meaning and content of the standards that the CJEU has most significantly employed in its copyright case law, selected as explained above, *sub* §3. As mentioned, several of them have been referred to and applied in combination with other standards. But, if we were to perform a statistical analysis of such principles, what would be the meaning of relations between them? In particular: are there couples of standards which are likely to be used together/in combination or, on the contrary, couples of standards that are unlikely to be used together in the same decision by the CJEU?

Using Fisher exact test and chi square test for categorical data (analysis of contingency tables), as appropriate, we performed the following analysis, and found how the following eleven policies and principles were employed (or not employed) by the CJEU in taking its decisions:

* High level of protection (G);
* Autonomous concepts of EU law (G);
* Effectiveness (G);
* Proportionality (G);
* Fair balance of different rights and interests (G);
* Interpretation in light of international instruments (G);
* Interpretation in light of wording and context of provisions (G);
* Interpretation in light of objectives pursued by legislation at issue (G);
* Interpretation in light of fundamental rights as granted by the EU Charter of Fundamental Rights (G);
* Preventive nature of economic rights (S);
* Strict interpretation of exceptions and limitations (S).

Such standards are either general (G) or specific (S), as detailed above.

When looking at a possible positive vs negative association between standards (where: positive association = more likely to be used together than would be expected by pure chance, and negative association = less likely to be used together than would be expected by pure chance, respectively), we performed a pairwise analysis among all the possible non-ordered couples of standards (11 standards, so giving 55 non-ordered pairs of standard).

For each pair of standards (e.g. Standard A and Standard B), we examined the related 2 x 2 contingency table:

|  |  |
| --- | --- |
|  | Did the Court employ Standard B? |
| Yes | No |
| Did the Court employ Standard A? | Yes | a | b |
| No | c | d |

where:

- a is the number of decisions where the CJEU employed both Standard A and Standard B

- b the number of decisions where the CJEU employed Standard A, but not Standard B

- c the number of decisions where the CJEU employed Standard B, but not Standard A

- d the number of decisions where the CJEU employed neither Standard A nor Standard B

We analyzed each 2 x 2 contingency table with a Fisher’s exact test.

For each pair of standards, we defined:

* No association: p value of Fisher exact test of the related 2x2 contingency table ≥ 0.05 (ie the two standards are used independently of each other)
* Weak association: p value of Fisher exact test of the related 2x2 contingency table < 0.05 but ≥ 0.01
* Strong association: p value of Fisher exact test of the related 2x2 contingency table < 0.01

Any weak or strong association between two standards was then classified as positive (v negative) if those two standards were more (vs less, respectively) likely to be used together than would be expected by pure chance.

All analysis was performed using the open source software for statistical computing and graphics R (<https://www.r-project.org/>).

## 5.1. Findings

Our findings were that:

* A strong positive association exists between:
	+ High level of protection and interpretation in light of the objectives pursued by legislation at issue;
	+ Effectiveness and proportionality;
	+ Effectiveness and fair balance of different rights and interests;
	+ Effectiveness and interpretation in light of fundamental rights as granted by the EU Charter;
	+ Proportionality and interpretation in light of fundamental rights as granted by the EU Charter;
	+ Interpretation in light of wording and context of provisions and interpretation in light of the objectives pursued by legislation at issue.
	+ Fair balance of different rights and interests and proportionality
* A weak positive association exists between:
	+ High level of protection and interpretation in light of wording and context of provisions;
	+ High level of protection and preventive nature of economic rights;
	+ Autonomous concepts of EU law and interpretation in light of international instruments;
* A weak negative association exists between:
	+ Fair balance of different rights and interests and interpretation in light of fundamental rights as granted by the EU Charter.
* A strong negative association exists between:
	+ Fair balance of different rights and interests and interpretation in light of international instruments.

We represented our findings (strong/weak positive/negative associations within pairs of standards) in the figure below[[121]](#footnote-121):



Figure 2 - Rosati & Rosati EU copyright DBCL (2019)

We also considered three distinct areas of copyright decisions: economic rights; exceptions and limitations; and enforcement. With the same method explained above, we wished to detect whether there are certain principles that are more likely to be employed by the CJEU when deciding cases in these three areas. We concluded in the affirmative.

Our findings are as follows.

### 5.1.1. Standards in case law on economic rights

With regard to decisions in the area of economic rights, the standards that have been employed most frequently are interpretation in light of the objectives pursued by the piece of legislation at issue and the need to guarantee a high level of protection. The results are shown on the table below[[122]](#footnote-122):

### 5.1.2. Standards in case law on exceptions and limitations

With regard to decisions in the area of exceptions and limitations, the standards that have been employed most frequently are the need to guarantee a fair balance of different interests and rights and to interpret relevant provisions light of the objectives pursued by the relevant piece of legislation. The results are shown on the table below[[123]](#footnote-123):

### 5.1.3. Standards in case law on enforcement

Finally, in the area of enforcement, the standards that have been employed most frequently are proportionality, effectiveness, and the need to provide a fair balance of different rights and interests. The results are shown on the table below[[124]](#footnote-124):

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# Conclusion

In developing its approach to the interpretation of copyright provisions in relevant EU directives, the CJEU has relied on a number of key standards. This contribution has mapped them and discussed their meaning and content. It has also provided a statistical analysis or relevant decisions (data-based copyright case law – DBCL), aimed at showing relevant relations between different standards. Our findings show that there is a strong positive association (which is statistically relevant) between certain pairs of standards, which – as a result – will likely be employed and mentioned together in relevant decisions. Similarly, we found that a strong negative association (which is statistically relevant) also subsist, though only in relation between the standard that a fair balance of different rights and interests be achieved and the need to interpret EU copyright provisions in light of international instruments.

We hope that work will be useful to appreciate the impact of CJEU activity in the area of copyright, and understand the implications thereof. More generally, quantitative methods employed in other disciplines result in a rationalization of judicial decisions in given areas of the law. They serve to appreciate the statistical significance of certain standards employed therein, and – overall – detect trends and patterns in case law.

1. \* This contribution builds upon the analysis contained in Chapter 2 of E Rosati, *Copyright and the Court of Justice of the European Union* (OUP:2019). [↑](#footnote-ref-1)
2. \*\* Eleonora Rosati is an Associate Professor in Intellectual Property Law at the University of Southampton (UK). Email: eleonora@e-lawnora.com. Carlo Maria Rosati is a Cardiothoracic Surgery Fellow at the University of Michigan (MI, USA). Email: carlo.m.rosati@gmail.com. [↑](#footnote-ref-2)
3. Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, OJ L 178, 17.07.2000, 1–16. Other relevant directives are: Council Directive 87/54/EEC of 16 December 1986 on the legal protection of topographies of semiconductor products, OJ L 24, 27.01.1987, 36–40; and Directive 98/84/EC of the European Parliament and of the Council of 20 November 1998 on the legal protection of services based on, or consisting of, conditional access, OJ L 320, 28.11.1998, 54-57. [↑](#footnote-ref-3)
4. Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, OJ L 248, 06.10.1993, 15–21. The directive was recently reviewed: Directive (EU) 2019/789 of the European Parliament and of the Council of 17 April 2019 laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes, and amending Council Directive 93/83/EEC, OJ L 130, 17.05.2019, 82-91. [↑](#footnote-ref-4)
5. Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, OJ L 77, 27.03.1996, 20–28. [↑](#footnote-ref-5)
6. 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, OJ L 167, 22.06.2001, 10–19. [↑](#footnote-ref-6)
7. Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (codified version), OJ L 376, 27.12.2006, 28–35. This directive repealed and replaced Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, OJ L 346, 27.11.1992, 61–66 (1992 Rental and Lending Rights Directive). [↑](#footnote-ref-7)
8. Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights, OJ L 372, 27.12.2006, 12–18. This directive repealed and replaced Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights, OJ L 290, 24.11.1993, 9–13. [↑](#footnote-ref-8)
9. Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art, OJ L 272, 13.10.2001, 32–36. [↑](#footnote-ref-9)
10. Corrigendum to 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, 30.04.2004), OJ L 195, 02.06.2004, 16–25. [↑](#footnote-ref-10)
11. Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (codified version), OJ L 111, 05.05.2009, 16–22. This directive repealed and replacedCouncil Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs, OJ L 122, 17.05.1991, 42–46 (1991 Software Directive). [↑](#footnote-ref-11)
12. Directive 2011/77/EU of the European Parliament and of the Council of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights, OJ L 265, 11.10.2011, 1-5. [↑](#footnote-ref-12)
13. Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works, OJ L 299, 27.10.2012, 5-12. [↑](#footnote-ref-13)
14. Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market, OJ L 84, 20.03.2014, 72–98. [↑](#footnote-ref-14)
15. Directive (EU) 2017/1564 of the European Parliament and of the Council of 13 September 2017 on certain permitted uses of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled and amending Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L 242, 20.09.2017, 6-13. [↑](#footnote-ref-15)
16. Regulation (EU) 2017/1563 of the European Parliament and of the Council of 13 September 2017 on the cross-border exchange between the Union and third countries of accessible format copies of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled, OJ L 242, 20.09.2017, 1–5. [↑](#footnote-ref-16)
17. Regulation (EU) 2017/1128 of the European Parliament and of the Council of 14 June 2017 on cross-border portability of online content services in the internal market, OJ L 168, 30.06.2017, 1–11. [↑](#footnote-ref-17)
18. Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, OJ L 130, 92-125. [↑](#footnote-ref-18)
19. Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, 47–390. [↑](#footnote-ref-19)
20. Consolidated version of the Treaty on European Union, OJ C 326, 26.10.2012, 13–390. [↑](#footnote-ref-20)
21. **Recommendations to national courts and tribunals, in relation to the initiation of preliminary ruling proceedings,** OJ C 439, 25.11.2016, 1–8, *sub* ‘Introduction’. [↑](#footnote-ref-21)
22. Treaty establishing the European Community (Consolidated version 2002), OJ C 325, 24.12.2002, 33–184. Examples include: *Deutsche Grammophon*, C-78/70, EU:C:1971:59; *Gema*, C-55/80, EU:C:1981:10; *Polydor*, C-270/80, EU:C:1982:43; *Cinéthèque*, C-60/84, EU:C:1985:329; *Warner Brothers and Metronome Video*, C-158/86, EU:C:1988:242; *EMI Electrola*, C-341/87, EU:C:1989:30; *Phil Collins*, C-92/92 and C-326/92, EU:C:1993:847. [↑](#footnote-ref-22)
23. Rules of Procedure of the Court of Justice, OJ L 265, 29.09.2012, 1–42. [↑](#footnote-ref-23)
24. TFEU, Protocol (No 3) on the Statute of the Court of Justice of the European Union. [↑](#footnote-ref-24)
25. A Arnull, *The European Unin and its Court of Justice* (OUP:1999), 529. [↑](#footnote-ref-25)
26. *Da Costa*, C-28/62, C-29/62 and C-30/62, EU:C:1963:6. [↑](#footnote-ref-26)
27. P Craig – G de Búrca, *EU law. Text, cases and materials* (OUP:2015), 6th edn, 472. [↑](#footnote-ref-27)
28. The cases are referenced according to the method used on the Curia website: <https://curia.europa.eu/jcms/jcms/j\_6/en/> (last accessed 20.05.2019). [↑](#footnote-ref-28)
29. Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 351, 20.12.2012, 1–32. [↑](#footnote-ref-29)
30. Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 12, 16.01.2001, 1-23. [↑](#footnote-ref-30)
31. RM Dworkin, ‘The model of rules’ (1967) 35(1) U Chi L Rev 14, 23. [↑](#footnote-ref-31)
32. *Id*, 27-29. [↑](#footnote-ref-32)
33. Charter of Fundamental Rights of the European Union, C 364, 18.12.2000, 1-22. [↑](#footnote-ref-33)
34. Up-to-date as of August 2018. Pending cases were excluded from the analysis. [↑](#footnote-ref-34)
35. *Vereniging Openbare Bibliotheken*, C-174/15, EU:C:2016:856, para 47. [↑](#footnote-ref-35)
36. *Laserdisken*, C-479/04, EU:C:2006:549, para 74. [↑](#footnote-ref-36)
37. *Id*, para 75. [↑](#footnote-ref-37)
38. *Id*, paras 76, 78, 80. [↑](#footnote-ref-38)
39. *Id*, para 75; *Peek & Cloppenburg*, C-456/06, EU:C:2008:232, para 37; *Stichting de Thuiskopie*, C-462/09, EU:C:2011:397, para 32; *Dimensione Direct Sales and Labianca*, C-516/13, EU:C:2015:315, para 34; *Stichting Brein*, C-610/15, EU:C:2017:456, para 32; *Bastei Lübbe*, C-149/17, EU:C:2018:841, para 30. [↑](#footnote-ref-39)
40. *Svensson and Others*, C-466/12, EU:C:2014:76, para 17; *UPC Telekabel Wien*, C-314/12, EU:C:2014:192, para 31. [↑](#footnote-ref-40)
41. *SGAE*, C-306/05, EU:C:2006:764, para 36; *Peek & Cloppenburg*, C-456/06, EU:C:2008:232, para 37; *Infopaq International*, C-5/08, EU:C:2009:465, para 40; *Bezpečnostní softwarová asociace*, C-393/09, EU:C:2010:816, para 54; *Football Association Premier League and Others*, C-403/08 and C-429/08, EU:C:2011:631, para 186; *Painer*, C-145/10, EU:C:2011:798, para 107; *Luksan*, C-277/10, EU:C:2012:65, para 66; *ITV Broadcasting*, C-607/11, EU:C:2013:147, para 20; *Nintendo and Others*, C-355/12, EU:C:2014:25, para 27; *OSA*, C-351/12, EU:C:2014:110, para 23; *Art & Allposters International*, C-419/13, EU:C:2015:27, para 47; *Sociedade Portuguesa de Autores CRL*, C-151/15, EU:C:2015:468, para 12; *SBS Belgium*, C-325/14, EU:C:2015:764, para 14; *GS Media*, C-160/15, EU:C:2016:644, para 30; *Soulier and Doke*, C-301/15, EU:C:2016:878, para 30 (implicitly); *ITV Broadcasting*, C-275/15, EU:C:2017:144, para 22; *Stichting Brein*, C-527/15, EU:C:2017:300, para 27; *Stichting Brein*, C-610/15, EU:C:2017:456, para 22; *Renckhoff*, C-161/17, EU:C:2018:634, para 18. [↑](#footnote-ref-41)
42. *NEW WAVE CZ*, C-427/15, EU:C:2017:18, para 24; *Stowarzyszenie Oławska Telewizja Kablowa*, C-367/15, EU:C:2017:36, para 22. [↑](#footnote-ref-42)
43. *Diageo Brands*, C-681/13, EU:C:2015:471, para 71. [↑](#footnote-ref-43)
44. *Liffers*, C-99/15, EU:C:2016:173, para 24; *Diageo Brands*, C-681/13, EU:C:2015:471, para 71. [↑](#footnote-ref-44)
45. *United Video Properties*, C-57/15, EU:C:2016:611, para 27. [↑](#footnote-ref-45)
46. *Ekro*, C-327/82, EU:C:1984:11, para 11. [↑](#footnote-ref-46)
47. *SENA*, C-245/00, EU:C:2003:68, para 24. [↑](#footnote-ref-47)
48. *Id*, para 34. [↑](#footnote-ref-48)
49. *VEWA*, C-271/10, EU:C:2011:442, paras 25-26. [↑](#footnote-ref-49)
50. *SGAE*, C-306/05, EU:C:2006:764, para 31. [↑](#footnote-ref-50)
51. *Football Association Premier League and Other*s, C-403/08 and C-429/08, EU:C:2011:631, para 154; *Infopaq International*, C-5/08, EU:C:2009:465, paras 27-29; *Donner*, C-5/11, EU:C:2012:370, para 25; *Dimensione Direct Sales and Labianca*, C-516/13, EU:C:2015:315, para 22. [↑](#footnote-ref-51)
52. *UsedSoft*, C-128/11, EU:C:2012:407, para 40. [↑](#footnote-ref-52)
53. *ITV Broadcasting*, C-275/15, EU:C:2017:144, para 18. [↑](#footnote-ref-53)
54. *Levola Hengelo*, C-310/17, EU:C:2018:899, para 33. [↑](#footnote-ref-54)
55. *Padawan*, C-467/08, EU:C:2010:620, para 37; *Hewlett-Packard Belgium*, C-572/13, EU:C:2015:750, para 35; *EGEDA and Others*, C-470/14, EU:C:2016:418, para 38; *DR and TV2 Danmark*, C-510/10, EU:C:2012:244, para 34; *Deckmyn and Vrijheidsfonds*, C-201/13, EU:C:2014:2132, para 15. [↑](#footnote-ref-55)
56. *Stowarzyszenie Oławska Telewizja Kablowa*, C-367/15, EU:C:2017:36, para 21-22. [↑](#footnote-ref-56)
57. *Promusicae*, C-275/06, EU:C:2008:54, para 57. [↑](#footnote-ref-57)
58. *Id*, para 70. [↑](#footnote-ref-58)
59. *LSG-Gesellschaft zur Wahrnehmung von Leistungsschutzrechten*, C-557/07, EU:C:2009:107, para 41. [↑](#footnote-ref-59)
60. *Coty Germany*, C-580/13, EU:C:2015:485, para 29; *Bastei Lübbe*, C-149/17, EU:C:2018:841, para 43. [↑](#footnote-ref-60)
61. *VG Wort*, C-457/11, EU:C:2013:426, paras 25-27; *Peek & Cloppenburg*, C-456/06, EU:C:2008:232, paras 37-39; *UsedSoft*, C-128/11, EU:C:2012:407, para 49; *Football Dataco and Others*, C-173/11, EU:C:2012:642, para 45. [↑](#footnote-ref-61)
62. *Football Association Premier League and Others*, C-403/08 and C-429/08, EU:C:2011:631, para 163. [↑](#footnote-ref-62)
63. *Eugen Ulmer*, C-117/13, EU:C:2014:2196, C-117/13, para 32; *Deckmyn and Vrijheidsfonds*, C-201/13, EU:C:2014:2132, para 23; *Painer*, C-145/10, EU:C:2011:798, para 133. [↑](#footnote-ref-63)
64. *Stichting de Thuiskopie*, C-462/09, EU:C:2011:397, paras 33-34; *Amazon.com International Sales and Others*, C-521/11, EU:C:2013:515, para 31; *Austro-Mechana*, C-572/14, EU:C:2016:286, para 20; *Microsoft Mobile Sales International and Others*, C-110/15, EU:C:2016:717, para 37. [↑](#footnote-ref-64)
65. *Scarlet Extended*, C-70/10, EU:C:2011:771, para 36; *SABAM*, C-360/10, EU:C:2012:85, para 34. [↑](#footnote-ref-65)
66. *L’Oréal and Others*, C-324/09, EU:C:2011:474, paras 138-141; *Tommy Hilfiger*, C-494/15, EU:C:2016:528, para 34. [↑](#footnote-ref-66)
67. *United Video Properties*, C-57/15, EU:C:2016:611, para 29; *Diageo Brands*, C‑681/13, EU:C:2015:471, paras 69-80; *Stowarzyszenie Oławska Telewizja Kablowa*, C-367/15, EU:C:2017:36, para 21. [↑](#footnote-ref-67)
68. In this sense, C Geiger, ‘Intellectual "property" after the Treaty of Lisbon: towards a different approach in the new European legal order?’ (2010) 32(6) EIPR 255, 257. [↑](#footnote-ref-68)
69. *Laserdisken*, C-479/04, EU:C:2006:549, para 53 and paras 56-58; *Promusicae*, C-275/06, EU:C:2008:54, para 70; *Flos*, C-168/09, EU:C:2011:29, para 57; *Painer*, C-145/10, EU:C:2011:798, paras 104-105; *Bonnier Audio and Others*, C-461/10, EU:C:2012:219, paras 58-59; *Donner*, C-5/11, EU:C:2012:370, para 36. [↑](#footnote-ref-69)
70. *Flos*, C-168/09, EU:C:2011:29, 57; *Painer*, C-145/10, EU:C:2011:798, paras 104-105. [↑](#footnote-ref-70)
71. *UPC Telekabel Wien*, C-314/12, EU:C:2014:192, paras 56-57. [↑](#footnote-ref-71)
72. Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, OJ C 306, 17.12.2007, 1–271. [↑](#footnote-ref-72)
73. In this sense, J Griffiths, ‘Constitutionalising or harmonising? The Court of Justice, the right to property and European copyright law’ (2013) 38(1) EL Rev 65, 71. Also considering references to the EU Charter by the CJEU as not affecting substantially the interpretation and construction of relevant EU provisions, see T Mylly, ‘The constitutionalization of the European legal order: Impact of human rights on intellectual property in the EU’, in C Geiger (ed), *Research handbook on human rights and intellectual property* (Edward Elgar:2015), 123-126. For more generous considerations regarding the Court’s engagement with the EU Charter, see D Voorhoof, ‘Freedom of expression and the right to information: Implications for copyright’, in C Geiger (ed), *Research handbook on human rights and intellectual property* (Edward Elgar:2015), 342-347. [↑](#footnote-ref-73)
74. *SENA*, C-245/00, EU:C:2003:68, paras 36-37; *Lagardère Active Broadcast*, C-192/04, EU:C:2005:475, paras 49-50; *VEWA*, C-271/10, EU:C:2011:442, paras 29-30. [↑](#footnote-ref-74)
75. *Promusicae*, C-275/06, EU:C:2008:54, paras 67-68; *LSG-Gesellschaft zur Wahrnehmung von Leistungsschutzrechten*, C-557/07, EU:C:2009:107, para 28; *Bonnier Audio and Others*, C-461/10, EU:C:2012:219, para 56; *Deckmyn and Vrijheidsfonds*, C-201/13, EU:C:2014:2132, paras 26-33; *Coty Germany*, C-580/13, EU:C:2015:485, para 34; *Mc Fadden*, C-484/14, EU:C:2016:689, C-484/14, para 83; *Bastei Lübbe*, C-149/17, EU:C:2018:841, para 45. [↑](#footnote-ref-75)
76. *Flos*, C-168/09, EU:C:2011:29, para 57. [↑](#footnote-ref-76)
77. *Football Association Premier League and Others*, C-403/08 and C-429/08, EU:C:2011:631, paras 163-164; *Public Relations Consultants Association*, C-360/13, EU:C:2014:1195, para 24. [↑](#footnote-ref-77)
78. *Padawan*, C-467/08, EU:C:2010:620, paras 43-50; *Stichting de Thuiskopie*, C-462/09, EU:C:2011:397, paras 25-29; *Amazon.com International Sales and Others*, C-521/11, EU:C:2013:515, paras 25-37; *ACI Adam and Others*, C-435/12, EU:C:2014:254, paras 52-53; *Copydan Båndkopi*, C-463/12, EU:C:2015:144, paras 53-54; *Hewlett-Packard Belgium*, C-572/13, EU:C:2015:750, paras 85-86; *Austro-Mechana*, C-572/14, EU:C:2016:286, para 22; *EGEDA and Others*, C-470/14, EU:C:2016:418, paras 35-36; *Microsoft Mobile Sales International and Others*, C-110/15, EU:C:2016:717, para 29. [↑](#footnote-ref-78)
79. *Painer*, C-145/10, EU:C:2011:798, paras 134-135. [↑](#footnote-ref-79)
80. *Eugen Ulmer*, C-117/13, EU:C:2014:2196, para 31; *Ryanair*, C-30/14, EU:C:2015:10, para 40. [↑](#footnote-ref-80)
81. *L'Oréal and Others*, C-324/09, EU:C:2011:474, paras 138-141; *Tommy Hilfiger*, C-494/15, EU:C:2016:528, para 34. [↑](#footnote-ref-81)
82. *Scarlet Extended*, C-70/10, EU:C:2011:771, paras 44-45; *SABAM*, C-360/10, EU:C:2012:85, paras 43-44. [↑](#footnote-ref-82)
83. *UPC Telekabel Wien*, C-314/12, EU:C:2014:192, paras 46-47; *Mc Fadden*, C-484/14, EU:C:2016:689, paras 88-89. [↑](#footnote-ref-83)
84. *GS Media*, C-160/15, EU:C:2016:644, para 31. [↑](#footnote-ref-84)
85. *Renckhoff*, C-161/17, EU:C:2018:634, para 41. [↑](#footnote-ref-85)
86. *Infopaq International*, C-5/08, EU:C:2009:465, paras 32-37. [↑](#footnote-ref-86)
87. *Levola Hengelo*, C-310/17, EU:C:2018:899, paras 39-40. See also Opinion of Advocate General Maciej Szpunar in Cofemel, C-683/17, EU:C:2019:363, para 23 noting that the InfoSoc Directive contains no definition of ‘work’, probably due to the fact that no universally acceptable definition could be agreed by the individual Member States. Because of this lacuna, it was unavoidable that a referral to the CJEU would be made on this at some point. [↑](#footnote-ref-87)
88. *SGAE*, C-306/05, EU:C:2006:764, para 35 and paras 40-41. [↑](#footnote-ref-88)
89. *SENA*, C-245/00, EU:C:2003:68, 35-36; *SCF*, C-135/10, EU:C:2012:140, para 51. [↑](#footnote-ref-89)
90. *SAS Institute*, C-406/10, EU:C:2012:259, para 33; *Infopaq International*, C-5/08, EU:C:2009:465, para 32; *SGAE*, C-306/05, EU:C:2006:764, para 35; *Football Association Premier League and Others*, C-403/08 and C-429/08, EU:C:2011:631, paras 189-190; *SCF*, C-135/10, EU:C:2012:140, para 51; *Peek & Cloppenburg*, C-456/06, EU:C:2008:232, para 30; *Donner*, C-5/11, EU:C:2012:370, para 23; *Art & Allposters International*, C-419/13, EU:C:2015:27, para 38; *Dimensione Direct Sales and Labianca*, C-516/13, EU:C:2015:315, para 23; *DR and TV2 Danmark*, C-510/10, EU:C:2012:244, para 29; *Football Dataco and Others*, C-604/10, EU:C:2012:115, para 31. [↑](#footnote-ref-90)
91. *Laserdisken*, C-479/04, EU:C:2006:549, para 40. [↑](#footnote-ref-91)
92. *Luksan*, C-277/10, EU:C:2012:65, para 64. [↑](#footnote-ref-92)
93. *SGAE*, C-306/05, EU:C:2006:764, para 34; *Infopaq International*, C-5/08, EU:C:2009:465, para 32; *Fundación Gala-Salvador Dalí and VEGAP*, C-518/08, EU:C:2010:191, para 25; *Bezpečnostní softwarová asociace*, C-393/09, EU:C:2010:816, para 30; *Circul Globus Bucureşti*, C-283/10, EU:C:2011:772, para 32; *Ryanair*, C-30/14, EU:C:2015:10, para 31; *Liffers*, C-99/15, EU:C:2016:173, para 14; *GS Media*, C-160/15, EU:C:2016:644, para 29; *NEW WAVE CZ*, C-427/15, EU:C:2017:18, para 19; *ITV Broadcasting*, C-275/15, EU:C:2017:144; para 18; *Stichting Brein*, C-527/15, EU:C:2017:300, para 26; *Bastei Lübbe*, C-149/17, EU:C:2018:841, para 48. [↑](#footnote-ref-93)
94. *Laserdisken*, C-479/04, EU:C:2006:549, para 24; *SGAE*, C-306/05, EU:C:2006:764, para 34; *Peek & Cloppenburg*, C-456/06, EU:C:2008:232, para 34; *Directmedia Publishing*, C-304/07, EU:C:2008:552, para 35; *Sony Music Entertainment*, C-240/07, EU:C:2009:19, para 22; *Fundación Gala-Salvador Dalí and VEGAP*, C-518/08, EU:C:2010:191, para 26; *Padawan*, C-467/08, EU:C:2010:620, para 57; *Infopaq International*, C-5/08, EU:C:2009:465, paras 28 and 32; *Phonographic Performance (Ireland)*, C-162/10, EU:C:2012:141, para 61; *Football Association Premier League and Others*, C-403/08 and C-429/08, EU:C:2011:631, para 64; *Ryanair*, C-30/14, EU:C:2015:10, para 33; *ITV Broadcasting*, C-275/15, EU:C:2017:144, para 19; *SNB-REACT*, C-521/17, EU:C:2018:639, paras 30 and 41. [↑](#footnote-ref-94)
95. *SGAE*, C-306/05, EU:C:2006:764, para 34; *Directmedia Publishing*, C-304/07, EU:C:2008:552, para 28; *Apis-Hristovich*, C-545/07, EU:C:2009:132, para 39; *Padawan*, C-467/08, EU:C:2010:620, para 32; *Football Association Premier League and Others*, C-403/08 and C-429/08, EU:C:2011:631, para 185; *Football Dataco and Others*, C-173/11, EU:C:2012:642, para 20. [↑](#footnote-ref-95)
96. *Luksan*, C-277/10, EU:C:2012:65, para 85; *Football Association Premier League and Others*, C-403/08 and C-429/08, EU:C:2011:631, paras 187-188; *UsedSoft*, C-128/11, EU:C:2012:407, para 60; *Mc Fadden*, C-484/14, EU:C:2016:689, para 36. [↑](#footnote-ref-96)
97. *DR and TV2 Danmark*, C-510/10, EU:C:2012:244, paras 38-45; *Eugen Ulmer*, C-117/13, EU:C:2014:2196, para 16; *Christie’s France*, C-41/14, EU:C:2015:119, paras 25-26. [↑](#footnote-ref-97)
98. *DR and TV2 Danmark*, C-510/10, EU:C:2012:244, para 45; *Christie’s France*, C-41/14, EU:C:2015:119, para 26. [↑](#footnote-ref-98)
99. *Butterfly Music*, C-60/98, EU:C:1999:333, paras 19-20; *Fixtures Marketing*, C-444/02, EU:C:2004:697, para 22; *Lagardère Active Broadcast*, C-192/04, EU:C:2005:475, para 29; *SAS Institute*, C-406/10, EU:C:2012:259, para 41; *C More Entertainment*, C-279/13, EU:C:2015:199, para 26; *Vereniging Openbare Bibliotheken*, C-174/15, EU:C:2016:856, para 41. [↑](#footnote-ref-99)
100. In this sense, see J Griffiths, ‘Constitutionalising or harmonising? The Court of Justice, the right to property and European copyright law’ (2013) 38(1) EL Rev 65, 77. Also critically, see C Sganga – S Scalzini, ‘From abuse of right to European copyright misuse: a new doctrine for EU copyright law’ (2017) 48(4) IIC 405, 413. Advocating a constitutionalization of intellectual property through reliance on fundamental rights, see C Geiger, ‘"Constitutionalising" intellectual property law? The influence of fundamental rights on intellectual property in the European Union’ (2006) 37(4) IIC 371, 385-389. [↑](#footnote-ref-100)
101. See Opinion of Advocate General Maciej Szpunar in *Funke Medien NRW*, C-469/17, EU:C:2018:870, para 40. [↑](#footnote-ref-101)
102. *Laserdisken*, C-479/04, EU:C:2006:549, para 65. [↑](#footnote-ref-102)
103. *Promusicae*, C-275/06, EU:C:2008:54, paras 62 and 65; *LSG-Gesellschaft zur Wahrnehmung von Leistungsschutzrechten*, C-557/07, EU:C:2009:107, para 28; *Flos*, C-168/09, EU:C:2011:29, para 50; *Bonnier Audio and Others*, C-461/10, EU:C:2012:219, para 56; *Bastei Lübbe*, C-149/17, EU:C:2018:841, para 45. [↑](#footnote-ref-103)
104. *Scarlet Extended*, C-70/10, EU:C:2011:771, paras 46-50; *SABAM*, C-360/10, EU:C:2012:85, C-360/10, paras 43-50. [↑](#footnote-ref-104)
105. *UPC Telekabel Wien*, C-314/12, EU:C:2014:192, para 45. [↑](#footnote-ref-105)
106. *Id*, paras 50-53. [↑](#footnote-ref-106)
107. *Id*, para 56. [↑](#footnote-ref-107)
108. *Id*, para 62. [↑](#footnote-ref-108)
109. *Painer*, C-145/10, EU:C:2011:798, paras 114-115; *Luksan*, C-277/10, EU:C:2012:65, para 68; *Deckmyn and Vrijheidsfonds*, C-201/13, EU:C:2014:2132, C-201/13, paras 25 and 30. [↑](#footnote-ref-109)
110. *VG Wort*, C-457/11, EU:C:2013:426, para 73; *Copydan Båndkopi*, C-463/12, EU:C:2015:144, paras 32-33; *Microsoft Mobile Sales International and Others*, C-110/15, EU:C:2016:717, paras 44-46. [↑](#footnote-ref-110)
111. *SCF*, C-135/10, EU:C:2012:140, para 75; *Vereniging Openbare Bibliotheken*, C-174/15, EU:C:2016:856, para 59. [↑](#footnote-ref-111)
112. *Reha Training*, C-117/15, EU:C:2016:379, para 30; *GS Media*, C-160/15, EU:C:2016:644, para 28; *Stichting Brein*, C-527/15, EU:C:2017:300, para 25; *Stichting Brein*, C-610/15, EU:C:2017:456, para 20; *Renckhoff*, C-161/17, EU:C:2018:634, para 29. [↑](#footnote-ref-112)
113. *Infopaq International*, C-5/08, EU:C:2009:465, paras 57 and 74; *Football Association Premier League and Others*, C-403/08 and C-429/08, EU:C:2011:631, para 162; *SCF*, C-135/10, EU:C:2012:140, 75; *Svensson and Others*, C-466/12, EU:C:2014:76, para 15; *Soulier and Doke*, C-301/15, EU:C:2016:878, para 33; *Renckhoff*, C-161/17, EU:C:2018:634, paras 30-31. [↑](#footnote-ref-113)
114. *Soulier and Doke*, C-301/15, EU:C:2016:878, para 35. [↑](#footnote-ref-114)
115. *Kapper*, C-476/01, EU:C:2004:261, para 72; *Commission v Spain*, C-36/05, EU:C:2006:672, para 31. [↑](#footnote-ref-115)
116. *Pinckney*, C-170/12, EU:C:2013:635, para 25; *Hi Hotel HCF*, C-387/12, EU:C:2014:215, para 26; *Hejduk*, C-441/13, EU:C:2015:28, para 16. [↑](#footnote-ref-116)
117. *Infopaq International*, C-5/08, EU:C:2009:465, para 57; *Football Association Premier League and Others*, C-403/08 and C-429/08, EU:C:2011:631, para 162; *Infopaq International*, C-302/10, EU:C:2012:16, 27; *ACI Adam and Others*, C-435/12, EU:C:2014:254, para 22; *Public Relations Consultants Association*, C-360/13, EU:C:2014:1195, para 23; *Deckmyn and Vrijheidsfonds*, C-201/13, EU:C:2014:2132, para 22; *Ranks and Vasiļevičs*, C-166/15, EU:C:2016:762, para 42; *AKM*, C-138/16, EU:C:2017:218, para 37; *VCAST*, C-265/16, EU:C:2017:913, para 32. [↑](#footnote-ref-117)
118. *ACI Adam and Others*, C-435/12, EU:C:2014:254, par 24. [↑](#footnote-ref-118)
119. *Football Association Premier League and Others*, C-403/08 and C-429/08, para 164; *Public Relations Consultants Association*, C-360/13, EU:C:2014:1195, para 24. [↑](#footnote-ref-119)
120. *Football Association Premier League and Others*, C-403/08 and C-429/08, paras 162-163; *Painer*, C-145/10, EU:C:2011:798, para 133; *Vereniging Openbare Bibliotheken*, C-174/15, EU:C:2016:856, para 50. [↑](#footnote-ref-120)
121. Up-to-date as of 31 December 2018. Pending cases were excluded from the analysis. [↑](#footnote-ref-121)
122. Up-to-date as of 31 December 2018. Pending cases were excluded from the analysis. [↑](#footnote-ref-122)
123. Up-to-date as of 31 December 2018. Pending cases were excluded from the analysis. [↑](#footnote-ref-123)
124. Up-to-date as of 31 December 2018. Pending cases were excluded from the analysis. [↑](#footnote-ref-124)