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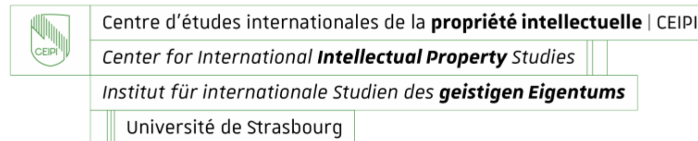

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EU Copyright Reform: An Institutional Approach

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List of Acronyms and Abbreviations

ACTA	Anti-Counterfeiting Trade Agreement
ADR	Alternative Dispute Resolution
AG	Advocate General
CBC	Copyright Board of Canada
CFR	Charter on Fundamental Rights
CISAC	Confédération Internationale des Sociétés d'Auteurs et Compositeurs
CJEU	Court of Justice of the European Union
CMO	Collective Management Organization
CRM	Collective Rights Management
DRM	Digital Rights Management
EC	European Commission
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECN	European Competition Network
EEA	European Economic Area
EEC	European Economic Community
EPO	European Patent Office
EU	European Union
EUIPO	European Union Intellectual Property Office
HADOPI	Haute Autorité pour la diffusion des oeuvres et la protection des droits sur l'Internet
IT	Information Technology
IPR	Intellectual Property Right
ISP	Internet Service Provider
MMA	Music Modernization Act (U.S.)
OHIM	Office for Harmonization in the Internal Market (now EUIPO)
RRA	Reciprocal Representation Agreement
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union (a.k.a. Treaty of Lisbon)
TPM	Technological Protection Measure
USCO	U.S. Copyright Office
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

InfoSoc Directive	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
CRM Directive	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
CDSM Directive	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

INTRODUCTION

I. PERSPECTIVES ON THE CURRENT STATE OF COPYRIGHT

i. Digitalization and the Rise of Regulation

Technology has provided many new opportunities for creativity to flourish. In an era of heightened interconnectedness, digital networks unite more consumers with creative works than ever before. Yet this phenomenon has brought with it a host of novel regulatory challenges, as governments find themselves pressured by stakeholders to scrutinize the performance of copyright laws in a new digital context. In this highly-contested area of the law, it comes as no surprise that discussions relating to the modernization of copyright law have become incredibly divisive. The opinions of politicians, industry players, academics, creators, publishers, and individual users tend to be at odds with one another over the direction of regulatory solutions – and the direction of copyright law itself.

Tracing back to the earliest forms of copyright systems, its design centred on the regulation of a limited number of different types of tangible works as they circulated on "relatively simple" markets.[1] Physical media such as books, maps, and sheets of music were easier to administer in a slow-moving, analogue world. As technology progressed, so too did copyright law, as it expanded to address a diverse set of new stakeholders as well as new types of creative works circulating on ever-larger, global (and borderless) markets.

Digitization has triggered an upheaval of many fundamental, preconceived notions of the role and functions of a copyright system in society. As opposed to transactions only rooted in physical exchanges of tangible works, creative content is now produced, uploaded and accessed at a much faster rate and larger scale. On devices and over the internet, a single file can be consumed an unlimited amount of times without any loss in the quality between the original file and copies. In contrast to the "relatively simple" markets of old, this new content market might rather be viewed as a "network" of exchange, where access – not ownership – is the main article of trade.

Moreover, public engagement with creative works has taken on new forms. The digital era has ushered in a wave of creativity in the form of "user-generated" content, turning ordinary citizens into amateur creators coming in direct contact with complex copyright

[1] Joseph P. Liu, 'Regulatory Copyright' (2004) 83 NC L Rev 129

issues. Users also have more options to attain works, either directly from rightholders, or by gaining access via online intermediaries.

Online intermediaries, taking the form of online platforms for sharing creative content, have become important new stakeholders in recent years, and have revolutionized the ways in which the market for creative goods functions. The regulation of online intermediaries dealing in copyrighted content has occupied a contentious space in international policymaking spheres. The task is difficult not just for the fact that intermediaries have grown immensely over a short span of time, but that their position in the creative market places them at the nexus of many public and private interests. With important fundamental rights issues at stake such as the freedom of speech and expression, privacy, and security, understanding the intersection of all these rights with copyright is critically important for designing appropriate regulation. In other words, it is no longer possible to conceive of copyright as a specific regime only regulating specific behaviours. The copyright discourse must be more expansive and interdisciplinary than ever in light of copyright's potential uses defending political speech, preventing access to documents in the public interest, or enabling new forms of content dissemination and novel uses of content for the public good.

Though the necessity for a broader copyright discourse in a digital age is apparent, reform efforts have been focused on narrow sets of interests and incremental changes to the law. Furthermore, efforts to adapt copyright in recent years have most often taken the form of strengthening rightholder protections rather than weakening them. Copyright, when recognized as a property right, incentivizes lawmakers to "define entitlements in a more particularized fashion," adding complexities and new challenges to the enforcement of rights.[2] A key example of this came in May 2015, when the Commission first proposed the "Digital Single Market" Strategy for the EU, aimed at modernizing digital marketing, e-commerce and telecommunication policies by 2020.[3] This strategy, culminating into the passage of the CDSM Directive in 2019, represented a hard-fought stakeholder debate and a massive political and financial investment for the EU. However, in attempting to respond to digitization, the Directive seems to layer on more complexities than it reduces, carving out more particularized protections for specific stakeholder groups. In 2020, as Member States enter into the implementation phase, their divergent approaches will predictably further

[2] Ibid 130

[3] European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Digital Single Market Strategy for Europe' (European Commission, 2015)

complicate the copyright regulatory environment in the EU for years to come. Given the current challenge of adapting copyright in a digital context, is finding a coherent "EU approach" to copyright still possible?

ii. (Still) Searching for Coherence in "EU Copyright"

In understanding the complexities in reaching a unified conception of copyright in the EU, there are two core sets of issues that can be identified: one set of issues relates to divergences in underlying copyright theory in the EU, and the other relates to the limitations of current institutions effectuating EU copyright policies and norms.

On the issue of copyright theory in the EU, it is useful to separate the discussion of "copyright" from the author's rights. The Anglo-Saxon tradition of "copyright" emphasizes the economic function of the right, providing a limited property entitlement for rightholders to "incentivize" future creativity and encourage the dissemination of creative works. The author's rights, or *droit d'auteur,* legal tradition, by contrast, emphasizes the author's entitlement as a natural right, taking the form of a "personal" or "private" right linked to the author/creator. This link between authors/creators and their works is reinforced through the recognition of one's moral rights in the work, which oftentimes cannot be assigned or waived. Along these lines, a key difference between the systems lies in differentiating the status of authors/creators from that of "rightholders" more generally. This can be an important distinction to make in author's rights discussions, but not so with respect to the "copyright" tradition, which rarely distinguishes between authors/creators, publishers or other assignees of IP rights.

In Continental Europe, the civil law conception of author's rights has dominated in many countries, whereas countries like the U.S. and U.K. have followed the common law copyright tradition. During the periods of European expansion, the idea of "copyright" was necessarily integrated into the discourse and recognized, but no Member States were forced to overhaul their domestic systems, nor conform to a singular "European" conception of "copyright." Thus, in the EU there persists an array of national differences in the administration and enforcement of copyright which collectively form an EU copyright *acquis communautaire*.

From a policy perspective, the challenge of finding an adequate means to advance a unified conception of IPRs among EU Member States has remained a constant one. In 2007, the Lisbon Treaty grounded an important set of competencies for EU level actors to advance

policies in the realm of IP. Specifically, Art. 118 of the Treaty focused on “establish[ing] measures for the creation of European intellectual property rights to provide uniform protection of intellectual property rights throughout the Union and for the setting up of centralised Union-wide authorisation, coordination and supervision arrangements.”[4] This provision, said to have been introduced concomitantly with the idea of a Unitary EU Patent (and Unified Patent Court), proved useful in the field of trademark as well during the launch of the Community mark.

As for copyright, Art. 118 seemed to provide a promising legal basis for forwarding the idea of a single copyright title, and was discussed alongside the idea of a “European Copyright Code.”[5] But, unlike the industrial property rights, the idea of a unitary EU copyright title appeared to be a more “distant” goal.[6] Strong national copyright traditions, especially in the area of culture, seem to prevent a consensus from forming between Member States on moves towards unified copyright regulatory practices. The idea has been shelved indefinitely. Instead, the CDSM Directive is poised to address certain new aspects of copyright law in the EU, but among its harmonization goals it seems to offer a host of new legal issues to be addressed by Member States in their domestic implementations.

The level and extent of copyright harmonization measures in the EU have varied considerably, in large part due to the lack of a consistent copyright theory understood at the EU and national levels. In particular, the grounding of property- and economic-based considerations within important EU instruments influences the interpretation of those instruments by institutional actors at multiple levels of governance. Intellectual property is recognized in the context of internal market-building in the TFEU, and this market-centric (property) interpretation tends to flow downwards into CJEU decisions relevant to copyright.[7]

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[4] TFEU, Art. 118

[5] Wittem Group, 'European Copyright Code' 2010) <https://www.jipitec.eu/issues/jipitec-1-2-2010/2622/wittem-group-european-copyright-code.pdf> ; European Commission, A Single Market for Intellectual Property Rights: Boosting creativity and innovation to provide economic growth, high quality jobs and first class products and services in Europe (Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 2011) 11 <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0287:FIN:en:PDF>

[6] See, e.g., Raquel Xalabarder, 'The Role of the CJEU in Harmonizing EU Copyright Law' (2016) 47 IIC - International Review of Intellectual Property and Competition Law 635-39 639; Mihály Ficsor, 'The hurried idea of a “European Copyright Code” in the light of the EU’s (desirable) cultural and copyright policy ' (20th Annual Fordham IP Conference)

[7] Since the primary role of the Court is the interpretation and application of the Treaties, there seems to be little room for manoeuvre in interpreting the Treaty IP provisions against the functions of IPRs more generally. For additional discussion on this point, but in specific relation to the introduction of a

In the Charter of Fundamental Rights of the European Union (CFR), which has the force of primary law, the protection of intellectual property is recognized under the general right to property, without further distinguishing the features of IP from those of a general property entitlement.[8] In the InfoSoc Directive, a Recital states that, "[i]ntellectual property has therefore been recognised as an integral part of property."[9] Moreover, in EU policy circles, the economic value of creative content has been used often as political rhetoric to draw attention to reform efforts.[10]

There are some clear issues inherent with adopting these types of rationales as the sole basis for regulating copyright, particularly in the EU. In general, property rights-based considerations alone cannot adequately address aspects of social or cultural policy, nor can they always respond to broader issues of public interest. By way of example, certain market failure scenarios can only be resolved through placing *limitations* on the scope of private rights, which may undercut rightholders' economic interests. The basis for the limitation derives from a social, rather than purely economic, justification: to counteract potentially high transaction costs or "holdout" behaviours of rightholders, legal mechanisms such as compulsory licenses are used in order to rebalance the exclusive rights of copyright owners against public-oriented interests in access.[11] More specifically, property-centric perceptions of copyright may not be well-aligned with some traditional underpinnings of the right as recognized in some Member States. Again, in *droit d'auteur* jurisdictions, copyright is not simply discussed as an economic or property right, but rather as a personal right tied to the

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"limitations-based" copyright, see Christophe Geiger, 'Promoting Creativity through Copyright Limitations: Reflections on the Concept of Exclusivity in Copyright Law' (2009) 12 Vand J Ent & Tech L 515-48

[8] Charter of Fundamental Rights of the European Union (2007/C 303/01) Article 17(2).

[9] 'Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society' (2001) OJ L 167 10-19, Recital 9.

[10] One of these justifications that has appeared often in recent copyright reform discourse is the "value gap" argument, which maintains that rightholders are unable to properly share in the wealth generated by online platforms and intermediaries hosting their creative content. European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Promoting a fair, efficient and competitive European copyright-based economy in the Digital Single Market' 2016); European Commission, 'Questions & Answers: EU negotiators reach a breakthrough to modernise copyright rules' 2019) accessed 2021 <https://ec.europa.eu/commission/presscorner/detail/en/MEMO_19_1151>. For comments and criticism of the value gap argument in EU policy circles, see e.g., Annemarie Bridy, 'The Price of Closing the 'Value Gap': How the Music Industry Hacked EU Copyright Reform' (2020) 22 Vanderbilt Journal of Entertainment and Technology Law 323-58; Giancarlo Frosio, 'To Filter or Not to Filter? That Is the Question in EU Copyright Reform' (2017) 36 Cardozo Arts & Entertainment Law Journal 331-68

[11] Liu, Regulatory Copyright 130

author. In these jurisdictions, even the property dimensions of the author's right is necessarily checked against countervailing "fundamental [social] values and competing rights."[12]

Simply put, enforcing a strong property-rights based copyright regime in the EU *per se* may fail to address more socially- or culturally-oriented goals of IP protection. Due to the diverse legal traditions of Member States, as well as the application of international treaties and general principles established by the CJEU, it would seem antithetical to adopt a uniform, purely property-based conception of copyright given the current state of the EU copyright *acquis*. Current disagreements over the correct balance of economic, property-based and cultural and social interests the regulation of copyright demonstrates the complexity in the task of reaching a single, unified, coherent conception of EU copyright.

A second major issue is that many EU institutions have competencies that are also defined by the advancement of economic-oriented missions, and tend to favour the rhetoric of a creative "industry" that benefits from stronger property-rights based regimes. This is especially the case for EU level political actors and legislators. Pressures from outside the institutions, including from the creative industry itself, have grown particularly strong over the years to support stronger rightholders' protections as a right of property. The result of these pressures has been numerous short-term and complex legislative carve-outs, ensuring ever increasing levels of protection over specific types of rights, and enabling more restrictions on uses. These types of legal provisions arguably represent political compromises rather than a genuine interest in promoting a balanced or fully harmonized body of copyright law in the EU. By constantly negotiating between the application of economic, property-based and socially/culturally-oriented rules,[13] in implementing EU legislation Member States may adopt vastly different regulatory solutions for the same problems, perpetuating mixed policy messages in national legislatures and courts. As the regulatory environment for creative goods continues to grow in complexity, approaching more common ground in regulating copyright in the EU becomes a challenge. Hence, there is a need to consider alternative, unconventional avenues for copyright reform.

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[12] Christophe Geiger, 'The Social Function of Intellectual Property Rights, or How Ethics can Influence the Shape and Use of IP Law' in Graeme Dinwoodie (ed), *Intellectual Property Law: Methods and Perspectives* (Edward Elgar 2013); Geiger, Promoting Creativity through Copyright Limitations

[13] This tension has been colloquially referred to as "copyright's paradox." See, e.g., Daniel Gervais, 'Collective Management of Copyright: Theory and Practice in the Digital Age' in D. Gervais (ed), *Collective Management of Copyright and Related Rights* (2nd edn, Kluwer Law International 2010)

iii. Considering an Institutional Approach to Copyright Reform

A body of scholarship has evolved over the years which turns the focus on the role of institutions to address the growing regulatory challenges presented by copyright law.[14] These works broadly identify issues relating to the inability of legislation to effectively set long-term copyright goals, and reinforce doubts over the ability of the law alone to be able to address systemic issues with copyright regulation. While legislative proposals continue to encourage "one-size-fits-all" approaches to reform, and courts continue to make references to unclear or vague notions in the law, scholars continue to question the trajectory of such efforts.

Institutions merit close consideration because they serve as the main guideposts for directing the functioning of the law. As a social construct, institutions give organizational form to the political and social ideas that define a society. Institutions provide representation for stakeholder interests, strengthen the legitimacy of its specific regulatory field, and facilitate coordination among different levels of government actors to execute consistent policy goals. Institutions can also provide a venue for underrepresented interests to be heard, and at times their actions can be explicitly aimed towards safeguarding public welfare through the design of its mandate. In some respects, institutions may carry with them a sense of "institutional memory," or the notion that its mission can outlast the lifespan of shifting

[14] Kimberlee Weatherall, 'A reimagined approach to copyright enforcement from a regulator's perspective' in Rebecca Giblin and Kimberlee Weatherall (eds), *What if we could reimagine copyright?* (ANU Press 2017); Liu, Regulatory Copyright ; Shubha Ghosh, 'When Property is Something Else: Understanding Intellectual Property through the Lens of Regulatory Justice' in Axel Gosseries, Alain Marciano and Alain Strowel (eds), *Intellectual Property and Theories of Justice* (Palgrave Macmillan UK 2008); Y. Gendreau, *Copyright administrative institutions* (Éditions Y. Blais 2002); Antonina Bakardjieva Engelbrekt, 'Copyright from an Institutional Perspective: Actors, Interests, Stakes and the Logic of Participation' (2007) 4 Review of Economic Research on Copyright Issues 65-97; Franciska Schönherr, 'Construction of an EU Copyright Law: Towards a Balanced Institutional and Legal Framework' (Ph.D. Thesis Manuscript, Universite de Strasbourg 2015); Jan Rosén, 'Administrative Institutions in Copyright: Notes on the Nordic Countries' in F.F. Schmidt (ed), *Scandinavian Studies in Law*, vol 42 (Almqvist & Wiksell 2002); Antonina Bakardjieva Engelbrekt, 'Designing Institutions for Multi-level Copyright Governance in the EU and Beyond' in Anna-Sara Lind and Jane Reichel (eds), *Administrative Law Beyond the State: Nordic Perspectives* (Martinus Nijhoff Publishers 2013) Christophe Geiger, 'Statutory Licenses as Enabler of Creative Uses' in R.M. Hilty and K.-C. Liu (eds), *Remuneration of Copyright Owners* (Springer 2017) 18; in the field of patent law (U.S.), see similarly, Arti K. Rai, 'Engaging Facts and Policy: A Multi-Institutional Approach to Patent System Reform' (2003) 103 Columbia Law Review 1035-135; L. Guibault, Guido Westkamp and Thomas Rieber-Mohn, Study on the Implementation and Effect in Member States' Laws of Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society (Report to the European Commission, DG Internal Market, 2007) (contemplating a "pan-European Observatory" option in the context of regulating and monitoring the use of TPMs under the InfoSoc Directive)

political regimes, and survive turnovers in government.[15] When sufficiently independent from government influence, institutions can also be given the complex task of balancing interests in a politically-neutral way. This kind of active balancing does not necessarily occur "from the bottom-up" in private or self-regulatory regimes, which often lack the level of transparency necessary to ensure that public interests are properly safeguarded.

As the European Commission releases policy instruments which continue to forward ambitious goals to support a "Digital Single Market," it is surprising that these instruments often fail to address questions of institutional governance and design.[16] When addressing policy objectives to be implemented by a system of governance as complex and interdependent as the EU system, an analysis of the capabilities and limitations of EU institutions to regulate important features of the copyright system becomes crucial. This is particularly the case when policy goals aim to establish broader societal objectives, which necessitate high levels of inter-institutional cooperation to achieve truly "EU-wide" reform. The examination of copyright regulatory systems and institutions in the EU is therefore a necessary and timely inquiry, considering the pressing need to re-examine how regulation can be made more coherent and responsive to innovations in technology, content access and dissemination.

II. Analysing Institutions: Institutional Choice Theory as an Analytical Framework

Assessing the current EU institutional order in its capacities to regulate copyright is no small task. It is therefore important to establish an analytical framework to guide the discussion, while recognizing some limitations of this analysis in the context of the current study. To this end, the use of "institutional choice theory" as an analytical frame may provide useful insights into how capable institutions in the EU are at representing and balancing the interests of stakeholders involved in the creation and dissemination of creative content.

Conceptually, an "institution" in a broad sense can be understood as a combination of regulative, normative, and cultural-cognitive elements which are set in motion to help bring

[15] Jessica Litman, 'Digital Copyright' (*Michigan Publishing,* 2017) <http://hdl.handle.net/2027.42/56221>

[16] Recent indications of a change in this trend can be found in provisions aimed at harmonizing CMO governance in the EU, embodied in 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, O.J. L 84. [CRM Directive]

structure and meaning to social life.[17] Institutions have the capacity to, on the one hand, control and constrain behaviours in their ability to define the boundaries of the legal and illegal, acceptable and unacceptable. On the other hand, institutions also have the capacity to support and encourage other behaviours through the use of stimulus, guidelines, and providing resources.[18] And in spite of views to the contrary, institutions are rarely monoliths, and undergo their own sets of internal changes as they operate within larger, dynamic institutional contexts.

Institutional choice theory, as an outgrowth of institutional economics, can be a helpful tool for mapping complex institutional structures and determining the efficacy of institutions in achieving political or social outcomes.[19] One variety of this theory, comparative institutional analysis, involves conceptualizing the market, political and judicial processes as distinct opportunities for stakeholders to participate in decisionmaking.[20] Depending on the type of stakeholder or the nature of the goal sought after, one process may be preferred over the other. The stakeholders' choice of participating in one process over another is assessed in terms of the costs and benefits of that participation, which in turn becomes the main unit of measurement ("participation costs").[21] Measuring the efficiency and efficacy of one institutional process over another is then judged against the availability of alternative means to achieve the desired law or public policy goal. Essentially, as put by Komesar, the question of "deciding who decides" – or determining whom we choose to allocate decisionmaking authority – is the centralizing inquiry of this strain of institutional choice theory, and is a key

[17] "Cultural cognitive" is described as the tendency of individuals to form beliefs about societal risks that reflect and reinforce their own commitments to achieving a certain societal goal. See W. Richard Scott, 'Crafting an Analytic Framework I: Three Pillars of Institutions', *Institutions and Organizations Ideas, Interests, and Identities* (SAGE Publications 2013); W. Richard Scott, 'Institutional Theory: Contributing to a Theoretical Research Program' in Ken G. Smith and Michael A. Hitt (eds), *Great Minds in Management: The Process of Theory Development* (Oxford University Press 2005). For a similar perspective, see, Douglass C. North, 'Institutions' (1991) 5 The Journal of Economic Perspectives 97-112

[18] Scott, 'Crafting an Analytic Framework I: Three Pillars of Institutions',

[19] William H. Clune, 'Institutional Choice as a Theoretical Framework for Research on Educational Policy' (1987) 9 Educational Evaluation and Policy Analysis 117-32; William T. Gormley, 'Institutional Policy Analysis: A Critical Review' (1987) 6 Journal of Policy Analysis and Management 153-69; Antonina Bakardjieva Engelbrekt, 'Globalisation and Law: A Call for a Two-fold Comparative Institutional Approach' in N.K. Komesar (ed), *Understanding Global Governance: Institutional Choice and the Dynamics of Participation* (European University Institutue 2014)

[20] N.K. Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy* (University of Chicago Press 1996)

[21] Bakardjieva Engelbrekt, Copyright from an Institutional Perspective: Actors, Interests, Stakes and the Logic of Participation 67

determinant of how effective the implementation of political or social goals will ultimately be.[22]

In addition to the works of Komesar, the application of institutional choice theory in the context of the current study is further informed by a body of relevant works by Bakardjieva Engelbrekt, which similarly opt for its use—specifically a participation-centred comparative institutional approach,[23] combined with historical institutionalism[24]—to analyse the modalities of institutional design and actor participation as related to developments in both EU copyright law specifically, and the EU legal order more generally.[25] Building upon these works, while the present analysis adopts a similar analytical frame, the current approach is forwarded in view of guiding a normative (prescriptive) analysis of a broader selection of copyright-relevant institutions and copyright issues in the EU. As such, following the combined analytic approach suggested by Bakardjieva Engelbrekt, the present research addresses elements of historical institutionalism alongside the participation-centred approach, but applies these frameworks 1) in specific relation to a select group of copyright-related regulatory issues; and 2) in the overall interest of constructing a new approach towards the regulation of copyright in the EU via its institutions. Overall, the current research aims to provide some unique insights into the development and logic behind copyright regulation in the EU through the lens of its decisionmaking bodies. In doing so, such an analysis may begin to reveal new avenues for improving the current institutional configuration to be able to regulate copyright more effectively, especially in digital contexts.

Further elaboration on the application of this selected analytical framework to the object of the current study, including a brief review of the basic assumptions of this theory (i), along with its possible limitations (ii), can be found in *Appendix I: Analytical Framework*.

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[22] Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy* 3
[23] Ibid
[24] See, e.g., North, Institutions (notion of "path dependency")
[25] Bakardjieva Engelbrekt, Copyright from an Institutional Perspective: Actors, Interests, Stakes and the Logic of Participation (examining the effects of the InfoSoc Directive and the resulting institutional responses in the EU); Bakardjieva Engelbrekt, 'Designing Institutions for Multi-level Copyright Governance in the EU and Beyond', (comparing different institutional regulatory approaches of France, UK and Sweden in establishing ISP liability regimes to demonstrate a pattern of institutional development when facing new legal issues brought on by copyright's digitization); Antonina Bakardjieva Engelbrekt, 'Institutional Theories, EU Law and the Role of the Courts for Developing a European Social Model' in Ulla Neergaard, Ruth Nielsen and Lynn M. Roseberry (eds), *The Role of Courts in Developing a European Social Model: Theoretical and Methodological Perspectives* (DJØF Publishing 2010)(applying institutional analysis to the role and development of Courts in the EU socio-legal order)

III. RESEARCH QUESTION, METHODOLOGY AND DEFINITIONS

In connecting the institutional choice theory articulated above with an analysis of the adaptation of copyright law in the EU, this thesis aims to fulfil two interrelated objectives from an institutional perspective. First, the current EU institutional framework for the regulation of copyright will be assessed, weighing the strengths and limitations of the current configuration in terms of fulfilling copyright objectives. Second, in examining some specific copyright issues currently faced by EU Member States, the potential for new forms of coordination and/or institutional intervention will be considered.

i. Research Question

The main question and sub-questions of the research have been defined as follows:

- How should copyright institutions in the EU be re-conceptualized and/or optimized for regulating copyright law in a digital era?
  - *What are the gaps in stakeholder representation that exist in the current institutional and regulatory framework for copyright? [**Part I.**]*
  - *How can experiences from other copyright regulatory bodies in other jurisdictions help influence the design of EU institutions in confronting copyright-related issues? [**Part II.**]*
  - *What are some EU-specific issues remaining with copyright that might be approached from an institutional perspective? [**Part III.**]*
  - *What should be the salient features of a redesigned framework for EU copyright institutions? [**Policy Options, Final Recommendation**]*

ii. Methodology

In Part I, this thesis will assess how current limitations in the EU institutional framework contribute towards overall policy incoherence in copyright, using institutional choice theory to guide the comparative institutional analysis. This Part will combine both descriptive and normative methods to analyse the effectiveness of the current system in regulating and enforcing copyright law. The conclusion of this Part will reflect upon the current strengths and limitations of the present EU institutional configuration, engaging in a comparative analysis to highlight areas in need of reform.

Part II will examine copyright administrative institutions in other jurisdictions (U.S. and Canada) to provide a perspective on how copyright issues can be dealt with by institutional actors. The analysis of the selected copyright institutions in these jurisdictions will ultimately

be used in part to inform the design of a potentially new institutional actor or institutional arrangement in the EU, as elaborated on in Part III.

In Part III, this thesis will propose how EU institutions can be adapted to address current issues with regulating copyright in digital contexts. This Part includes a normative analysis of different potential "functions" of an administrative actor in confronting specific copyright-related legal issues. As argued in this Part, adequately confronting these issues may require the creation of a new regulatory body at the EU level which is able to ensure that copyright policy is advanced in a more uniform and coherent manner in the EU.

The conclusion of this thesis will take the form of Policy Recommendations, outlining several potential options for institutional adaptation, cooperation or reform. The choice of "Options" for revising the current institutional will be discussed along with a brief comparison of the proposed options against each other in terms of both their potential effectiveness in dealing with identified issues, and practical feasibility.

Further notes on the selected Methodology for the current project can be found in *Appendix II. Extended Methodology*.

iii. Definitions

It is necessary to differentiate the idea of an institution as a specific regulatory body or decisionmaking entity with that of "institutions" referenced by "comparative institutional analysis" proposed by Komesar, which conceives of institutions as complex *processes* encompassing interactions between many different participants. In applying historical institutionalism, North also distinguishes between institutions and organizations, the latter covering groups of individuals such as firms, political parties, or governmental agencies.[26] "Institutions" also have a specific meaning in core EU legal texts, in limited reference to specific EU actors such as the Commission, Council, Parliament, and other EU level policy and decisionmaking bodies.[27]

To avoid confusion, the following terminology is adopted in the thesis to distinguish references to institutions *per se* from reference to institutional *processes* as forwarded by Komesar. Institutional *processes* (institutions in their broadest sense) are hereinafter

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[26] Bakardjieva Engelbrekt, Copyright from an Institutional Perspective: Actors, Interests, Stakes and the Logic of Participation 70 (citing North, "Institutional Change: A Framework of Analysis," in Sjöstrand, S.E. (ed.), Institutional Change: Theory and Empirical Findings, New York: Scharpe, 35-46).

[27] 'Consolidated version of the Treaty on European Union' OJ C 326 13–390 [TEU], Art. 13

referenced as "*arenas of decisionmaking*," which shall encompass institutions *per se*, the relevant institutional processes, and the actors/participants involved in that specific institutional process. For example, the judiciary as an arena of decisionmaking will include reference to the Court, the judicial process, and litigant-participants. Reference to institutions (hereinafter, e.g., the Commission, the CJEU, national regulatory bodies, etc.) will then be more particularized (and hopefully remain more intuitive by reference) throughout the thesis. The distinction made between institutions and organizations will not be made to maintain consistency in the broad conception of an "institution," as applied in the terms "comparative institutional analysis," "EU institutional framework," etc.. Lastly, references to institutions will not be strictly limited to the definition of institutions set out in the Treaty, but will include other regulatory bodies, authorities, courts, or organizations.

The use of "copyright" here will generally refer to "European" conceptions of copyright. Given that there is no single or coherent understanding of "EU Copyright" as briefly discussed above, further distinctions (i.e., utilitarian conceptions of copyright, *droit d'auteur* authors' rights) are relevant, but in the thesis will only be made as needed.

PART I. EU INSTITUTIONS AND COPYRIGHT: THE ARENAS OF DECISIONMAKING

This Part will break down the features of institutional design and governance in the EU as related to the regulation of copyright. The main goal of this Part is to investigate the strengths and limitations of the current institutional arrangement for advancing stakeholder interests, using specific examples to identify the weaknesses and/or gaps in stakeholder representation that exist in the current arrangement. Institutional choice theory will be used at the conclusion of this Part to perform a side-by-side comparison of the efficacy of stakeholder representation between each of the arenas of decisionmaking, weighing the opportunities and costs for stakeholders in participating in one decisionmaking arena over another. This comparative analysis will highlight where there may be room for reconsidering the current EU approach to copyright regulation. The conclusions will then be built upon in Part III, which elaborates on specific areas of potential institutional and/or regulatory reform.

1. THE POLITICAL ARENA

The institutions part of the political arena are the principal drivers of copyright reform. There are seven EU "Institutions" identified in the Treaty of the European Union (TEU) which are chiefly tasked with promoting the interests of EU citizens and promoting EU values.[28] While all of these institutions are not directly relevant to the present study, understanding the role of some of these primary EU institutions in the different arenas of decisionmaking will be crucial to form a coherent picture of the quality and extent of the institutional regulation of copyright in the EU.

In the political arena, the institutions that are directly relevant to the legislative process include the Commission, the European Council, and Parliament (1.1). In addition to their own resources, these bodies are able to delegate tasks to expert and working groups during the development stages of the legislative process.[29] The functions of these core EU Institutions are complemented by other bodies which contribute to the representation of interests at the legislative stage, including *inter alia* the Council of the European Union, advocating for the interests of national governments, and the Committee of the Regions, representing regional

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[28] Ibid.

[29] For example, COREPER, the Committee of Permanent Representatives, plays a significant role in assisting the Council of the EU by preparing the agenda and coordinating the work of expert groups and committees. "It is both a forum for dialogue (among the Permanent Representatives and between them and their respective national capitals) and a means of political control (guidance and supervision of the work of the expert groups)" EUR Lex, 'Glossary of summaries: COREPER' accessed <https://eur-lex.europa.eu/summary/glossary/coreper.html> ; 'Consolidated version of the Treaty on the Functioning of the European Union' OJ C 326 47–390 [TFEU], Art. 240.

and local-level interests.[30] This organizational scheme encourages the diffusion of information, objectives and interests between governmental actors at all levels in order to promote coherency in the development of EU-wide policy goals.

While the focus here will mainly be on EU institutions involved in the policymaking process, it is acknowledged that national governments and policymaking bodies encounter many of the same issues that are faced at the EU level, including, e.g., issues of representation of stakeholder interests due to imbalanced lobbying influences. This can create an additional layer of complexity in recognizing that, in many cases, national governments must effectually re-negotiate the harmonization goals and copyright policy objectives articulated at the EU level to be able to pass new national-level legislation.

On the administrative side (1.2), at the EU level there are several agencies charged with regulatory policymaking. Independent administrative authorities act "independently" in the sense that they "…are allowed to operate outside the line of hierarchical control by the departments of central government."[31] While considered independent, as will be demonstrated, these agencies are often under very direct oversight authority from either the Commission on the CJEU, as well as Member States which have the tendency to view some exercises of EU agency authority as conflicting with their own regulatory autonomy.

1.1. Policymaking in the EU

The Union is bound by treaties which indicate the scope of EU level competencies, as well as provide a framework for the interactions between EU institutions.[32] The earliest treaties brought together the first group of European countries in an "economic community," with the overall objective of forming a common market to reduce impediments to trade and manufacture due to the application of differing national laws. To achieve this, the TEU establishes its objectives for forming such a market, along with measures such as eliminating

[30] "The Committee of the Regions (CoR) is the political assembly that provides the regional and local levels with a voice in EU policy development and EU legislation. The Treaties oblige the Commission, Parliament and Council to consult the Committee of the Regions whenever new proposals are made in areas that affect the regional or local level. The CoR has 344 members from the 27 EU countries, and its work is organized in 6 different commissions. They examine proposals, debate and discuss in order to write official opinions on key issues." Queens University Institute of Intergovernmental Relations, 'Multilevel Governance Bodies: European Union institutions' accessed 2020 <https://www.queensu.ca/iigr/links/multilevel-governance-bodies-eu-institutions>
[31] Giandomenico Majone, 'The Agency Model: The Growth of Regulation and Regulatory Institutions in the European Union' 1994) 1-2
[32] These competencies are further governed by the principles of conferral, subsidiarity and proportionality. Art. 5, TEU.

customs duties and establishing common tariffs, and importantly introducing EU level institutional authorities, being the Commission, the Council, the Parliament and the Court of Justice.

In accordance with the EU's "multi-level" structure of governance, only where the EU is granted an exclusive competence may it operate unilaterally to adopt EU-wide binding law.[33] One example is decisionmaking related to EU currency, the Euro. Otherwise, in cases involving "shared" competencies, EU agreements must be negotiated between Member States and approved with their consent.[34] For legislation relating to copyright, the competency is shared, though there is no specific competency clause that relates to copyright. Instead, EU competencies that have been used to harmonize copyright law refer to building the Internal Market, and is restated in the preambles of EU instruments regulating copyright. A third form of competence involves EU level coordination of Member State action, where Member States act independently. This includes areas of research, culture, and education, for example.[35]

In relation to the EU institutional structure and its effect on the legislative process, the Commission is perceived as a main driver of EU policymaking through its ability to set the agenda and "initiate" EU law. The role of the European Council and the European Parliament is to debate and amend the proposed legislation by way of adoption or rejection of the Commission's proposal. In practice, however, agenda-setting itself involves many "backstage" elements, and the internal decisionmaking framework, as it operates within the Commission, is an important contributing factor in shaping the agenda. These dynamics will be further explored in 1.1.2.

At the same time, it should not be understated that Member States maintain considerable power over the EU decisionmaking process. The "primacy of national control" is maintained within the EU institutional order by way of the Council of Ministers, representing national governments, and the European Council.[36] The necessity of unanimity in decisionmaking empowers national governments to use their veto powers effectively over

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[33] On multi-level governance in the EU, see 1.1.1, *infra*. See also, Paul Stephenson, 'Twenty years of multi-level governance: 'Where Does It Come From? What Is It? Where Is It Going?'' (2013) 20 Journal of European Public Policy 817-37; Fritz W. Scharpf, 'Introduction: the problem-solving capacity of multi-level governance' (1997) 4 Journal of European Public Policy 520-38
[34] Art. 4, TFEU.
[35] Elizabeth Golberg, *'Better Regulation': European Union Style* (Mossavar-Rahmani Center for Business & Government, Harvard Kennedy School 2018)
[36] Fritz Scharpf, 'The Joint-Decision Trap: Lessons From German Federalism and European Integration' (1988) 66 Public Administration 239-78

certain European policy decisions.[37] As argued by Scharpf, this has translated into impeding effective decisionmaking at the EU level, weakening the overall federal structure through a "joint-decision trap." Simplistically, the joint-decision trap is the notion that once EU level action is taken on a particular issue, it is extremely difficult to revert that use of authority back to the exclusive regulatory domain of national governments.[38]

Representationally, the uniquely "European" blend of competencies and institutional structure might seem to suggest a tension between supporting "Community" interests (Commission) and "national" interests (Council).[39] This picture of interactions is very much simplified, however, and does not fully capture the nuances of the relationship between EU level and national actors. Other considerations outside this basic description may be necessary to form a more accurate picture. For instance, the authority that Member States maintain in the transposition phase of EU legislation can very powerfully impact the efficacy of EU adopted measures. With broader and more optional Directive provisions continuously being negotiated into law, Member State implementations can quite effectively undermine policy objectives fought for and won at the EU level.[40] On the other hand, there are distinctive areas where the EU level regulator is held out as more capable of resolving issues than national-level regulators, as in the cases of establishing external tariffs, and articulating broader competition and telecommunications policies.[41]

The following is a more detailed accounting of some of the key characteristics of the EU policymaking process and the role and functions of EU political actors. The discussion begins with a review on the organizational structure of key EU political institutions (1.1.1) and the importance of the agenda-setting stage of the policy process (1.1.2). Afterwards, a more focused discussion on the impact of these elements on the process of copyright lawmaking (1.1.3) will help to frame some of the current limitations of the EU political process in copyright regulation (1.1.4).

[37] Ibid
[38] Ibid
[39] Renaud Dehousse, 'The Community Method: Chronicle of a Death too Early Foretold' in L. Boussaguet and R. Dehousse (eds), *The transformation of EU Policies – EU Governance at Work* (Connex Report Series 8 2008)
[40] This is the object of current debate relating to the transposition of some of the more controversial provisions in the CDSM Directive. See, e.g., EDRi, 'The Netherlands, aim for a more ambitious copyright implementation!' 2019) accessed 2020 <https://edri.org/the-netherlands-aim-for-more-ambitious-copyright-implementation/>
[41] Scharpf, Problem-Solving Capacity of MLG 532-3

1.1.1 A Multi-Level System of Governance

In describing the division of regulatory authority among EU institutions, the political sciences adopt the concept of "multi-centred" or "multi-level" governance,[42] which represents a "system of continuous negotiation among nested governments at [supranational, national and regional] territorial tiers."[43] In essence, a multi-level theory of governance approaches the complexities of the EU policymaking process by envisioning it as a scheme of joint participation among institutions, ranging from supranational to sub-national and local actors, implying a sense of mutual dependency through the intertwining of their activities.[44] Though the term includes the word "level," this should not impart an impression of a hierarchical order.[45] While this model has previously referred to the interactions between EU institutions, the scope of this concept has expanded over time to consider the effects of non-governmental actors in policymaking as well. In this light, such cooperation operating on multiple levels would seem to safeguard against the emergence of a strong central government, a particularly strong institution, or a hegemony of a few strong countries or interests.

The multi-level organization of governance in the EU is further a reflection on some of the key tenets of European integration, which have necessarily prioritized the autonomy of Member States and created strict safeguards against the establishment of hierarchical decisionmaking. According to Dehousse, there is a clear link between such a distribution of powers at the EU level and a theory of multi-level governance: "[b]ecause the institutions of the Union had been deliberately designed to be able to represent a variety of interests,

[42] In its 2001 White Paper on Governance, the European Commission characterizes the European Union as one "based on multi-level governance in which each actor contributes in line with his or her capabilities or knowledge to the success of the overall exercise. In a multi-level system the real challenge is establishing clear rules for how competence is shared – not separated; only that non-exclusive vision can secure the best interests of all the Member States and all the Union's citizens" European Commission, 'European Governance - A White Paper' 2001) 35-36

[43] Hooghe Liesbet and Gary Marks, 'Types of Multi-Level Governance' (2002) 5 Les Cahiers européens de Sciences Po, European Integration online Papers (EIoP) (citing Marks, Gary (1993) "Structural Policy and Multilevel Governance in the EC." In The State of the European Community, ed. Alan Cafruny and Glenda Rosenthal. Boulder: Lynne Rienner, 391-411.)

[44] Stephenson, Twenty Years of MLG (Note: Variations of Multi-Level Governance include Type I and II, as defined by Hooghe and Marks (2002). This level of differentiation is not required for the present analysis).

[45] Liesbet and Marks, Types of Multi-Level Governance

preserving the distribution of power effectuated by the Treaty of Rome was necessary to avoid any kind of capture by specific interests."[46]

The system of multi-level governance is therefore responsive to classic principles of subsidiarity and proportionality, which delimits the actions of supranational regulators by prioritizing national, regional, and local level proposals.[47] The idea is to assimilate policies at the level that is closest to the beneficiary of that policy. This is also linked with the principle of proportionality, which requires that any action by the EU should not go beyond what is necessary to achieve Treaty objectives.[48] It is noteworthy that these principles on their own do not serve to further grant or limit a competency once given, but rather restrict the manner in which a competency may be executed.[49]

It is important to point out that multi-level systems, while possessing certain advantages, start to face issues when efforts become too spread out over too many actors. This leads to uneven enforcement and issues of transposition at the Member State level, where externalities of domestic policy implementations are not adequately captured and begin creating consistency issues within the larger European context. As put by Hooghe and Marks,

> "The chief benefit of multi-level governance lies in its scale flexibility. Its chief cost lies in the transaction costs of coordinating multiple jurisdictions. The coordination dilemma confronting multi-level governance can be simply stated: To the extent that policies of one jurisdiction have spillovers (i.e. negative or positive externalities) for other jurisdictions, so coordination is necessary to avoid socially perverse outcomes."[50]

This problem, known as the "coordination dilemma," can be addressed in a few ways. By imposing limitations on the amount of autonomous actors within the system, or limiting interactions among actors by dividing competencies into larger and distinct units, this can potentially mitigate the issues associated with coordination.[51] Along these lines, reconsidering the role of agencies as decentralized and independent actors operating within the multi-level

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[46] Renaud Dehousse, 'Delegation of powers in the European union: The need for a multi-principals model' (2008) 31 West European Politics 789-805 795 (citing Majone, Giandomenico (2005). 'Federation, Confederation, and Mixed Government: A EU-US Comparison', in Anand Menon and Martin Schain (eds.), Comparative Federalism: The European Union and the United States in Comparative Perspective. Oxford: Oxford University Press, 121–47.
[47] Art. 5(3), TEU.
[48] Art. 5(4), TEU.
[49] This makes sense as to not contravene the third principle of "conferral," as embodied in Art. 5(1) and (2) TEU.
[50] Liesbet and Marks, Types of Multi-Level Governance
[51] Ibid

governance framework may provide some useful additional insights, as expanded upon, *infra*. This position, a clear shift away from the traditional multi-level governance model, is especially relevant to today's ongoing debates on the appropriateness of preferencing fragmented national-level regulatory and enforcement strategies in a borderless online sphere.

1.1.2 Agenda-Setting Dynamics

At the first stage of the regulatory cycle for EU law, possessing the ability to set the course of policy through setting the agenda is arguably one of the most crucial in the whole political process. The Commission is said to possess this "monopoly" on legislative initiative, as other institutions (Council, Parliament) are generally prevented from legislating in the absence of a prior Commission proposal.[52] By the same token, "…the Commission cannot be compelled to take a legislative initiative when it thinks that such initiative is not in the interest of the Community."[53] While a "monopoly" on initiative may seem to unbalance institutional powers to give the Commission too much authority, it is pointed out that, "…[t]he much-criticised monopoly of initiative bestowed upon the Commission…was requested by the smaller member states in order to counteract the influence of larger countries within the Council of Ministers."[54] As put by Majone, et. al., "[i]f the Council had a right of legislative initiative, it could undo previous pro-integration legislation any time this appeared to be politically advantageous. By the same logic, but also to preserve the balance between Community institutions, the right of legislative initiative is denied also to the popularly elected Parliament." Thus, this particular arrangement is "…one of several instances where the value of integration trumps democratic values."[55]

Setting the course of a new policy objective is as much of an exercise in defining new problems as it is an exercise in restraint, as the government cannot address all issues at a given time. The onus is on the Commission to "…structure, control and filter what enters into

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[52] Giandomenico Majone, Sara Poli and Aleksander Surdej, Risk Regulation in the European Union: Between Enlargement and Internationalization, 2003) 65 (The Commission's "monopoly" power in terms of initiating legislation is "…only slightly diminished by the right of the European Parliament to submit directly to the Council its amendments at second reading in the co-decision procedure – [this] should be understood as a form of pre-commitment to the process of European integration by the framers of the Treaty.")
[53] Ibid
[54] Dehousse, Delegation of powers in the European union: The need for a multi-principals model (citing Küsters, H.J. (1990). Fondements de la Communanté économique Européenne. Brussels: Labor).
[55] Majone, Poli and Surdej, *Risk Regulation in the European Union: Between Enlargement and Internationalization*,

the policymaking machinery."[56] Formalized means of agenda "gate-keeping" involve procedural rules that allow the Commission to prevent unwanted items from entering onto the agenda as well as safeguard the consideration of other items.[57] It is therefore unsurprising that, "interest organizations, local governments and governmental agencies which have not been successful in projecting their agendas on the national arena often try to influence the agenda setting process..."[58]

This initial phase is described as "the most open-ended part of the EU decisionmaking process," and enables the Commission to utilize a wide degree of latitude. Importantly, at this early stage, any limitations or omissions will translate into less available solutions at the end of the process.[59] Setting up specific committees of inquiry, for example, may extend some additional opportunities for the Commission to adapt proposals before formal decisionmaking procedure begins.[60] In this way, the organizational role of the government in ensuring certain items make it into the agenda (while others are removed) may partly explain why policy rhetoric often plays to a sense of urgency, high economic stakes, and far-reaching consequences.

The system for setting the EU's agenda is also perceived as particularly integrative in contrast with other political systems, as it features the inputs of small and large expert groups and committees which serve to cross-cut more national or "territorial" interests in decisionmaking.[61] In their empirical work on EU agenda setting within the Commission, Larson and Trondal emphasize advantages of such expert groups, and highlight that these exchanges may have a higher likelihood of stimulating "networked" decisionmaking among typically nationally-interested officials. They also observe the formation of collegiality and small supranational "clubs" within and around EU committees, which may increase the likelihood of forming policy that is more representative of supranational interests.[62]

Before a legislative proposal can be submitted, the Commission must further carry out an *ex-ante* impact assessment to evaluate the 'potential economic, social and environmental

[56] Torbjörn Larsson and Jarle Trondal, 'Agenda setting in the European Commission: how the European Commission structure and influence the EU agenda' in H.C.H. Hofmann and A.H. Türk (eds), *EU Administrative Governance* (Edward Elgar Publishing 2006) 22
[57] Ibid 15.
[58] Ibid .
[59] This observation reflects "Rational Actor" theory of governance.
[60] Larsson and Trondal, 'Agenda setting European Commission',
[61] Ibid 11
[62] Ibid 13.

consequences' of the proposed measure.[63] To complete this task, public consultations with interested parties, including citizens and representative associations, is usually required.[64] Consulting with stakeholders "increases the legitimacy of EU action" from the point of view of stakeholders and citizens.[65] Only under cases of "exceptional urgency," may the Commission skip this consultation stage, and must state reasons for this decision in the legislative proposal.

Once the legislative proposal reaches the formal decisionmaking stage, as guided by the Council and Parliament via co-decision procedure, the Commission will take up a more understated role, limited to defending its original proposal.[66] At the implementation and administrative stage, the Commission then resumes a leading role in the proceedings, and the Council authority is more passive and supervisory in nature. Finally, the Court of Justice of the European Union serves to influence the "final" outcome of policy by way of judicial interpretation of the resulting legislation.

Granted these formal channels exist to advance policy, it is emphasized that the institutions mentioned are not the only actors that play a role in shaping norms and implementing resulting law. Along the way, a variety of regional, national, and subnational actors, as well as supranational non-state actors, may all contribute to how the meaning and purpose behind the agenda set by the Commission operates in practice.

1.1.3 EU Competencies in Copyright Lawmaking

1.1.3.1 The Mandates of EU Institutional Actors and Copyright

Multi-level governance systems tend to balance the interest in developing local, regional and national-level solutions over large-scale centralized "top-down" actions. It is worth recognizing that the EU does not have administrative agencies of its own situated at the

[63] European Commission, 'Smart Regulation Impact' accessed 2020 <http://ec.europe.eu/smart-regulation/impact/index_en.htm>

[64] "Under title II of TEU relating to 'democratic principles' article 11(1) provides that the institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known or publicly change their views in all areas of Union action."

[65] European Commission, Impact Assessment Guidelines, 15 January 2009, SEC (2009) 92; see also (revised version), Commission Staff Working Document, Better Regulation Guidelines, Strasbourg, 19.5.2015 SWD(2015) 111 final.

[66] At this stage, the Council would need unanimity to amend a Commission proposal without its agreement, otherwise the Commission can rely on the possibility to accept or refuse changes to a text it has proposed. Christine Neuhold and Elissaveta Radulova, 'The involvement of administrative players in the EU decision making process' in H.C.H. Hofmann and A.H. Türk (eds), *EU Administrative Governance* (Edward Elgar Publishing 2006)

regional and local levels, but instead relies entirely on national governments to execute EU policies as they see fit.[67] In terms of copyright, both the prioritization of localized solutions and the institutional structure has ensured that Member States are able to defend their particular legal traditions, which has helped to reinforce territorial notions of copyright law. This arrangement is put to the test frequently, as laws must increasingly respond to acts occurring on borderless digital mediums.[68] In effect, an over-prioritization of national-level solutions seems to have emerged in relation to adopting copyright regulatory solutions in the EU.

To counterbalance this phenomenon, there have been numerous projects launched at the EU level which generate "institutionalized" forms of stakeholder engagement to aid in re-centralizing and coordinating regulatory efforts at the EU level (expert group meetings, mediations, stakeholder dialogues), but the results of these efforts have often been somewhat mixed.[69] In assessing the current degree of centralization of copyright-related interests among the EU Institutions, it is useful to identify copyright-specific features of the principal EU Institutions and briefly consider some interactions with institutions situated at the supranational level.

Within the Commission, copyright-related issues have been the responsibility of different DGs over time and the dedicated departments of DGs. One specific team, the copyright unit, was relocated[70] as DG INFSO transitioned into DG Communications Networks, Content and Technology (DG CNECT).[71] Currently, DG CNECT's devoted copyright team (Copyright Unit I.2) is tasked with the supervision of key activities related to the development, implementation, monitoring and interpretation of copyright legislation.[72] The Unit is responsible for drafting legislation in the area of copyright, as well as following

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[67] Scharpf, Joint Decision Trap

[68] Liesbet and Marks, Types of Multi-Level Governance

[69] For example, the results of the 2013 Mediation on Private Copying Levies did not result in any legislative action, while there were many issues identified. See European IP Helpdesk, 'Mediation on private copying and reprography levies: recommendations now available' 2012) accessed 2020 <http://www.iprhelpdesk.eu/news/mediation-private-copying-and-reprography-levies-recommendations-now-available>

[70] Agnieszka Vetulani-Cęgiel, 'EU Copyright Law, Lobbying and Transparency of Policy-Making: The cases of sound recordings term extension and orphan works provisions' (2015) 6 JIPTEC 159 fn. 44.

[71] European Commission, 'The Directorate-General for Communications Networks, Content and Technology ' accessed 2020 <https://ec.europa.eu/info/departments/communications-networks-content-and-technology_en>

[72] European Commission, 'Strategy: Shaping Europe's digital future' accessed 2020 <https://ec.europa.eu/digital-single-market/en/content/copyright-unit-i2>

up on its implementation by organizing expert group meetings, drafting assessment reports, and proposing follow-up actions where necessary. This process is carried out with the assistance of "Seconded National Experts," who are compelled to make "…frequent contacts with other Directorates General in the Commission, the European Parliament, the Council, Member States' authorities and stakeholders." The Unit is also regularly called upon to provide input on preliminary ruling adjudications related to copyright for the CJEU. The Unit further represents the EU in copyright discussions and negotiations in WIPO, and are involved in the work of other DGs as regards copyright-related aspects of bilateral trade agreements.[73] On its own, the Copyright Unit does not have a self-standing rulemaking or standard-setting capacity. If regulatory intervention is identified by the Copyright Unit as necessary or desirable, the Commission itself would be the appropriate actor to follow through on such suggested action.

Several DGs within the Commission have interactions with copyright-related issues based on their mandates. Commissioners from different policy departments (Internal Market; Digital Agenda; Education, Culture, Multilingualism and Youth) have previously shared responsibilities for carrying out copyright-related projects, such as organizing the stakeholder dialogues for the "Licenses for Europe" initiative.[74]

Despite their collaborative efforts, there can be also be differences in the regulatory approaches considered by the different DGs based on the nature of their mandates, which may have an effect on how regulatory solutions are considered. DG Internal Market, for example, is considered one of the most influential DGs within the Commission, and addresses policy issues from the 'Single Market' perspective. DG Competition, which also has a particularly strong influence within the Commission, has reinforced its support for more market-oriented (specifically, market "liberalizing") regulatory approaches in the field of copyright.[75] These more powerful DGs in the Commission hold positions that are well-aligned to the interests of creative industry actors such as advertisers, broadcasters and IT/Telecom companies, which

[73] The foregoing information was taken from a publically-available call for seconded national experts. See, Communications Networks, Content & Technology Media Policy, Copyright Unit. "Notice of Vacancy Seconded National Experts to the European Commission." <http://www.exteriores.gob.es/RepresentacionesPermanentes/EspanaUE/es/TrabajarenUE/Documents/CNECT-I-2_EN.pdf>.
[74] European Commission, '"Licenses for Europe" Stakeholder Dialogue' 2013) accessed 2020 <https://ec.europa.eu/digital-single-market/en/news/licences-europe-stakeholder-dialogue>
[75] Annabelle Littoz-Monnet and others, *European Union and Culture : Between Economic Regulation and European Cultural Policy* (Manchester University Press 2007) 33

favour a more liberal, “soft-touch” regulatory regime.[76] DG Education and Culture, on the other hand, has held somewhat less influence in the Commission, and its reach in relation to regulating the creative industry at the EU level has been more limited. This DG traditionally represents the European creative community and backs the interests of groups of artists, film directors, and cinemas, who have been more active in campaigning for interventionist mechanisms to be adopted at the EU level.[77] Given these different regulatory philosophies and the often polarizing nature of copyright debate, the Commission can hardly be viewed as a singular actor when participating in the copyright policy debate.

Notably, DG Internal Market has been responsible for the formation of an Observatory tasked with monitoring and gathering data related to counterfeiting and copyright infringement. In 2009, the “European Observatory on Counterfeiting and Piracy” was established under the mandate of DG Internal Market.[78] In 2011, EUIPO began co-operating with the Observatory through the operation of a Memorandum of Understanding, and in 2012 through Commission proposal and Parliamentary/Council approval, the officially became a department within the ambit of the EUIPO.[79] Changing its name to the “European Observatory on Infringements of Intellectual Property Rights,” the EUIPO currently finances the Observatory's activities, while the Observatory, “…will draw on EUIPO's expertise, experience and resources with a view to becoming an information centre par excellence.”[80] While it lacks specific authority to promulgate regulations or directly influence policy directions, the Observatory serves as an important neutral evidence-gathering authority upon which the Commission relies for much of its copyright industry-related data.

The Commission further has at its disposal various “institutionalized” forms of consultation. Stakeholder dialogues, such as the 2012-2013 “Licenses for Europe” and Mediations, such as the 2013 stakeholder mediation on private copying levies, serve to unite stakeholders from different copyright sectors in establishing a consensus on highly-disputed and yet-unresolved issues.[81] The problem is that there can be legislative inertia on the issue

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[76] Ibid
[77] Ibid
[78] 2011 MOU, Regulation establishing Observatory
[79] Ibid
[80] Observatory: About Us. EUIPO. <https://euipo.europa.eu/ohimportal/en/web/observatory/about-us>.
[81] Commission, '"Licenses for Europe" Stakeholder Dialogue'; António Vitorino, Recommendations resulting from the mediation on private copying and reprography levies, 2013) <http://ec.europa.eu/internal_market/copyright/docs/levy_reform/130131_levies-

afterwards,[82] a failure of consensus on the most difficult issues (e.g., user-generated content), or an overall lack of authoritativeness of the resolutions reached, which may ultimately lead to "watered-down" stakeholder commitments.[83]

For the sake of completeness, regarding some of the international dimensions of copyright governance, the World Intellectual Property Organization (WIPO) plays a role in the direction of certain EU policies. WIPO administers the core international copyright Conventions, the Berne Convention and the Rome Convention, as well as the WIPO Internet Treaties which were aimed at modernizing the Berne Convention.[84] Intellectual Property is also subject to multilateral trade regulation through the introduction of TRIPS in 1995, which sets enforcement standards (procedural rules and sanctions) for the infringement of IP. This is complimented by the quasi-judicial WTO dispute settlement procedure, which increasingly plays a role in shaping national and international IP norms based on the interpretation of the TRIPS agreement.[85] These international institutions contribute to the consistency of the interpretation and implementation of copyright principles at the supranational level, as well as indirectly influencing EU level policy considerations.

1.1.3.2 EU Institutional Actors and Treaty Competencies: Another Look at 118 TFEU

Now turning to the legal instruments which guide the EU institutions in the policy sphere, it is worth recognizing the breadth and scope of the current body of copyright laws in the EU. The EU copyright *acquis* as it exists today includes a set of Directives and Regulations which aim to harmonize the "essential rights of authors and of performers, producers and broadcasters." The *acquis* largely consists of Directives which are sectoral in nature, focusing on specific groups of rights (Software (91/250) Rental/Lending Right (92/100), Satellite and Cable (93/83), Term of Protection (93/98), Legal Protection of Databases (96/09), Artists Resale Right (2001/84), Orphan Works (2012/28)). Four Directives have cross-sectoral applications (Information Society (2001/29), Enforcement (2004/48),

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vitorinorecommendations_en.pdf. Alternatively https://www.mkcr.cz/doc/cms_library/130131_levies-vitorino >

[82] No reform on private copying levies was proposed following the 2013 Mediation (or since).

[83] Stakeholder Dialogue, 'Licenses for Europe: Ten pledges to bring more content online' (European Commission, 2013) <http://ec.europa.eu/newsroom/dae/document.cfm?doc_id=49196>

[84] Berne Convention for the Protection of Literary and Artistic Works; Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations; WIPO Copyright Treaty [1996]; WIPO Performances and Phonograms Treaty [1996].

[85] Graeme B. Dinwoodie and Rochelle C. Dreyfuss, 'TRIPS and the Dynamics of Intellectual Property Lawmaking' (2004) 36 Case W Res J Int'l L

Collective Management (2014/26) and DSM Directive (2019/790)). Two Regulations are also part of the *acquis* (Regulation Implementing Marrakech Treaty (2017/1563) and the Portability Regulation (2017/112)). The *acquis* is also formed by secondary legislation and the case law of the CJEU, and is subject to international treaty obligations.[86]

The role of the Treaties in the context of IP, and particularly in copyright lawmaking, is in part to establish the parameters for EU institutions and their efforts. The principles of subsidiarity and proportionality provide the general scope of the EU's regulatory authority by cutting it off at the point where national regulators have the capability of rulemaking. This broadly-circumscribed protection over Member States' legislative autonomy has predictably led to very few EU level measures adopted in the realm of copyright which have had a truly harmonizing effect. This has remained the reality in the application of copyright today, as it continues to be defined by its territorial character in both application and enforcement.

Though a full accounting of historical bases of copyright competencies in the EU cannot be covered here, an overview may be useful.[87] Prior to the establishment of an explicit Union competence for legislating in the IP arena, EU level legislation on copyright relied on the legal bases of the EC Treaties.[88] Generally, justifications for IP rulemaking needed to be linked to its "impact on the Internal Market."[89] The 2001 InfoSoc Directive, an instrument aimed at facilitating horizontal harmonization of copyright laws among Member States, echoes this principle in its first Recital: "The Treaty provides for the establishment of an internal market and the institution of a system ensuring that competition in the internal market is not distorted. Harmonization of the laws of the Member States on copyright and related rights contributes to the achievement of these objectives."[90] As such, the "harmonization" objective, as linked to the achievement of a single market, has long been necessary for EU

[86] Paul Goldstein and P. Bernt Hugenholtz, *International Copyright: Principles, Law and Practice*, vol 3 (Oxford University Press 2013)
[87] For a more thorough review of the historical bases of EU competencies in copyright lawmaking, see A. Ramalho, *The Competence of the European Union in Copyright Lawmaking: A Normative Perspective of EU Powers for Copyright Harmonization* (Springer International Publishing 2016)
[88] Bernd Justin Jütte, *Reconstructing European Copyright Law for the Digital Single Market* (2017) ("Substantive copyright law has traditionally been harmonized under the non-exclusive competence of the EU (or earlier the EC) based on Article 114 TFEU, certain aspects relating to cross-border provision of services have also been based on Articles 51(1), 53(1) and 62 TFEU.")
[89] Art. 114, TFEU: "The Council shall…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."
[90] Recital 1, InfoSoc Directive.

legislators to establish before being able to utilize the legal basis of the Treaty for advancing copyright objectives.

The most recent Treaty amendment was in 2009 with the adoption of the Treaty on the Functioning of the EU (TFEU), a.k.a. the Treaty of Lisbon, which had a specific impact on EU competencies regarding IP. The entry into force of this Treaty most notably granted the EU as such legal personality. This meant that the EU, subject to international law, became capable of negotiating and concluding agreements on its own behalf, within the ambit of its Treaty-conferred competencies.[91]

Two particular articles in the TFEU which define the EU's IP lawmaking competencies are worth review. First, Article 114 grants a "functional" competence to the EU which enables it to legislate towards building an internal market without specifying the subject matter of the proposed legislation. This broad authority, as explained by Ramalho, lends some flexibility in terms of the range of subjects that may be regulated in efforts to maintain an internal market, but such leeway may likewise encourage "competence creep" on behalf of the legislator.[92] Article 118, however, is more specific in its reference to IP, and its interpretation in IP circles has been the subject of some debate. Article 118 TFEU reads as follows:

> "In the context of the establishment and functioning of the internal market, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish measures for the creation of European intellectual property rights to provide uniform protection of intellectual property rights throughout the Union and for the setting up of centralized Union-wide authorization, coordination and supervision arrangements."

In joined cases C-274/11 and C-295/11, an action brought by the Spanish and Italian governments to annul legislation supporting the adoption of a unitary patent, the CJEU ruled that Article 118 cannot be used as a "self-standing" provision, and must necessarily be tied to the aim of building an internal market.[93] This means, implicitly, any proposed measures that

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[91] , 'International agreements and the EU's external competences' (*Eur-LEX,* accessed <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=legissum:ai0034>

[92] Ramalho, *The Competence of the European Union in Copyright Lawmaking: A Normative Perspective of EU Powers for Copyright Harmonization*

[93] Joined cases C-274/11 and C-295/11, Judgment of the Court (Grand Chamber) of 16 April 2013 — Kingdom of Spain and Italian Republic v Council of the European Union ECLI:EU:C:2013:240 (CJEU) (2013)

would include, e.g., setting up coordination or supervision arrangements regarding copyright, would still necessarily have to be tied to an Internal Market-building objective.[94]

Generally, there are degrees of optimism and pessimism in relation to the use of Article 118 TFEU to facilitate harmonization efforts in copyright, as it has already been applied in the areas of patent and trademark successfully, but not yet with any major copyright legislation. It has been pointed out that the introduction of Article 118 was specifically linked to the introduction of a unitary patent, rather than consideration of a single copyright title, at the time of its inclusion.[95] It was also notably used (in part) to establish a Community trademark, but even in that case the overall circumstances were deemed "exceptional."[96]

This is not to say that the case for creating a unitary copyright title has not been a compelling one. According to Jütte, the fragmentation of copyright due to the presence of 27 different copyright titles provides an even more obvious case for establishing a unitary title than in the case of the other IPRs.[97] He argues that the barriers to trade that exist for providing cross-border online services are much higher for works covered by copyright and related rights than industrial rights due to the sheer level of transaction costs.[98] Recognizing this, the application of Art. 118 TFEU was seriously debated in discussions surrounding both the adoption of a "European Copyright Code," a 2002 project forwarded by a group of academics ("the Wittem Group") as a means to harmonize copyright law at the European level, and the idea of introducing an optional unitary EU title for copyright (modelled on the unitary EU patent), as alluded to in a 2011 Commission memo.[99] Neither have come into fruition.

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[94] This connection to copyright policymaking was identified in: Ana Ramalho, 'EU: Playing Sherlock, or spotting copyright consequences in patent cases' 2013) accessed 2020 <http://copyrightblog.kluweriplaw.com/2013/05/02/eu-playing-sherlock-or-spotting-copyright-consequences-in-patent-cases/>

[95] Jütte, *Reconstructing European Copyright Law for the Digital Single Market* 533

[96] Theodore Georgopoulos, 'The Legal Foundations of European Copyright Law' in T.E. Synodinou (ed), *Codification of European Copyright Law: Challenges and Perspectives* (Information Law Series, Wolter Kluwer Law & Business 2012) 32 ("…Regulation (EC) 40/94 on Community trademarks has been adopted on the basis of the exceptional mechanism of Article 308 EC (Art. 352 TFEU). This latter provision institutionalizes the theory of implied powers, allowing EU institutions to extend their fields of regulation through supranational rules beyond the frontiers fixed by the Treaties, and to exercise a wider competence, provided that the exercise of this competence is necessary for the pursuit of European objectives. This method, however, remains exceptional and cannot offer a sufficient legal basis for the foundation of a European competence in copyright law.")

[97] Jütte, *Reconstructing European Copyright Law for the Digital Single Market* 533

[98] Ibid

[99] Bernt Hugenholtz, 'The Wittem Group's European Copyright Code' in T.E. Synodinou (ed), *Codification of European Copyright Law: Challenges and Perspectives* (Kluwer Law International

Importantly, Article 118 TFEU may yet have some utility for copyright outside the debate of establishing a unitary title. It has been argued that this provision may serve as a basis for reconsidering the institutional framework used to implement EU rules regarding copyright. In referencing the potential utility of Article 118 for rebalancing the relationship between EU regulators and national authorities, Georgopoulos remarks that, "[t]he possibility of the creation of an EU agency – or the extension of powers of an existing one to cover copyright matters – should not be excluded."[100] This perhaps indicates that Article 118 (linked to internal market objectives) may serve as a future basis for proposing new institutional solutions in regulating copyright – and is therefore directly relevant to the proposals suggested by this thesis in Part III.

Lastly, it is also worth mention that there may be room for fundamental rights-based revisions to copyright law based on its entrance into primary law via Article 6 paragraph 1 TEU.[101] According to Ramalho, "Following the argument of hierarchy of sources, since fundamental rights are now part of primary law, they too are candidates to be part of a normative basis for copyright lawmaking. The Charter itself makes clear that fundamental rights must be respected by the EU institutions 'in accordance with their respective powers' which adds an extra justification for the EU legislator to instil elements from the fundamental rights framework in copyright legislation."[102] So far there has been limited attention on the use of a fundamental-rights basis for revisions to current copyright laws, at least in the political arena.

1.1.4 Deficiencies of EU Copyright Lawmaking

1.1.4.1 "Necessity" of Economic-Based Justifications to Legislate

One particularly important facet of the EU legislative dynamic concerns the role of economic justifications in shaping debates which will ultimately affect social and cultural outcomes. In the cultural policy sector, much like in the copyright policy sector, ideologies are split between two conceptions of how best to achieve the goal of generating net social

2012); Group, 'European Copyright Code' 2010) <https://www.jipitec.eu/issues/jipitec-1-2-2010/2622/wittem-group-european-copyright-code.pdf> ; European Commission, 'Intellectual Property Strategy – Frequently Asked Questions, MEMO/11/332' (European Commission, 2011) <https://ec.europa.eu/commission/presscorner/detail/en/MEMO_11_332>

[100] Georgopoulos, 'The Legal Foundations of European Copyright Law', 42

[101] Art. 6(1), TEU: "The Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties."

[102] Ramalho, *The Competence of the European Union in Copyright Lawmaking: A Normative Perspective of EU Powers for Copyright Harmonization* 98

benefits: on the one hand, the cultural sector can be perceived as an economic market as any other markets, and as such, should be subject to regulation via competition rules. On the other hand, some perceive the cultural sector as more "unique," driven instead by the "symbolic, aesthetic, and the artistic nature" of its outputs, and as such would be ill-suited to market-regulating mechanisms or purely market-driven solutions.[103] The debate between these approaches further relates to the "relationship between the utilitarian functions and non-utilitarian (artistic/aesthetic/entertainment) functions of symbolic goods," wherein, "…when it comes to books, television programmes, plays and fine art prints, at issue [is] whether the non-utilitarian elements outweighed other dimensions (or not)."[104] As evident to those familiar with the characteristics of a copyrighted work, it has both the qualities of a "market" good and a "cultural" good.[105] Regulations targeting just one of these aspects at a time will naturally be inadequate; and therein lies the core complexity in the task of developing an adequate approach to copyright regulation based on legislative measures alone.

As mentioned previously, the exercise of EU legislative competencies in the field of copyright thus far have been mostly limited to "internal market" building considerations. Initially this seems to create a tension between reconciling cultural and social aspects of copyright policy against economic rationales. In practice, the result of copyright policymaking has been a compromise which links cultural interests to economic objectives, sometimes in a cursory and superficial manner with regards to fulfilling the cultural component. In the 1988 Green Paper on Copyright and the Challenge of Technology, the Commission acknowledges that:

> "[t]he economic interests which copyright law aims at protecting are inextricably interwoven with cultural interests and cultural needs…Intellectual and artistic creativity is a precious asset, the source of Europe's cultural identity and of that of each individual State. It is a vital source of economic wealth and of European influence throughout the world. This creativity needs to be protected; it needs to be given a higher status and it needs to be stimulated."[106]

This demonstrates the prevailing way of interlinking economic and cultural aspects of copyright, and has likewise been reflected in the Recitals of copyright-related Directives and

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[103] Littoz-Monnet and others, *European Union and Culture : Between Economic Regulation and European Cultural Policy*
[104] Ibid 21.
[105] 'Convention on the Protection and Promotion of the Diversity of Cultural Expressions' (2007) 1440 UNTS 311 (18 March 2007) UNESCO , para. 18 Preamble; Article 1(g) (recognizing the dual nature of cultural goods and services as objects of trade and cultural artifacts).
[106] European Commission, 'Green Paper on Copyright and the Challenge of Technology' 1988)

Regulations in the EU. Yet this also reinforces that there is rarely, if ever, any self-standing culturally- or socially-justified legal rules forwarded at the EU level. This is by design.

Cultural regulations *per se* have traditionally been considered an exclusive competence of Member States. As such, it seems that cultural justifications alone cannot serve as a self-standing basis for EU legislative intervention. According to Article 3 TEU, "[the Union]…shall ensure Europe's cultural heritage is safeguarded and enhanced," while Article 6 TFEU states that the EU's competences in the field of culture are limited to carrying out actions which "support, coordinate or supplement the actions of the Member States." Article 167 TFEU provides some elaboration, beginning with the general consideration that the EU shall "contribute to the flowering of the cultures of the Member States," while respecting their national and regional diversity. Further on, this Article is careful to distinguish economic and non-economic objectives relevant to culture: EU action should encourage cooperation between Member States and "support and supplement their action" in "improving the knowledge and dissemination of the culture and history of the European peoples, conserving and safeguarding cultural heritage of European significance, and fostering *non-commercial* cultural exchanges and artistic and literary creation, including in the audiovisual sector."[107] While this should, in theory, serve to establish a clear boundary between EU level regulatory competencies and the territory of Member States in the area of culture, it is undeniable that copyright significantly affects culture, and not just in a national or territorially-limited way. In this respect, at first glance the Treaties seem to overly-constrain EU level intervention, limiting the types of copyright issues that can be considered by the EU legislator in the first place, and ultimately having an effect on the scope of proposed solutions.

Interestingly, over time "EU cultural policy" itself has also been strategically reframed to emphasize economic goals in order to garner necessary visibility at the agenda-setting level.[108] While this brings into question whether or not traditional notions of the role of cultural policy held by most Member States is maintained, this reframing exercise is concededly in line with policy-building strategies adopted in other sectors. The political reality that social and cultural objectives are not as effective at flagging the interests of the Commission as it sets policy goals is confronted when copyright discussions are filtered

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[107] . (Citing Art. 167, TFEU) (emphasis added).
[108] Annabelle Littoz-Monnet, 'Agenda-Setting Dynamics at the EU Level: The Case of the EU Cultural Policy' (2012) 34 Journal of European Integration 505-22

through the legislative process. This grounds an impression of the legislative process as one which may tend to stretch further away from core "EU" notions of fairness, balance, and interests in genuine harmonization in the field of copyright the closer it moves towards emphasizing economic goals. As evidenced by the recent addition of a press publishers right in the CDSM Directive,[109] the introduction of a new neighbouring right was discouraged at the proposal stage in view of its potential to further fracture the current system of rights.[110] While it found adequate justification as a means to improve remuneration for press publishers at the policy level, the introduction of a new neighbouring right is ironically at odds with the "Single Market" objective, which can only be achieved through higher levels of harmonization.

In taking a close look at the way cultural policy is defined, understood and utilized under the EU treaties, these same perceived constraints on behalf of the EU legislator should not necessarily serve as a complete barrier towards framing effective legal rules that are chiefly motivated by cultural and social concerns. Again, Article 6 TFEU states that the EU's competences in the field of culture are limited to carrying out actions which "support, coordinate or supplement the actions of the Member States." Coordinating the actions of Member States at the EU level, or even supplementing the actions of the Member States through an EU level intervention, actually entails that the EU legislator has some rather broad leeway in terms of proposing culturally-motivated legal rules at the EU level, as long as it is considered unattainable through Member State action alone. By way of example, perhaps the EU legislator can suggest the prioritization of certain cultural and social criteria in Member States' competition policies in the creative sector.[111] If such action is promoted at the EU level, this could ensure a higher level of policy cohesion among Member States in terms of how they engage in balancing market-oriented legal considerations against cultural and social objectives.

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[109] 'Directive 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' (2019) OJ L 130, 17.5.2019 92–125 [CDSM Directive] Art. 15, "Protection of press publications concerning online uses."

[110] Christophe Geiger, Oleksandr Bulayenko and Giancarlo Frosio, Opinion of the CEIPI on the European Commission's Copyright Reform Proposal with a Focus on the Introduction of Neighbouring Rights for Press Publishers in EU Law, 2016) ; Lionel Bently and others, Strengthening the Position of Press Publishers and Authors and Performers in the Copyright Directive, 2017)

[111] Relatedly, see Josef Drexl, 'Competition in the Field of Collective Management: Preferring 'Creative Competition' to Allocative Efficiency in European Copyright Law' in P. Torremans (ed), *Copyright Law A Handbook of Contemporary Research* (Edward Elgar 2007)

Thus, while there seem to be opportunities for broader rulemaking on behalf of the EU legislator in the field of copyright, it has been traditionally understood that the EU has a very limited internal competence regarding the regulation of culture, which in turn steers the EU legislator towards emphasizing the economic and property-based effects of copyright regulation (via "internal market building" justifications). Though the Recitals of the Directives are careful to mention complimentary cultural and social objectives, legislative measures seem to be primarily driven by economic considerations. As emphasized, limitation in regulating in the area of culture does not mean that the EU has no authority to regulate; nor does it mean that advancing economic goals are antithetical to the accomplishment of cultural and social goals. Legislative goals that are chiefly motivated by cultural concerns can be just as effective – if not more effective – at generating optimal outcomes for copyright stakeholders than relying on economically-motivated goals alone. Particularly, this shift would seem to benefit smaller and underrepresented stakeholders participating in the creative marketplace, especially independent artists wishing to reach a broader audience, and consumers wishing to obtain access to a wide variety of content; such interests are economically-motivated. Yet by judging the current approach to copyright lawmaking in the EU, it seems that the EU legislature has adopted a very restrictive view in terms of its own ability to advance proposals with more explicit prioritization of cultural and social policy goals, ultimately limiting the scope (and efficacy) of legislative solutions presented at the EU level.

1.1.4.2 Limitations of Legal Instruments

As for the instruments used in EU level copyright lawmaking, Directives have been used the most due to their flexibilities in terms of Member State implementation. Article 3 TEU limits Union action to considering measures that "shall not exceed what is necessary to achieve the objectives of the Treaties." This has been interpreted as using the least intrusive legal means to achieve the desired legislative aims. This choice of legal instrument is further influenced by the Protocol on Subsidiarity and Proportionality, "as it instructs the European legislator to minimize the financial and administrative burden of legislative acts, including those for national and local authorities."[112]

[112] P. B. Hugenholtz, 'The European Concern with Copyright and Related Rights' in Mireille van Eechoud and others (eds), *Harmonizing European Copyright Law: The Challenges of Better Lawmaking* (Information Law Series, Kluwer Law International 2009) (citing Article 5, Protocol No. 2 ON THE APPLICATION OF THE PRINCIPLES OF SUBSIDIARITY AND PROPORTIONALITY, OJ 115 , 09/05/2008 P. 0206 – 0209).

Member States are compelled to transpose a growing number of EU Directives into domestic law, and must implement such laws under the scrutiny of the European Commission and the CJEU. Nevertheless, certain protections over Member States' autonomy still enable them to nuance their approaches to setting new norms and adapting their domestic legislative solutions to a degree.[113] The principles of subsidiarity and proportionality enshrined in the Treaties impose limits on the degree of authority that can be exerted by the EU primary institutions towards Member States. The application of these principles have somewhat dampened the ability of the EU legislator to launch more specific proposals for legislation, as the texts of Directives relevant to copyright mostly operate as optional provisions, and rarely utilize mandatory provisions (which might have otherwise encouraged some level of harmonization).[114] In the case of the most recent copyright Directive, for example, only three mandatory exceptions are prescribed and are relatively narrowly-drawn.[115]

Unlike Regulations, Directives do not necessitate direct transpositions of the legal provisions into domestic law. When sufficiently narrowly-drawn, Directives can result in fairly uniform legal rules applied throughout the EU when Member States opt for a close or word-for-word transposition.[116] Yet despite the harmonization aims of most Directives passed in the realm of copyright and related rights, more often than not the Directives' broadly-circumscribed terms of implementation have rather led to a patchwork of national laws that seem to impede, rather than enable, the EU's "Single Market" objective.[117] Along these lines, the majority of optional provisions within the Directives add complexities that are sometimes unjustified by needs of Member States to preserve their legislative autonomy in the interests

[113] Ibid . ("In theory at least, there need not be a literal transposition of the directive's provisions in a (new) domestic statute, as long as the Member States law achieves the result envisaged by the directive. In practice, freedom for Member States is limited, because the ECJ has more than once required an almost literal transposition of a directive's wording.")

[114] The InfoSoc Directive attempts to harmonize the reproduction right, right of communication to the public and making available, and the distribution right. Whether it has been successful in its harmonization aim is the subject of criticism. See, e.g., Guibault, Westkamp and Rieber-Mohn, *Study on the Implementation and Effect of Directive 2001/29/EC*,

[115] These are the exceptions for text and data mining, illustration for instruction, and preservation of collection items by cultural heritage institutions. See 'CDSM Directive' (2019) , Arts. 3-7.

[116] "Where the directives have provided precise instructions, leaving the Member States little discretion for deviation, such as in the case of the Computer Programs Directive, the harmonization process has led to fairly uniform legal rules throughout the EU, and thereby enhanced legal certainty, transparency, and predictability of norms in these distinct sectors." P. B. Hugenholtz and others, Recasting of Copyright Related Rights Knowledge Economy, 2006) <ec.europa.eu/internal_market/copyright/docs/studies/etd2005imd195recast_report_2006.pdf>p. 211.

[117] Criticisms for the InfoSoc Directive, Guibault, Westkamp and Rieber-Mohn, *Study on the Implementation and Effect of Directive 2001/29/EC*,

of their citizens. In the case of the private copying exception or limitation and levy scheme, for example, the lack of an EU-wide consensus regarding which goods or services should be subject to the levy has led to an inconsistent marketplace for levied products, varying substantially from one jurisdiction to the next.[118] Similarly, the protection of technological protection measures in the InfoSoc Directive seems to strengthen, rather than diminish, the ability of rightholders and intermediaries to partition the internal market.[119] Although EU legislators intend to promote a greater degree of harmonization of copyright, they may still "contribute to the preservation and in theory even proliferation of differences between the laws of Member States."[120]

1.1.4.3 Lobbying and Stakeholder Representation

Representation of interests in political processes can be understood from the perspectives of the relevant stakeholders, and can be assessed on the basis of their opportunities to participate in the legislative process. Actors such as politicians, lobbyists, academics and ordinary members of the public may participate in the political process at various stages to influence legislative outcomes. However, some of these actors are better suited for forwarding interests in the political arena than others, and therefore tend to have a higher degree of influence on resulting legislation. Lobbyists, for example, are strong political actors in governments worldwide. While there are several measures in place to invite transparency into lobbying activities in the EU, lobbyists still tend to have certain advantages. By representing only one or a few group interests, policy messages can be conveyed in a singular, coherent form to policymakers. These messages are also received by a direct audience in the ability of lobbyists to meet personally with politicians. Unlike the public, which is allowed some "direct" participation in the legislative process through public consultation stages, lobbyists are well-organized, offer specialized knowledge of the issues at stake, and frequently have vested interests in a government's adoption of certain policies over others.

Generally, lobbying is a practice employed by interest groups to communicate with legislators, and more directly concerns influencing legislative outcomes. Lobbying practices

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[118] See, e.g., M. Kretschmer, Private Copying and Fair Compensation: An empirical study of copyright levies in Europe, 2011) <https://ssrn.com/abstract=2063809>

[119] Hugenholtz, 'The European Concern with Copyright and Related Rights', 25

[120] Ibid

in the EU are accepted as lawful, and is mostly a regulated practice.[121] Lobbying is also to be differentiated from "advocacy," which is undertaken by entities without a direct link to third parties or interest groups, such as academics and research centres.

Lobbying in the EU occurs in a structured way, as interest groups are divided, "among such entities are international or European branch federations (which constitute 'umbrella' organisations for national bodies, businesses, NGOs etc.), national business or industry or citizen associations, national or European NGOs, corporations, consultancy and law firms, think-tanks, representations of regions etc."[122] In this way, lobbying is understood to have a broad reach into different branches of EU policymaking. While contacting Commission officials through the respective DGs are recognized as an important way to generate initial interest in specific issues, lobbying activity increasingly occurs in the European Parliament, a "natural venue for lobbyists," and in the Council, to a lesser degree.[123]

With regards to the transparency of lobbying practices, lobbyists in the EU are required to register for accreditation and disclose details about the organization it represents and the goals of its activities, accepting to abide by a minimal ethical standard.[124] However, for consultations run by the Commission, registration is not required (although registered and non-registered contributions are differentiated).[125] Under the Junker Commission, Commissioners, cabinet members and director generals have been required to disclose a list of all of their lobby meetings.[126] It was only in January 2019 that MEPs changed their procedural rules to mandate that rapporteurs, shadow rapporteurs and committee chairs must publically list their lobby meetings.[127]

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[121] Vetulani-Cęgiel, EU Copyright Law, Lobbying and Transparency of Policy-Making 148 ("In 2002 the Commission established the *General principles and minimum standards for consultation of interested parties*. The general principles were defined as: a) wide participation throughout the policy chain, from conception to implementation, b) openness and accountability of the institutions (by ensuring the visibility and transparency of consultation processes run by the Commission), c) effectiveness of the consultations (by running consultations at an early stage of policy development and by respecting the principle of proportionality) and d) coherence of the actions taken by the Commission departments.")
[122] Ibid
[123] Ibid 147
[124] Lobby Europe, 'Rules and Regulations' accessed <https://lobbyeurope.org/rules-and-regulations/>
[125] Vetulani-Cęgiel, EU Copyright Law, Lobbying and Transparency of Policy-Making
[126] Corporate Europe Observatory, 'Copyright Directive: how competing big business lobbies drowned out critical voices' 2018) accessed 2020 <https://corporateeurope.org/en/2018/12/copyright-directive-how-competing-big-business-lobbies-drowned-out-critical-voices>
[127] Europe, 'Rules and Regulations'

Furthermore, lobbying can take both direct and indirect forms. Lobbyists can produce position papers, economic reports, or other similar documents during the consultation stage of the legislative process to convince legislators to take a particular position. Indirect lobbying can involve raising a certain level of public interest or awareness for certain issues, encouraging individuals to participate in the process by contacting legislators themselves, signing petitions, organizing demonstrations or campaigning online.[128] The impact of public intervention in legislative debate has been pronounced in the last few years, especially in relation to copyright legislation. The CDSM Directive, due to its profound potential effects on the exercise of fundamental rights online, generated a wave of public petitions, campaigns, and protests.[129]

The legislative process for copyright issues must necessarily entertain the interests of a variety of stakeholders who often have oppositional goals, and as such has always been a volatile ground for negotiating policy. Copyright legislation is often faced with criticisms for apparent biases towards certain stakeholder groups with significant lobbying power.[130] Stakeholder groups consist of musicians, artists, publishers, record companies, and online platforms which are generally able to assemble in some form to be able to "speak" in a unified political voice.[131] Yet the biggest group of these affected stakeholders, the public, is often the most disorganized and underrepresented in these discussions.[132] While there are several organizations that specifically cater to safeguarding public interests, their impact may be less pronounced due to the size and high stakes of the other stakeholders. To use the recent CDSM

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[128] Vetulani-Cęgiel, EU Copyright Law, Lobbying and Transparency of Policy-Making
[129] See, e.g., Julia Reda, 'EU Copyright Reform: Our Fight Was Not In Vain' 2019) accessed 2019 <https://juliareda.eu/2019/04/not-in-vain/> ("More than 5,000,000 signatures made the petition against Article 13 the biggest in EU history. Many activists invested their time and passion into the fight. By taking to the streets, 200,000 protesters ensured that our concerns became impossible to ignore.")
[130] Observatory, 'Copyright Directive: how competing big business lobbies drowned out critical voices' (2018)
[131] Hugenholtz, 'The European Concern with Copyright and Related Rights', 28. ("the interests of different stakeholders on the right owners' side are often relatively easy to align and indeed well organized, allowing for effective lobbying impact. For example, authors and publishers, or composers and music collecting societies, despite the fact that they also have diverging interests, have more shared interests than other parties whose activities are affected by copyright law. Such other stakeholders are as diverse at producers of computer hardware, appliances and storage media, telecommunications corporations, libraries, educational institutions, art auctioneers, consumers, and Internet service providers.")
[132] Ian Hargreaves, Digital Opportunity A Review of Intellectual Property and Growth, 2011) 93 ("…there is a striking asymmetry of interest between rights holders, for whom IP issues are of paramount importance, and consumers for whom they have been of passing interest only until the emergence of the internet as a focus for competing technological, economic, business and cultural concerns.")

Directive as an example, the significant lobbying power of both the big creative industry players on the one hand, and tech companies on the other, seemed to steer the discussion away from a consideration of public interests. As the group Corporate Europe Observatory put it,

> It is clear that these significant business lobbies representing big tech, publishers and collecting societies have completely taken over the public discussion on the merits and pitfalls of the Copyright Directive. As collateral damage of these lobby strategies, the criticism of the Copyright Directive from civil society organisations working on human rights, consumer rights and open access to knowledge, libraries, the inventor of the World Wide Web Tim Berners-Lee, input from academics, the UN Rapporteur for Freedom of Expression, and now almost 4 million citizens who signed a petition against content-filtering, have simply been ignored or dismissed.[133]

Although it is assumed that lawmakers should serve as the voice of the public they nominally represent, at least at the proposal and consultation stages, legislation troublingly seems to be drafted under the influence of select interest groups.[134]

Overall, while lobbying is a key way for interested parties to communicate their positions within the legislative process, as described by Weatherall, "…both the spectacle of lobbying and the resulting ever-more-outrageously draconian copyright law will be presented by opponents as proof of copyright's lack of justice and legitimacy."[135] This perceived imbalance of representation in the legislative process caused by lobbying practices, especially from the perspective of safeguarding public interests, is an apparent flaw of the decisionmaking in this arena, and carries consequences for the quality and efficacy of stakeholder engagement and representation in copyright lawmaking.

1.1.4.4 Length of the Legislative Process

Lastly, the mechanism of "positive integration" for adapting EU copyright laws, and the length of the lawmaking process it entails, is not well suited for adapting copyright to the

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[133] Observatory, 'Copyright Directive: how competing big business lobbies drowned out critical voices' (2018)

[134] Regarding the CDSM Directive, s*ee, e.g.*, Christophe Geiger, Oleksandr Bulayenko and Giancarlo Frosio, 'The Introduction of a Neighbouring Right for Press Publisher at EU Level: The Unneeded (and Unwanted) Reform' (2017) 39 European Intellectual Property Review ; CREATe, 'The Copyright Directive is failing (Open Letter to Members of the European Parliament and the Council of the European Union)' 2018) accessed 2019 <https://www.create.ac.uk/wp-content/uploads/2018/04/OpenLetter_EU_Copyright_Research_Centres_26_04_2018.pdf> . Regarding the influence of lobbying on the Term Extension Directive 2011/77/EU and Orphan Works Directive 2012/28/EU, See Vetulani-Cęgiel, EU Copyright Law, Lobbying and Transparency of Policy-Making .

[135] Weatherall, 'A reimagined approach to copyright enforcement from a regulator's perspective', 290

speed at which technology evolves. In a review of the InfoSoc Directive in 2006, Hugenholtz et. al. identified that,

> "[d]ue to the complexity of the European law-making procedure, even a relatively non-controversial directive takes several years to complete, from its first proposal to its final adoption … Upon adoption of a directive, another round of lawmaking will commence at the level of the Member States…The step-by-step approach towards harmonization that the EC legislature has followed, has placed an enormous burden on the legislative apparatus of the Member States. For national legislatures, the harmonization agenda of the EC has resulted in an almost non-stop process of amending the national laws on copyright and related rights... the time span between the first proposal of a directive and its final implementation can easily exceed ten years."[136]

Though this observation was made some years ago, the description of the transposition process from beginning to end is one that remains fairly accurate. With the recent passage of the CDSM Directive, it seems that this process will start anew, and will be executed by the same slow-moving political apparatus.

With all of these limitations in mind, it should be acknowledged that passing legislation at the EU level is hardly the end of the copyright policy process. A confluence of regional, national and subnational actors, along with other authorities and institutions, affect the interpretation of law, and determine the ultimate effectiveness of legal measures implemented across the EU. Conversely, this also means that the legislative process itself is not solely to blame for shortcomings or inconsistencies in the various copyright implementations across EU Member States.

What is apparent from this overview of the EU legislative process is that copyright interests may not be adequately considered or represented at all stages. Considering new methods of regulation which are responsive to the unique characteristics of creative goods may yield more balanced outcomes for copyright stakeholders, especially the public, in the long run. As further explored in this thesis, more flexible approaches to copyright regulation, including more efficient means of inter-institutional information sharing, coordination, and collaboration, may present a more workable alternative to setting copyright norms and addressing copyright-related legal issues than through the use of EU level legislative interventions alone. Additionally, situating an independent authority at the EU level which has a sufficient degree of expertise, may be a better solution for articulating useful regulatory

[136] Hugenholtz and others, *Recasting of Copyright Related Rights Knowledge Economy*, 211-12

and enforcement solutions than relying on politically-motivated parties who are vested in the outcomes of legislation.

1.2 Administration: EU Agencies and National Regulators

Specialized regulators play a key role in the successful implementation and interpretation of the law in institutional frameworks worldwide. With the ability to combine expert knowledge and pass regulations that are responsive to contemporary issues, this subset of political actors has often witnessed a sizeable increase in the amount of their responsibilities as time progresses, and as laws have become more complex and technical. The distribution of, at times, significant rulemaking and interpretive authority – most often the result of a legislature directing some of its own rulemaking powers to the “expert” administrative authority – is nevertheless checked by a strong judiciary, as well as closely monitored by executive and/or political actors wishing to preserve their core policy-steering competencies. The following sections offer some insights into the functioning of administrative actors specifically within the EU institutional framework and in some select Member States, drawing particular attention to the allocation of authority among actors, as well as the consequences of strong executive and judicial oversight on institutional growth.

1.2.1 EU Agencies

Institutional decentralization trends in the late 90s and early 2000s led to the formation of over twenty regulatory agencies within the EU framework over an exceptionally short span of time. The justifications for this so-called “agencification” largely revolved around the necessity to bring in more expertise to the public policy process and therefore enhance the credibility of EU decisionmaking.[137] Agencies are central to the multi-level governance model, as they act to integrate policy solutions among Member States, and provide guidelines on achieving coherence in certain policy areas.[138] They facilitate the input of experts to contribute solutions to common issues faced by national and EU authorities, which can in turn reduce information asymmetries between the market and market regulators.[139] As independent institutional actors within the EU framework, agencies are perceived as not only able to

[137] Dehousse, Delegation of powers in the European union: The need for a multi-principals model 790
[138] Jacint Jordana and Juan Carlos Triviño-Salazar, 'European Union Agencies: A transnational logic?' <https://www.jstor.org/stable/resrep14166>
[139] M. de Visser, *Network-Based Governance in EC Law: The Example of EC Competition and EC Communications Law* (Bloomsbury Publishing 2009) 23

lighten the workload of principal decisionmaking bodies, but are also uniquely situated to be able to resolve complex technical issues and perform objective analyses.[140]

After the Lisbon Treaty, there exists three legal grounds for the establishment of EU agencies within the EU institutional framework: 1) Treaty modification or explicit Treaty provision (Art. 42(3) and 45 TEU); 2) special provisions regulating a specific EU policy, such as for research and technological development policy (Art. 182(5) and 187 TFEU); or 3) based on the general provision (Art. 114 TFEU and 352 TFEU) which allows for the establishment of agencies as measures to be taken pursuant to a specific policy.[141] On these bases, agencies may be established by "(a) the Council and the EP regulation under regular legislative procedure, for the bulk of the decentralised bodies and agencies; (b) by the decision of the Council, for the agencies under CFSP, [or] (c) by the decision of the European Commission based on the Regulation for the executive agencies."[142]

Agencies are designed to be adept at administering complex and technical laws in specific sectors. The Commission's 2001 White Paper on European Governance recognizes that, "[t]he advantage of agencies is often their ability to draw on highly technical, sectoral know-how, the increased visibility they give for the sectors concerned (and sometimes the public) and the cost-savings that they offer to business. For the Commission, the creation of agencies is also a useful way of ensuring it focuses resources on core tasks."[143] Unfortunately, this recognition stops short with a clear (and somewhat contradictory) message in the White Paper, which ultimately reinforces the role of the Commission as the primary initiator and executor of policy.[144]

But perhaps one of the most important advantages of agencies within the EU framework lies in the fact that they are "institutions." Through a combination of specialized expertise and vested commitments to solving policy issues, they are able to set longer-term goals and support enduring societal changes that are more difficult to achieve by governments

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[140] Damien Geradin and Nicolas Petit, 'The Development of Agencies at EU and National Levels: Conceptual Analysis and Proposals for Reform' 35-36 < https://ssrn.com/abstract=489722>
[141] Anamarija Musa, 'Reforming the European Union Agency Governance: More Control, Greater Accountability' (2014) 14 Croatian and Comparative Public Administration 317–53
[142] Ibid (citing Council Regulation (EC) No 58/2003 of 19 December 2002 laying down the statute for executive agencies to be entrusted with certain tasks in the management of Community programmes)
[143] Commission, 'European Governance - A White Paper' 2001)
[144] Ibid 29. (The Commission maintains a position relating to the "Community" method of lawmaking, which is no longer the prevailing view. On the contradictory nature of this position in the White Paper, see Esther Versluis, 'Compliance Problems in the EU What potential role for agencies in securing compliance?' (3rd ECPR General Conference))

which are constantly turned-over. Majone identifies that, "[i]n the expectation of alternation, politicians have few incentives to develop policies whose success, if at all, will come after the next election. Hence, it is difficult for political executives to credibly commit themselves to a long-term strategy."[145] Therefore, the idea that agencies may be able to carry some form of "institutional memory" which may endure despite the ebb and flow of politics may be another reason why they are better placed to propose and maintain more long-term goals, or tackle more ambitious ones requiring systemic change.[146] With the harmonization process of certain concepts in copyright being roughly estimated at around 10 years, this quality can be crucial in ensuring that this process goes smoothly over time.[147]

Despite these numerous advantages, EU agencies have very limited authority within the EU institutional order. Agency authority is perceived to be strictly by delegation, from either the Commission or Member States. Any exercise of agency authority is subjected to strict transparency and accountability controls on multiple fronts. First, the CJEU is empowered to review "the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties," (Art. 263 TFEU) and can hear any proceedings against a regulatory act that affects any natural or legal person it allows any natural or legal person (Art. 263 (4) TFEU). Infringement actions may be raised in instances of failure to act (Art. 265/1 and 2 TFEU). Additionally, revenues and expenditures of agencies are subjected to the Court of Auditors, and the European Ombudsman may be called upon to inspect complaints of maladministration or fraud (Art. 228 TFEU; Art. 325 (4) TFEU). As elaborated below, many historical limitations on EU agency authority have served to restrict their institutional growth over time, but in a modern society there may be some avenues available for challenging these limitations.

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[145] Majone, 'The Agency Model: The Growth of Regulation and Regulatory Institutions in the European Union' (1994)

[146] The idea of "institutional memory" is partly discussed in relation to the role of the U.S. Copyright Office in copyright policymaking. See Jessica Litman, 'The Exclusive Right to Read' (1994) 13 Cardozo Arts & Ent LJ

[147] Hugenholtz and others, *Recasting of Copyright Related Rights Knowledge Economy*, 212; Ficsor, 'The hurried idea of a "European Copyright Code" in the light of the EU's (desirable) cultural and copyright policy ', 4

1.2.1.1 Delegation of Authority

Again, the authority granted to agencies in the EU is strictly limited. To understand the effect of the EU delegation of powers principles on agency authority, a typical starting point for analysis relates to the "principal-agent" model.[148]

In its 2001 White Paper on Governance, the Commission represents itself as a "principal" through which agencies act as "agents," which are delegated authority specifically to aid in the completion of Commission tasks.[149] In the 2005 Inter-institutional agreement drafted by the Commission, agencies are similarly represented as auxiliary entities, playing a supporting role in the fulfilment of Commission duties.[150] This view is further encapsulated by the CJEU ruling in *Meroni*, which is commonly cited in discussions relating to the limited ability of executives to delegate powers.[151] These views of delegation have guided a large portion of the principal-agent discourse of EU institutional theory, as the dominant view reflects the understanding that the Commission delegates some of its powers to the agency (horizontal delegation), and the agency operates within a strict mandate as delineated by this "principal."[152]

However, this dominant theory of delegation within the "principal-agent" paradigm has been challenged, especially in light of the EU's regulatory mode of multi-level governance. Whereas the "principal-agent" paradigm is perhaps more easily discerned in single-principal scenarios, *e.g.*, in strong central governments, the multiplicity and shared authority of EU institutional actors across many Member States complicates the transferability of this concept. As Dehousse elucidates, "in order to make sense of both the decision to delegate powers to and the institutional design of EU agencies, one must keep in mind the absence of a defined hegemon within the EU, which is itself a by-product of the multi-level

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[148] Arthur Lupia, 'Delegation of Power: Agency Theory' in Neil J. Smelser and Paul B. Baltes (eds), *International Encyclopedia of the Social and Behavioral Sciences*, vol 5 (Elsevier Science Limited 2001)

[149] Commission, 'European Governance - A White Paper' 2001) 8

[150] European Commission, 'Draft INTERINSTITUTIONAL AGREEMENT on the operating framework for the European regulatory agencies ' (25.02.2005 COM(2005)59 final*, European Commission* 2005).

[151] Delegation of powers is only permissible when, "…it involves clearly defined executive powers, the exercise of which can, therefore, be subject to strict review in light of criteria determined by the delegating authority." Case 9/56, Meroni & Co., Industrie Metallurgiche, SpA v High Authority of the European Coal and Steel Community ECLI:EU:C:1958:7 (1958)

[152] See e.g., Robin Gauld, 'Principal-Agent Theory of Organizations' in Ali Farazmand (ed), *Global Encyclopedia of Public Administration, Public Policy, and Governance* (Springer International Publishing 2016)

character of that system."[153] Taking on this view, Member States may well be "principals" in addition to the EU level executive actors.

This observation is reinforced due to the fact that, in some instances, the authority "delegated" to the agency was not the Commission's authority in the first place. The OHIM (later EUIPO), for example, has the ability to register Community trademarks, which was a power that was originally (and exclusively) within the ambit of national governments.[154] This, combined with an awareness of the diffusion of authority particular to the EU multi-level governance approach, would make it inadequate to understand the scope of the authority delegated to EU agencies as an "agent" of any single "principal" actor.

Recognizing this, the authority of EU agencies should also be understood within the larger context of the multi-level governance framework. The absence of a *per-se* principal, but rather a grouping of institutions that act as "co-principles," creates a closely-monitored regulatory sphere within which agencies are allowed to operate. National governments, acting in their capacity as members of the Council, must equally recognize the benefits and limitations of agency delegation as well as the Commission, for authority may also be transferred vertically.

Procedurally speaking, the creation of agencies requires a Commission proposal, and must be accepted by both national governments and the European Parliament. This, as Dehousse argues, "…enables us to understand some key structural features of the decentralized bodies that have been established and the variety of controls to which they have been subjected."[155] Thus, the decision to create an agency within the European institutional framework is a shared decision, requiring consensus on the level of delegated authority assigned to the agency, which is ultimately subjected to a variety of "strings attached" control mechanisms from EU institutional actors at the supranational level, as well as national governments themselves.[156] Therefore, the very existence of an agency is itself proof of a wide-reaching consensus between political actors; that an additional institution is justified to facilitate efforts in regulation. Between political actors with strong self-interests in preserving

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[153] Dehousse, Delegation of powers in the European union: The need for a multi-principals model 790-91. A similar argument is made by Thatcher and Stone Sweet regarding "Composite" principals, or multiple actors who, due to changes in elections, may not maintain stable and coherent preferences over time. See Mark Thatcher and Alec Stone Sweet, 'Theory and Practice of Delegation in Non-Majoritarian Institutions' (2008) 25 West European Politics 1-22

[154] The role of OHIM within the EU framework is elaborated on, infra.

[155] Dehousse, Delegation of powers in the European union: The need for a multi-principals model

[156] Ibid

as much institutional influence as possible within the framework, such a consensus is not easy to achieve.

1.2.1.2 Limitations on Authority

The agency model as it operates in the EU, while beneficial, is limited by legal and political conditions regarding the conferral of authority to agency actors. As posited before, limitations are embedded within the Treaty and echoed in the *Meroni* doctrine can be collectively understood as restricting the ability of EU institutions to delegate powers on the basis of "specific" conferral; institutions such as the Commission cannot delegate authority that they otherwise do not have, and may not unconstitutionally assign powers.[157] Delegation does not exclusively involve the reallocation of EU powers, but can regard the reallocation of Member States' authority as well, which also becomes a politically-challenging exercise.[158] Imbuing agencies with "real discretionary powers," as argued by de Visser, not only challenges the centrality and unity of the Commission's executive functions, but may pose a direct challenge to Member States which would, "…not look kindly upon what they perceive as a transfer of their 'prerogatory' competences and role in the enforcement stage to a Community body."[159]

Another source of reluctance on the side of Member States to delegate regulatory authority to an EU level agency rests in a type of "path dependency" over traditional regulatory roles.[160] As de Visser points out, "…the lack of a European tradition of regulation by independent agencies further fuels the reluctance of Member States: why should they grant European agencies powers that they themselves have historically been unwilling to delegate to similar domestic institutions?"[161]

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[157] Art. 13, TEU ("each institution shall act within the limits of the powers conferred upon it by this Treaty"); Meroni v. High Authority of the European Coal and Steel Community,

[158] This particular view of delegation of powers not being strictly limited to EU-level conferral is forwarded by Dehousse and Everson: "Renaud Dehousse and Michelle Everson have argued that the granting of regulatory powers to European agencies do not amount to a delegation of powers from an EC institution to a regulatory body but rather a 'Europeanization' of powers traditionally belonging to the Member States." de Visser, *Network-Based Governance in EC Law: The Example of EC Competition and EC Communications Law* 23

[159] Ibid

[160] North, Institutions

[161] de Visser, *Network-Based Governance in EC Law: The Example of EC Competition and EC Communications Law* (citing European Commission, 'Communication from the Commission: The operating framework for the European Regulatory Agencies' (European Commission, *Commission* 2002))

To further concretize the political tension inherent in adopting an EU level action – specifically in suggesting extended powers for a regulatory agency or considering a new agency – the work of Scharpf on the phenomenon known as the "joint-decision trap" is worth raising again here. According to Scharpf, joint-decision traps emerge when the decisionmaking of central government actors depends upon unanimous, or nearly unanimous, agreement between multiple constituent parts (Member States).[162] When agreement cannot be reached at the EU level, the status quo continues, but with a caveat: if the policy objective relates to changing or reversing a decision already passed at the EU level, then the "return to status quo" will rather represent a *continuation* of an existing common EU policy, as opposed to allowing Member States to revert to adopting individual measures.[163] The more entrenched the policy becomes at the EU level, the more difficult it is to reverse. This arrangement clearly safeguards any progress made by European integration efforts, but perhaps at the same time creates a strong incentive for Member States fight against relinquishing any regulatory authority to an EU level actor.

Bringing this theory back into the themes of current discussion, the joint-decision trap can have specific consequences for EU institutional growth:

> "… joint-decision systems are a "trap" in yet another, and more important sense. They are able to block their own further institutional evolution... Our studies of joint decisions in German federalism have discovered a mechanism that preserves the institutional status quo: it is the political priority of substantive solutions over institutional reforms."[164]

The so-called joint-decision trap, and the resulting lack of institutional growth, generates an "institutional vacuum" that provides limited means of assuring policy cohesion as it flows between policy actors situated at the EU, national, and subnational levels.[165] Though the Commission has recognized that, "[c]oherence requires political leadership and a strong responsibility on the part of the Institutions to ensure a consistent approach within a complex

[162] Fritz W. Scharpf, *Community and Autonomy: Institutions, Policies and Legitimacy in Multilevel Europe* (Campus Verlag 2010) 37
[163] Ibid 41
[164] Ibid 52
[165] Majone, 'The Agency Model: The Growth of Regulation and Regulatory Institutions in the European Union' (1994) ("At present, the lack of a European administrative infrastructure means that between the supranational level of rule-making and the national level of enforcement there is an institutional vacuum which is supposed to be filled by the loyal cooperation of the national authorities. Unfortunately, in many cases such cooperation is not forthcoming, while significant differences in the resources, expertise and political independence of national regulators…impede a uniform application of the common rules.")

system," this would likely require the reinforcement of more central points for ensuring policy consistency and adapting more uniform enforcement strategies for European rules.[166] Some further institutional development which encourages a more uniform and predictable application of legal rules is desirable, and while difficult to achieve, may still be feasible.

One way of filling this "institutional vacuum" could be to enhance the role of decentralized regulatory institutions – agencies – in a meaningful way. As Majone identifies, the effects of limitations on the regulatory powers of agencies within the EU institutional order may be significant, but need not pose a significant barrier for the same to utilize its capacity to shape norms:

> "…with knowledge and persuasion as the principal means of influence at their disposal, the agencies could develop indirect, information-based modes of regulation more in tune with current economic, technological and political conditions than the coercive instruments of command and control that have been denied to them."[167]

Although this observation was made nearly 25 years ago, there may again be an opportunity for agencies to leverage these same characteristics, but under a slightly different regulatory paradigm; in the case of copyright regulation, this could take the form of a paradigm shift which provides for the operation of an alternative means of copyright norm-setting as opposed to a strict legal regime of complex and sector-specific laws.

As elaborated in the following sections, agencies may be able to revitalize their unique characteristics within the EU framework by leveraging their position as intermediary actors on a "network," allowing them to contribute to the coordination of regulatory approaches between different jurisdictions (1.2.1.3). And, given the current situation, challenging the long-held delegation of powers discourse may be more feasible now than ever before with the advent of the digital age, which has pushed regulators towards streamlining and simplifying regulatory practices in the online sphere (1.2.1.4). In all, existing obstacles to expanding the competencies of EU agencies need not serve as a barrier to their future expansion.

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[166] Commission, 'European Governance - A White Paper' 2001)

[167] Majone, 'The Agency Model: The Growth of Regulation and Regulatory Institutions in the European Union' (1994)

1.2.1.3 Agency Regulation by Network

To reconceptualize the role of agencies in a modern context, it is useful to consider the role of agencies as hubs on a "network."[168] Generally, networks within the context of governance are understood as "a set of relatively stable relationships which are of non-hierarchical and interdependent nature linking a variety of actors, who share common interests with regard to a policy and who exchange resources to pursue these shared interests acknowledging that co-operation is the best way to achieve common goals."[169] According to Littoz-Monnet, "…networks have become an ideal 'tool' by the European Commission to foster exactly the policy objectives it aims at: the promotion of the mobility of persons, as a vector of the creation of a 'we-feeling' on a European scale."[170]

According to the "Better Regulation" initiative launched in 2017, a more networked approach to regulation is already supported where,

> "…political decisions are prepared in an open, transparent manner, informed by the best available evidence and backed by the comprehensive involvement of stakeholders. This is necessary to ensure that the Union's interventions respect the overarching principles of subsidiarity and proportionality i.e. acting only where necessary at EU level and in a way that does not go beyond what is needed to resolve the problem. 'Better Regulation' also provides the means to mainstream sustainable development into the Union's policies."[171]

Networks have therefore been recognized within the EU regulatory sphere as a "natural by-product of subsidiarity," which in turn fuels, "…a considerable expansion of bilateral and multilateral cooperation and coordination among national regulatory bodies, leading to the emergence of more or less formalised network structures."[172]

By design, agency "cooperation and networking [is] unavoidable" where agency governing boards are comprised of representatives from Member States, the Commission and

[168] Renaud Dehousse, 'Regulation by networks in the European Community: the role of European agencies' (1997) 4 Journal of European Public Policy 246-61; R. Dehousse, 'The Politics of Delegation in the European Union' in D. Ritleng (ed), *Independence and Legitimacy in the Institutional System of the European Union* (Collected Courses of the Academy of European Law, OUP Oxford 2016).
[169] Tanja A. Börzel, 'Organizing Babylon: On the different conceptions of policy networks' (1998) 76 Public Administration 253-73
[170] Annabelle Littoz-Monnet, 'European Cultural Networks, Social Communication and the Construction Process of the European Community' in R. McMahon (ed), *Post-identity?: Culture and European Integration* (Routledge 2013)
[171] ''Better Regulation' Guidelines' (2017) 4<https://ec.europa.eu/info/sites/info/files/better-regulation-guidelines-better-regulation-commission.pdf>
[172] Littoz-Monnet, 'European Cultural Networks',

Parliament.[173] This arrangement, which ensures intergovernmental participation as well as establishes agencies as "hubs" within the network of national administrators, was perceived as more favourable by national governments when the first agencies were established in the EU, as it prevented the agencies from "political drift" in the form of capture by an institutional rival.[174] An agency further,

> "…sees itself as part of a transnational network of institutions pursuing similar objectives and facing analogous problems, rather than as a marginal addition to an established bureaucracy pursuing a number of different objectives…This is because the agency executives have an incentive to maintain their reputation in the eyes of the other members of the network. Unprofessional or politically motivated decisions would compromise the executives' international reputation and make cooperation more difficult to achieve in the future."[175]

Thus, agencies can be understood to undertake an important facilitator and coordinator role within a network, leveraging its relative centralization to promote more efficient dissemination of information and good practices among a range of national actors and interested third parties. The positioning of agencies as "hubs" in the network of EU institutional actors best highlights the fact that, by design, administrative actors offer more opportunities for centralizing and coordinating regulation than possible by pure EU level political action or pure Member State action alone.

1.2.1.4 Enhancing the Role of EU Agencies within the EU Framework

There are some exceptional examples of EU agency authority worth mentioning where enhanced regulatory powers have already been granted. The notable agency in this context is the OHIM (later EUIPO), which was entrusted with the ability to "…adopt individual decisions in clearly specified areas of Community legislation, 'where a single public interest predominates and where they do not have to arbitrate on conflicting public interests, exercise powers of political judgement or make complex economic assessments.'"[176] Only the Community Plant Variety Office and the European Aviation Safety Agency have similar authority to adopt legally binding decisions in particular cases.[177] Because these rare instances show that agencies may undertake quasi-executive decisionmaking by exercising the ability to

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[173] Ibid

[174] Dehousse, Regulation by networks in the European Community: the role of European agencies

[175] Majone, 'The Agency Model: The Growth of Regulation and Regulatory Institutions in the European Union' (1994)

[176] Commission, 'Communication from the Commission: The operating framework for the European Regulatory Agencies' (Commission*, Commission* 2002) 21

[177] Majone, Poli and Surdej, *Risk Regulation in the European Union: Between Enlargement and Internationalization*, 63

adopt binding EU-wide decisions, some have characterized this exercise as an "uncomfortable and unconstitutional position of agencies as bearers of executive powers."[178] This tension is linked to a combination of the conferral principle as written in Article 5(2) TEU, and application of the "*Meroni* doctrine," which strictly delimits the delegation of executive authority to agencies, as previously discussed.[179]

There are, however, modern realities that are not reflected in *Meroni* that arguably support a more flexible interpretation of the delegation of powers doctrine. While today it is still a frequently cited case in the delegation of powers discourse, *Meroni* is criticized as "anachronistic" in a post-Treaty context – the 1958 case relates to the delegation of regulatory powers to the "High Authority of the European Coal and Steel Community," an agency established under Belgian private law.[180] This characteristic is highlighted in *ESMA*, a 2014 case relating to the validity of a regulation passed by the European Securities and Markets Authority, where the CJEU specifically distinguishes post-Treaty EU agencies from the organization in *Meroni*: "the bodies in question in *Meroni* v *High Authority* were entities governed by private law, whereas ESMA is a European Union entity, created by the EU legislature."[181] The Court determines that agencies which exercise only the authority conferred to it in its establishing Regulation may, in some cases, merit the use of certain discretionary powers under certain specific conditions and subject to judicial review. Importantly, the delegation of powers issue is not strictly analysed by the Court in terms of the hierarchical "principal-to-agent" archetype, but the Court rather recognizes the inherent nuances of agency exercises of power within a multi-level regulatory context. The agency's Regulation in *ESMA* is therefore perceived as "…forming part of a series of rules designed to endow the competent national authorities *and* ESMA with powers of intervention to cope with adverse developments which threaten financial stability within the Union and market confidence."[182]

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[178] Ellen Vos, EU Agencies, Common Approach and Parliamentary Scrutiny (European Implementation Assessment, 2018) 41

[179] Art. 5(2), TEU ("the Union shall act only within the limits of the competences conferred upon it by the Member States *in the Treaties*…") (emphasis added).

[180] Case 9/56, Meroni & Co., Industrie Metallurgiche, SpA v High Authority of the European Coal and Steel Community [1958] ECR 0011.

[181] Ibid, para. 43.

[182] Case C-270/12, United Kingdom v Parliament and Council [2014] ECLI:EU:C:2014:18 para. 84 (emphasis added)

This considered, the current lack of agency authority, especially in domains which would benefit from a higher degree of centralized regulatory action, seems mostly a political rather than practical legal issue, driven by, "vested interests of national governments or their agencies/regulators/supervisors (where relevant) and/or business segments benefitting from the fragmentation" – and of course, continued application of the *Meroni* doctrine.[183] As identified by Pelkmans,

> Even when the first type of resistance [from Member States] has become less credible or is shown to be costly for the EU or is gradually objected to by European business in light of European strategies or globalisation, the Meroni 'excuse' has been chilling or killing almost any debate about the functional need of EU Agencies. Ever since the mid-1990s, the Meroni doctrine has stalled all attempts to endow, when explicitly and carefully justified, EU Agencies with powers ensuring the proper functioning of a truly single market.[184]

While Pelkmans maintains that there is still a sound constitutional basis for the application of the *Meroni* doctrine in light of preserving the overall EU institutional balance, use of the doctrine in the specific context of agency building has had the effect of stymying the development of institutions in relation to their ability to adopt new approaches to regulatory issues. If one of the key drivers of EU integration is the proper functioning of the single market, as a matter of principle, constitutional safeguards should complement, rather than negate, that mission. This stance frames the utility of the *ESMA* ruling in facilitating a more modern interpretation of the Treaty principle of conferral. Indeed, the *ESMA* ruling has already seemed to usher in a new stance on the issue referred to as "mellowed Meroni" or a "Meroni 2.0," where the application of the conferral principle seems to leave more of an opportunity to adopt an "appropriate and justified degree of delegation to EU agencies (with some carefully circumscribed regulatory or intervention powers) for the completion and proper functioning of the single market."[185] Ultimately, this ruling could provide an important legal grounding for agencies to be able to usefully develop their functions to assist in the resolution of new legal challenges.

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[183] Jacques Pelkmans and Marta Simoncini, 'Mellowing Meroni: How ESMA can help build the single market' (*Brussels,* 2014)

[184] Ibid

[185] Ibid . See also, Vos, *EU Agencies, Common Approach and Parliamentary Scrutiny*, (After ESMA, "…the Court sees no objections to have delineated but 'somewhat' discretionary powers conferred upon EU agencies. Of crucial importance hereby is that such delegation takes place in relation to agencies that are set up by the EU legislature and that judicial review of acts of these agencies is guaranteed. It must be considered though that the exercise of fairly discretionary powers may entail important political, economic or social choices to be made by agencies, which would require adequate control and accountability mechanisms").

Taking this into consideration, agencies are important actors in the EU institutional framework entrusted with tasks that require impartiality, consistency, and high levels of expertise. Despite these qualities, they also seem to be underdeveloped within the EU institutional framework. The political interests of core EU Institutional actors have limited the development of agencies, and have reinforced a rigid application of Treaty and caselaw-developed principles on the delegation of powers and the principle of conferral. Given that these doctrines themselves seem to be evolving within the Court, and given that there is a growing need for agencies to fulfil their roles as hubs of coordination among EU level and Member State institutions, more progressive solutions which build up the regulatory capabilities of EU agencies should be seriously considered in the future.

1.2.2 The EU's IP Administrative Body: EUIPO (OHIM)

In the field of IP, there are several agencies and regulatory bodies situated at the EU and national levels which contribute to the overall consistency of the application of national laws. In relation to EU trademarks, the Office of Harmonization of the Internal Market (OHIM), now the EUIPO, performs several functions as an EU level regulatory agency chiefly tasked with the administration of the EU trademark, and shall be the subject of this section. To follow, in 1.2.3, the discussion turns to administrative authorities situated at the national level, specifically the HADOPI in France, and National Competent Authorities designated under the 2014 CRM Directive.

The OHIM was established in 1994, but the idea for a Community Trademark had already been in the works for nearly forty years: Since 1960, the "German Group of the International Association for the Protection of Intellectual Property ("AIPPI") published a document spelling out the main features of a possible Community trademark ("CTM")."[186] The lengthy process of realizing the Community Mark required a consideration of pre-existing national systems (and institutions) regulating trademarks which would function alongside the potential Community mark. The first European Trademark Directive ("TMD") was adopted by the Council on December 21, 1988,[187] but it would take another five years to agree on a Community Trademark Regulation ("CMTR").[188] Pursuant to the Regulation, the

[186] The following section is a brief history of OHIM, as relevant to the present thesis. For additional background, see Paul Maier, 'OHIM's Role in European Trademark Harmonization: Past, Present and Future' (2013) 23 Fordham Intell Prop Media & Ent LJ 689
[187] Council Directive 89/104, 1989 O.J. (L 40) 1 (EC)
[188] Council Regulation 40/94, 1994 O.J. (L 11) 1 (EC), which was later codified in Council Regulation 207/2009, 2009 O.J. (L 78) 1 (EC).

OHIM was established as an independent agency tasked with the registration and administration of the Community trademark (and later Community designs).[189]

Importantly, the OHIM from its inception was able to operate as an autonomous regulatory body within the EU institutional framework, and could therefore take actions independently from the Commission. This was considered a more favourable arrangement according to the Member States which were in favour of a Community trademark regime, as it was conceptualized early on that the OHIM would benefit most from operating with the same level of independence as a similar institution, the EPO.[190] The Commission, on the other hand, was interested in fully integrating the OHIM into the pre-existing institutional framework, which would consequently subject it to more direct Commission (and other executive) oversight. The resulting arrangement was a compromise between complete independence and executive supervision, where the autonomy of the OHIM is subjected to strict transparency and accountability reporting requirements and CJEU enforcement. Hence, "[t]he EU Institutions have all the necessary a posteriori control powers but they cannot impede the functioning of the Office through a priori policy or budgetary checks."[191]

Over the years since its inception, the OHIM has rapidly expanded due to the popularity of the Community trademark and its need to adapt quickly to new management challenges. Since the OHIM was funded by trademark registration fees, it was able to attain financial independence from the EU early on. Once fees were able to be reduced, the operations of the OHIM were met with concern from National Offices who perceived the reduction as "an expression of aggressive competition between offices."[192] This was resolved through an agreement between the OHIM and National Offices to create a Cooperation Fund (which entailed a distribution of 50% of renewal fees to National Offices), which reinforced the need for balance between the systems, and recognized that national trademarks still appealed to a large number of applicants.[193] The initial Fund, running from 2008 to 2012, also provided a means for national IP offices to modernize and coordinate electronic filing

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[189] Council Regulation 6/2002, 2002 O.J. (L 3) 1 (EC).

[190] Notably, the EPO is not a legal entity as such and is not an EU agency. Therefore, EU rules do not apply to it; neither does EU law apply to the European patent. Instead, the EPO is an organ of the European Patent Organisation, and is joined by an Administrative Council. Maier, OHIM's Role in European Trademark Harmonization: Past, Present and Future ; The European Patent Convention, Article 4(a) 10-36, "European Patent Organisation."

[191] Ibid 702

[192] Ibid

[193] Ibid

systems. The agreement would also set the foundations for a European Trademark and Design Network (ETMDN), as discussed below.

Within the same timeframe, a Regulation was passed which both transferred the European Observatory on Counterfeiting and Piracy to OHIM, and renamed it as the "European Observatory on Infringements of Intellectual Property Rights." In 2016, OHIM officially changed its name to the EUIPO, and the trademark it administered officially became the "European Union trade mark."[194]

1.2.2.1 EUIPO Cooperation via Network (ETMDN, EUIPN)

The formation of the Trademark and Design Network (ETMDN) is a recent regulatory innovation within the EU institutional framework, and precisely demonstrates how an EU agency can economize on its position as a centralized point for coordinating the approaches of national regulators.

In 2012, the OHIM launched an international Convergence Programme which was to coordinate national offices and user organizations, and was aimed at "reach[ing] common ground on a series of issues where IP offices in the EU have different practices."[195] The ETMDN was a major part of the EUIPO's first Strategic Plan (2011-2015), and with the Convergence Fund was able to bridge several technical and practice gaps between national and regional offices, while improving the experience of system users. This was of course no small feat, as the practices of 28 national and regional IP offices and the inputs from international partners and users were all coordinated over several years, and involved various sub-projects including office IT modernization and the implementation of Common Practice standards (via "Communication" documents issued by the EUIPO).[196] Nevertheless, the Network has sustained and expanded into the European Union Intellectual Property Network (EUIPN)**,** now comprising of five "strands" of projects which are "…supported by a working group comprising EU national and regional IP office experts, users, and, where relevant, experts from international organisations."[197] While at this point speculation on behalf of the

[194] 'Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark' (2017) OJ L 154 1-99; Commission Delegated Regulation (EU) 2018/625 of 5 March 2018 supplementing Regulation (EU) 2017/1001 of the European Parliament and of the Council on the European Union trade mark, and repealing Delegated Regulation (EU) 2017/1430 C/2018/1231 OJ L 104, 24 April 2018, p. 1–36.
[195] EUIPO, "European Cooperation." https://euipo.europa.eu/ohimportal/en/european-cooperation.
[196] Maier, OHIM's Role in European Trademark Harmonization: Past, Present and Future
[197] Some examples of currently open projects include, "…digitising historical files and document tagging support for trade marks and design registers; on the ground technical support for IP offices;

author, this name change encompassing a broader sense of IP might entail further expansions, perhaps (if following the proposals of this thesis) in the realm of copyright.

1.2.2.2 EUIPO Observatory on Infringement

In the early 2000s, the threats of piracy and online infringement resulted in massive outcry from the copyright industry. While some of the reports relating to the financial consequences of infringement were famously overblown, it brought attention to the underlying difficulties in gathering reliable evidence to ascertain the "true" effect that copyright infringement had on the creative market, and in turn, the EU economy.[198] In 2009, the Commission established the EU Observatory on Counterfeiting and Piracy with the goals of disseminating more accurate information on the effects of infringement on the creative economy, "…to raise public awareness of Intellectual Property rights; and to encourage the spread of national best practice strategies and enforcement techniques from both the public as well as the private sector." In 2011, the EUIPO began to engage in projects with the Observatory, and by 2012 the Observatory was entrusted to the EUIPO.[199]

In addition to gathering data on infringement and releasing comprehensive reports on changes to the online landscape which affect rightholders, through the Observatory EUIPO also supports projects that coordinate user consumers in an attempt to "shift" online norms. For example, due to the Observatory's research which identified the issue of EU citizen unawareness of legal platforms to download content, the Agorateka project was initiated to help consumers identify legal offers of online content by generating a list of websites through which they can lawfully access, license or purchase the content they are interested in, depending on the territory and conditions of use.[200]

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project management certification for IP office experts; and management systems training for IP office experts." Ibid

[198] Benjamin H. Mitra-Kahn, 'Copyright, Evidence And Lobbynomics: The World After The UK's Hargreaves Review' (2011) 8 Review of Economic Research on Copyright Issues 65-100; Jeremy de Beer, 'Evidence-Based Intellectual Property Policymaking: An Integrated Review of Methods and Conclusions ' (2016) 19 The Journal of World Intellectual Property 150-77

[199] 'Regulation 386/2012/EU of the European Parliament and of the Council of 19 April 2012 on ensuring the Office for Harmonization in the Internal Market (Trade Marks and Designs) with tasks related to the enforcement of intellectual property rights, including the assembling of public and private sector representatives as a European Observatory on Infringements of Intellectual Property Rights ' (2012) OJ L 129

[200] EUIPO, 'AGORATEKA: The European Online Content Portal' 2020) accessed <https://agorateka.eu/ea/> ("we created agorateka to provide a single access point to national portals, and to allow EU citizens to find legal content sources easily and quickly. agorateka also provides an overview of the online landscape of websites in the different countries offering creative content. It contains useful information, including statistics, for citizens and businesses.")

In all, the role of the EUIPO, as well as its constituent parts relevant to monitoring and reporting on copyright-related legal issues, is already well-placed as a self-standing EU agency actor with an active role in the management of IP rights in the EU. As posited in the Policy Options section of this thesis, there may be room for expanding the competencies of this regulatory body in the field of copyright specifically.

1.2.3 National Regulators

It is well accepted that a functioning system of IP rights enhances a country's ability to innovate and create. It is no coincidence that questions of IP protection are sometimes directly addressed in a country's overall public policy agenda. Primary institutional actors, i.e., legislators and judges, are thought of as the initial points of contact when answering IP questions, and respond through either drafting new legislation, or "fine-tuning" aspects of existing legal provisions in the courts. Over time, as legal questions have become more complex and nuanced, advice has been requested more frequently from experts, academics, and specialists. As governments and courts continue to reach out to gather specialized knowledge on certain issues, the role of specialized administrative agencies has evolved to meet this demand.

One of the explanations for the rise of national-level institutional regulators is derived from the system of policymaking established in the Treaty of Rome. As each Member State is charged with the implementation of EU rules according to the Treaty, it is now more often the case that Member States need to either delegate some responsibilities to an already-existing national body, or expand an existing one for the purposes of properly implementing and enforcing the relevant EU law.[201] Heightened regulatory efforts at the EU level in the area of copyright, due in large part to digitization, can be viewed to propel the development of national level administrative efforts. As put by Majone, "Member States have been forced to develop regulatory capacities on an unprecedented scale. In this way, the development of the EC as a 'regulatory state' has strongly influenced a parallel development at national level."[202]

Administrative agencies in form of public authorities have therefore played a key role in the maintenance and development of IP new regulatory practices over the last few decades. In relation to the administration of industrial property rights, Patent and Trademark Offices are commonly found in countries offering IP protection. These public authorities are usually

[201] Majone, 'The Agency Model: The Growth of Regulation and Regulatory Institutions in the European Union' (1994) 2
[202] Ibid

tasked with examining individual claims for protection according to standards established by the law, and thus have the responsibility of ensuring that standards are applied and developed consistently. However, the same cannot be said about copyright – in fact, in the countries that have "IP" offices, there will rarely also be a separate "copyright office."

Unlike patent and trademark rights which necessitate an evaluation before the grant of an exclusive right, copyright vests automatically in the creator of the work. Thanks to the Berne Convention, the international norm is consistent in its rejection of the requirement of formalities before protection is granted in a creative work.[203] One of the underlying thoughts behind eliminating the need to register rights is that administration is kept "closer" to the creator.[204] In the continental *droit d'auteur* tradition particularly, the individuality and autonomy of the creator is distinctively embedded into the legal concept of a creative work. As such, the conception of copyright is more closely aligned to that of an individual, "private" right – one which is generally out of the reach of governmental limitations on the initial grant of protection.

This perhaps begs the question: are copyright offices necessary? In common law countries, which had legal traditions incorporating the use of formalities, such offices were established specifically for the purpose of registration. Yet today, as opposed to being phased out, these offices continue to operate as their mandates have shifted and expanded considerably over time.[205] As discussed in more detail below, the U.S. Copyright Office is a specific example of an organization that has continued to fulfil its role in the area of copyright by facilitating registration, as well as playing a key role as a governmental agency tasked with monitoring the development of copyright law, delivering policy analysis to Congress, and providing legislative support in key areas related to copyright.[206]

In largely common-law jurisdictions (UK, U.S., Canada), copyright offices continue to fulfil an important role in the regulation of copyright. In other jurisdictions, especially in

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[203] Art. 5(2), 'Berne Convention for the Protection of Literary and Artistic Works' (1982) WIPO [Berne Convention]

[204] As a more recent outgrowth of this idea, the use of blockchain and other decentralised digital means of enforcement is renewing the idea of a "register" of works, but one which eliminates the traditional concept of an informational intermediary. See, Bodó, B., Gervais, D., and Pedro Quintais, J. (2018), 'Blockchain and Smart Contracts: The Missing Link in Copyright Licensing' Int'l J. L. & Inf. Tech. 1–26.

[205] Copyright offices continue to function in the UK, Canada, and the U.S.

[206] In the U.S., though registration of copyrighted works is not necessary for a grant of protection, there are several benefits of registration with the Office. One of the biggest incentives for registration is the availability of statutory damages in cases of infringement. 17 U.S.C. § 412, "Registration as prerequisite to certain remedies for infringement."

Europe, the tasks related to copyright are somewhat more dispersed among IP offices and cultural ministries, and these bodies are arguably much less specialized in handling copyright issues. Countries that have a "PTO" may have an additional sub-department dedicated to copyright issues, and often some of these functions may be combined with the mandate of the Ministry of Culture in that country. This complex arrangement will be further discussed below.

There are a variety of national actors charged with the governance and administration of copyright, and their functions within the EU institutional framework have contributed in a significant way to the current conceptions of copyright law. Therefore, the following section examines the role of national regulatory bodies related copyright governance at the Member State level. The purpose of this section is primarily to assess the role fulfilled by specialized national institutions (1.2.3.1), and to gauge the impact of differences in institutional and regulatory arrangements among Member States' copyright regulators (1.2.3.2). This will be accomplished through the analysis of specific "cases" to provide the necessary context for the assessment.

1.2.3.1 Specialized Regulatory Bodies: ISP Liability Regimes and HADOPI

There have been few attempts by the EU to set uniform standards of governance among Member States. Significant differences in national rules, differences in national legal traditions, and diversity in the forms of institutional regulators upholding those rules, pose a clear initial problem for the EU legislator in terms of how far its efforts can reach in standardizing Member State practices. Yet, in passing tasks onto the national legislator, and then leaving these issues to the interpretation of national courts, this approach still does not address the larger objective of creating uniformity in enforcement – an objective which is made more pressing in relation to digital copyright.

In the case of Article 8 of the InfoSoc Directive and Article 11 of the Enforcement Directive, related to the responsibilities of Internet Service Providers (ISPs) to provide means of enforcement for rightholders, these provisions resulted in a widely varying institutional response from Member States.[207] While the Enforcement Directive was specific in providing for a "right of information" that may be enforced by a competent judicial authority, the

[207] 'Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights' (2004) OJ L 157 45–86 [Enforcement Directive]

procedural and situational bases for applying this general "right" were not detailed.[208] As such, complex regulatory issues such as setting procedures for notice and takedown obligations on host and storage providers, establishing ISP obligations relating to personal data disclosure of infringers, and setting thresholds for infringement which justify the use of technical protection measures, are all strictly within Member States' discretion. This generated a series of cases raised in national courts, and manifested into multiple requests by national courts for preliminary rulings from the CJEU, to clarify how to approach balancing the interests and liabilities of stakeholders in specific situations.[209] The CJEU ultimately provided little additional guidance on this front, demonstrating a theme of judicial restraint in articulating how exactly liability regimes should be constructed. The Court reflects further that such contentious issues might better be represented and resolved by the national legislator, leaving Member State approaches not only fragmented, but lacking a centralizing and consistent regulatory objective.[210]

It has therefore been the exclusive task of Member States to devise appropriate regulatory arrangements and enforcement schemes to deal with the increasingly regulatory character of digital copyright issues. In response, some Member States opted to create new institutional actors to cope with the challenges of monitoring and enforcing infringing conduct. The resulting "new dynamic of institution building" placed nationally-appointed regulators in intermediary positions to be able to successfully mediate between stakeholders, and therefore encourage more balanced outcomes.[211] This approach was especially effective in representing user interests which might have otherwise been lost in the courts or in the law

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[208] Ibid Art. 8.

[209] E.g., Case C-275/06, Productores de Música de España (Promusicae) v Telefónica de España SAU [2006] ECLI:EU:C:2008:54 [Promusicae]. For a full discussion on the CJEU caselaw in this area, see Martin Husovec, *Injunctions against Intermediaries in the European Union: Accountable but Not Liable?* (Cambridge University Press 2017)

[210] Ibid. In a subsequent case relating to the infringement of a trademark, *Coty Germany*, it has been interpreted that the Court imposes a positive obligation on Member States to protect intellectual property rights as a right of property according to the Charter. Martin Husovec, 'Intellectual Property Rights and Integration by Conflict: The Past, Present and Future' (2016) 18 Cambridge Yearbook of European Legal Studies 239-69 (citing Case C-230/16, Coty Germany [2017] ECLI:EU:C:2017:941). It is cautioned that *Coty Germany* relates to the *right of remedy* for the violation of a property right, and not a general "right to control a particular form of use of the protected form." Its implications in the realm of copyright are still therefore unclear. See Jonathan Griffiths, 'Taking power tools to the acquis -- The Court of Justice, The Charter of Fundamental Rights and European Union Copyright Law' in C. Geiger, C.A. Nard and X. Seuba (eds), *Intellectual Property and the Judiciary* (Edward Elgar Publishing Limited 2018). For further discussion, see generally, Husovec, *Injunctions against Intermediaries in the European Union: Accountable but Not Liable?* .

[211] Bakardjieva Engelbrekt, 'Designing Institutions for Multi-level Copyright Governance in the EU and Beyond', 184

making process.[212] Importantly, as identified by AG Kolkott in *Promusicae,* "[i]nvolving state authorities is more lenient because, unlike private individuals, they are directly bound by fundamental rights. In particular, they must respect procedural safeguards. Moreover, they invariably also take into consideration circumstances which exonerate the user accused of an infringement of copyright."[213] This reasoning explains the responses of Member States, which brings attention to institutional solutions that emerged at the national level. Jurisdictions such as France took a strong proactive position by establishing a new institutional body tasked with the development and implementation of the "graduated response" regulatory regime, HADOPI.

Concisely, "graduated response" regulatory regimes enable rightholders to monitor online activity to detect infringements of their content, in which case a notice is sent to the alleged infringer.[214] In the French implementation, a "three-strike" rule was put in place which raises punishment after three successive notices.[215] The punishments can range from suspending internet connection for a certain period of time, setting fines, or resorting to court recourse. Because of its similarities to the typical scenario of rightholders exhausting alternatives before pursuing litigation, the "three-strike" rule seems to "institutionalize" the practice.[216]

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[212] Ibid ("…due to the limited character of the judicial process, the interests of those most seriously affected by the requested measures, namely the interest of users, are not represented….for end users, who are only weakly involved in the process of European law making, often the first encounter with the enacted European legislation takes place only after the Directive has reached the stage of national implementation. It is then that broad majoritarian interests of Internet users get politically mobilized…")

[213] Opinion of AG Kolkott, Case C-275/06 – Promusicae [2007] ECLI:EU:C:2007:454

[214] The controversial draft agreement ACTA also focused on a "graduated response" type regulatory regime. Anti-Counterfeiting Trade Agreement (ACTA), Consolidated Text Prepared for Public Release, Apr. 2010. For related comment, see, Annemarie Bridy, 'ACTA and the Specter of Graduated Response' <https://ssrn.com/abstract=1619006>. For related discussion on the graduated response regime in France, see Christophe Geiger, 'Challenges for the enforcement of copyright in the online world: Time for a new approach' in P. Torremans (ed), *Research Handbook on the Cross-Border Enforcement of Intellectual Property* (Edward Elgar, 2014); Christophe Geiger, 'Counterfeiting and the Music Industry: Towards a Criminalization of End Users? The French 'HADOPI' Example' in Christophe Geiger (ed), *Criminal Enforcement of Intellectual Property: A Handbook on Contemporary Research* (Edward Elgar 2012). Generally, see Peter K. Yu, 'The Graduated Response' (2010) 62 Florida Law Review 1373-430.

[215] The "three-strike" rule originates from the model proposed in the "Report Olivennes," commissioned by the government of France. Denis Olivennes, 'Le developpement et la protection des oeuvres culturelles sur les nouveaux reseaux novembre, Rapport au ministre de la culture et de la communication, 2007)

[216] Thierry Rayna and Laura Barbier, 'Fighting consumer piracy with graduated response: An evaluation of the French and British implementations' (2010) 6 Int J Foresight and Innovation Policy 294-314

In 2007, the French government concluded a multi-stakeholder agreement with cultural industries which served as the first step towards implementing the graduated response regime to online infringement.[217] With the passage of two statutes "HADOPI 1" and "HADOPI 2," the regulatory regime was formalized into national law, with HADOPI 1 laying the groundwork for a new public authority to assist in enforcement.[218] The High Authority for the Diffusion of Creative Works and Copyright Protection on the Internet (Haute autorité pour la diffusion des oeuvres et la protection des droits sur internet) was consequently formed as an independent regulatory authority focusing on issues of online copyright enforcement. While designed to be independent, it is still state-funded and subject to governmental and parliamentary oversight: "[i]t has to annually report on its work, its budget, and the compliance of obligations by right holders and ISPs. Its work is governed by principles of public access and transparency."[219] Initially, the goal of the HADOPI was to both legalize a "right to monitor" user activity for rightholders, and to automate certain processes in identifying infringers and enforcing repercussions which could avoid expensive or lengthy litigation in national courts.[220] In addition to functions relating to enforcement, the agency's mandate included monitoring technical protection measures, partly assuming the responsibilities of another (briefly-formed) regulator, the Authority on Regulation of Technological Measures (L'Autorité de régulation des mesures techniques, ARTM).[221] Overall, the mandate of HADOPI is "deliberately broadly-defined to give the agency an

[217] The "Élysée Agreement" was signed between the French Government and representatives of roughly 40 main stakeholders, notably from the creative industries (audiovisual, cinema and music right holders and television broadcasters) and ISPs. Although this agreement represented an unprecedented multi-stakeholder pact, two main Internet access providers, Orange and Free, later revoked their support, and consumer associations were strongly against the enforcement of a "three-strikes" regime. See Bakardjieva Engelbrekt, 'Designing Institutions for Multi-level Copyright Governance in the EU and Beyond', (citing 'The "Élysée Agreement" for the development and protection of creative works and cultural programmes on the new networks,' 23 November 2007). See also, Trisha Meyer, 'Graduated Response in France: The Clash of Copyright and the Internet' (2012) 2 Journal of Information Policy 107-27 115; Rebecca Giblin, 'Evaluating Graduated Response' (2013) 37 Colum JL & Arts 147

[218] French National Assembly and Senate, LOI n° 2009-669 du 12 juin 2009 favorisant la diffusion et la protection de la création sur internet (HADOPI 1); French National Assembly and Senate, LOI n° 2009-1311 du 28 octobre 2009 relative à la protection pénale de la propriété littéraire et artistique sur internet (HADOPI 2). These provisions were followed by numerous implementation decrees.

[219] Bakardjieva Engelbrekt, 'Designing Institutions for Multi-level Copyright Governance in the EU and Beyond',

[220] Ibid

[221] Ibid (citing Article L331-13 CPI).

image of a neutral guardian of copyright as a tool of both protecting right holders revenues and ensuring public access."[222]

Importantly, as detailed by Meyer, the French Constitutional Council in its decision to establish HADOPI as a regulatory authority prioritized "free communication of thoughts and opinions," which it considered akin to human rights.[223] It goes further by stating that, "'in the current state of communication means and in view of the general development of online public communication services as well as the importance of these services for the participation in democratic life and the expression of ideas and opinions, this right [free communication of thoughts and opinions] implies the freedom to access these [Internet] services.'"[224] As such, the Council deemed unconstitutional what it considered several overreaching aspects of the original HADOPI 1 mandate which allowed it to unilaterally terminate or suspend Internet access of users without proper judicial recourse.[225] HADOPI II therefore included the appropriate judicial sanctions which incorporated an accelerated judicial procedure, likened to the procedures for appealing a parking ticket.[226] Consequently, HADOPI II "transform[ed] digital piracy from an administrative offence to a criminal one."[227]

Since the HADOPI is state-funded, its efficacy has been highly scrutinized. The mixed results of the "three strikes" regime on combatting piracy sparked political discussions as to the future role of the agency. In 2013, HADOPI was faced with criticisms against its efficacy in deterring piracy with the release of the "Lescure Report," a 500 page document which advocated for the scaling down of penalties and the elimination of the internet suspension remedy, among other suggestions.[228] Notably, the report advocated for a transfer of HADOPI's powers to the Higher Audiovisual Council (CSA), the French broadcasting regulator. However, this transfer of powers did not come to pass. HADOPI is still currently fulfilling its original mission, which has turned recently to forms of infringement occurring

[222] Ibid 180
[223] Ibid
[224] Meyer, Graduated Response in France
[225] Ibid ("The French Constitutional Council … concluded that the Internet was too important for participation in democratic life and freedom of expression to cut off without the involvement of a judge.")
[226] Rayna and Barbier, Fighting consumer piracy with graduated response: An evaluation of the French and British implementations
[227] Nicola Lucchi, 'Regulation and Control of Communication: The French Online Copyright Infringement Law (HADOPI)' Max Planck Institute for Intellectual Property and Competition Law Research Paper No 11-07
[228] Pierre Lescure.
<https://www.culture.gouv.fr/var/culture/storage/culture_mag/rapport_lescure/files/docs/all.pdf>.

over streaming and the use of mirror-sites.[229] In furtherance of its continued mission to regulate in this area, the Ministry of Culture approved its funding in 2019.[230] It seems that the case for a specialized regulatory authority in this area remains a strong one.

1.2.3.2 Institutional Diversity: The CRM Directive and "National Competent Authorities"

The recent example of the passage of the 2014 CRM Directive presents a rare case for examining the efficacy of coordinated national approaches to Member State institutional governance schemes as related to copyright-relevant legal issues. In the CRM Directive, in addition to the substantive law provisions, the legislation specifically calls for a coordinated form of CMO governance by directing Member States to recognize "national competent authorities" to undertake certain supervisory and enforcement tasks.[231] This measure was adopted in addition to the recognition that internal CMO governance was not sufficiently harmonized among Member States, and therefore required that external supervisory mechanisms also become a part of the overall reform package of CMO governance. The idea of appointing a national "competent authority" is not a new concept. In other sectors, such as the EU market for securities, the agency ESMA (European Securities and Markets Authority) identifies that, "Member States have an obligation to designate competent authorities under most of EU directives and regulations and to notify them to the European Commission and, where these acts fall under ESMA's remit, also to ESMA."[232] Distributing supervisory competences between Member States can also be observed in other copyright-relevant

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[229] HADOPI. <https://www.hadopi.fr/english-version>.
[230] Julien Lausson, 'Pending reform, Hadopi will be entitled to 9 million euros in 2019' 2018) accessed 2020 <https://www.numerama.com/politique/421980-en-attendant-sa-reforme-la-hadopi-aura-droit-a-9-millions-deuros-en-2019.html>
[231] Register of Commission Expert Groups and Similar Entities. <https://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetail&groupID=3634>.
[232] ESMA, "National Competent Authorities" <https://www.esma.europa.eu/rules-databases-library/eu-acts-and-national-competent-authorities>. ("In order to promote supervisory convergence ESMA has the power to issue guidelines (Article 16ESMA Regulation 1095/2010) which are addressed to competent authorities or, as the case may be, to market participants. In the context of developing the guidelines ESMA will, where appropriate, conduct open public consultation. ESMA is entitled to receive information from competent authorities or, as the case may be, from market participants whether they comply with the guidelines and to publish the reasons of supervisory authorities' non-compliance."). ESMA, "Technical Standards" <https://www.esma.europa.eu/convergence/guidelines-and-technical-standards>.The idea of an agency actor facilitating coordination of competent authorities will be returned to at the end of this section.

directives such as the Audiovisual Media Services Directive 2010/13 and the Services Directive 2006/123/EC.[233]

At first glance, the provisions related to the appointment of a competent authority in the CRM Directive are broad in granting Member States a wide level of discretion in terms of appointing a regulator. While Member States are not compelled to form a new body, they are tasked with appointing a regulator that already has certain competencies relating to the ability to compel information and impose sanctions.[234] Regulators are also responsible for cooperating with other competent authorities, the Commission, and stakeholders in the future development of the multi-territorial licensing scheme.[235]

As identified by Bakardjieva Engelbrekt, there are several inherent complications in the designation of a body that can be recognized as "competent" for the purposes of the Directive.[236] For example, a judicial or quasi-judicial authority may be equipped to deal with the types of disputes in question, but would be ill-suited for the types of information-gathering and disclosure obligations which are also envisioned for a "competent authority" to undertake under the Directive. This impression is reinforced by the observation that,

> While the Directive does not itself prescribe the sanctions and measures for ensuring compliance (see Article 35(3) Directive), Recital 50 gives some examples of measures which should be at the disposal of the authority, such as orders to dismiss directors who have acted negligently, inspections at the premises of a CMO, withdrawal of authorisation (in case such is required). All of the above examples suggest that a purely self-regulatory body, or a judicial body, would not fulfil the Directive's requirement.[237]

This can pose specific issues in some jurisdictions. In France, for example, it can be observed that public supervision of CMOs is dispersed among several different regulatory authorities, presenting a challenge in terms of allocating responsibilities to a single institution, as anticipated by the Directive. While the French Ministry of Culture may be able to compel the disclosure of information, handle foreign informational requests, and initiate judicial proceedings against non-compliant CMOs, the CRC SPRD (Commission permanente de

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[233] Antonina Bakardjieva Engelbrekt, 'Toward Network Governance of Collective Management Organisations in Europe: The Problem of Institutional Diversity' in Jan Rosén (ed), *Liber Amicorum* (2016)
[234] CRM Directive 2014, Art. 36-37.
[235] Ibid, Art. 38.
[236] For analysis of this specific issue in relation to the legislative approaches of France, Germany, and the UK, see Bakardjieva Engelbrekt, 'Toward Network Governance of Collective Management Organisations in Europe: The Problem of Institutional Diversity',
[237] Ibid

contrôle sociétés de perception et de répartition des droits) is specifically mandated to exercise ad hoc control over the finances and economic activities of French collecting societies.[238] Yet another candidate for such duties could be HADOPI, discussed earlier, which operates on a broad mandate to regulate in relation to digital copyright related issues. This is perhaps a reason why a regulator has not been designated as of this writing (see Fig. 1, below).

Furthermore, a special, or highly deferential, relationship may exist between the CMOs and national competent authorities. This could potentially diminish the latter's ability (or rather, inclination) to conduct thorough audits or impose sanctions. In some of the Nordic countries, it is pointed out that there is a deferential standard in place towards the tariff-setting practices of CMOs, allowing them to largely self-regulate.[239] While this may not necessarily be problematic, it does create the risk of underregulation in certain Member States where the Directive envisions a stricter standard of oversight to be applied Union-wide.

In addition, at its worst CMO oversight conducted by a national authority may be ineffective if the national authority lacks the requisite objectivity towards the national CMO. In a study conducted by Jiang and Gervais, the regulatory model for CMOs in China, which is similarly based on permanent CMO oversight by a national competent authority, was determined ineffective for this reason.[240] Specifically, the credibility of the competent authority to make independent decisions was questioned, as it was observed that a "special relationship" existed between CMOs and the authority: "CMOs are seen as being 'affiliated' with such authorities, which tend to protect them rather than prevent abuses from happening."[241] As such, Jiang and Gervais argue that a "credible specialized regulatory body with adjudicative powers" would be more effective in both regulating CMO conduct and making decisions that take into account public interests.[242]

[238] Ibid (citing L.321-13 au CPI [2000]).
[239] Ibid
[240] Fuxiao Jiang and Daniel Gervais, 'Collective Management Organizations in China: Practice, Problems and Possible Solutions' (2012) 15 The Journal of World Intellectual Property 221-37
[241] Ibid (internal cite omitted).
[242] Ibid. Interestingly, the proposed model for such a specialized regulator is based on the model of the Copyright Board of Canada: "This model requires the appointment of independent judges or commissioners, with a specialized staff of lawyers and economists. The specialized body may oversee various operations, from the establishment of CMOs to their annual reports, audit of operations and rate-setting. A good model to consider might be the Copyright Board of Canada."

Member State	Competent Authority
Austria	Supervisory Authority for Collective Management Organisations (Aufsichtsbehörde für Verwertungsgesellschaften)
Belgium	Service de contrôle des sociétés de gestion du droit d'auteur et des droits voisins (SPF Economie)
Bulgaria	
Cyprus	Copyright and Related Rights Authority
Czech Republic	Ministry of Culture
Germany	Deutsches Patent- und Markenamt (German Patent and Trademark Office)
Denmark	Ministry of Culture
Estonia	Ministry of Justice
Greece	Hellenic Copyright Organisation
Spain	Deputy General Directorate for Intellectual Property (Ministry of Education, Culture and Sports)
Finland	Patent and Registration Office
France	
Croatia	State Intellectual Property Office
Hungary	Hungarian Intellectual Property Office (Szellemi Tulajdon Nemzeti Hivatala)
Ireland	Controller of Patents, Trademarks and Industrial Designs
Italy	AGCOM
Lithuania	Ministry of Culture
Luxembourg	
Latvia	Ministry of Culture
Malta	Copyright Board
Netherlands	College van Toezicht Auteurs – en naburige rechten (CvTA)
Poland	Ministry of Culture (Ministerstwo Kultury i Dziedzictwa Narodowego, Departament Własności Intelektualnej i Mediów)
Portugal	
Romania	Romanian Copyright Office (ORDA)
Sweden	Swedish Patent and Registration Office (Patent- och registreringsverket)
Slovenia	Slovenian Intellectual Property Office (Urad Republike Slovenije za intelektualno lastnino)
Slovakia	Ministry of Culture

Figure 1 Source: European Commission [Last updated: February 2020]. https://ec.europa.eu/digital-single-market/en/news/publication-collective-management-organisations-competent%20authorities-collective-rights-management-directive

Returning to the state of affairs in the EU, the above chart is taken from the European Commission's website and demonstrates the institutional diversity of authorities designated by Member States. In some jurisdictions, the Ministry of Culture is tasked with oversight of CMOs under the CRM Directive, whereas in others the Patent and Trademark Offices are appointed. It is unclear what the effects of this institutional diversity will be in the long run, but it could foreseeably complicate the envisioned "network of governance" under the Directive. As Bakardjieva Engelbrekt also observes,

> [g]iven that CMOs are expected to act freely across borders and to provide services to right holders and users in all EU Member States, the monitoring can only be effective if it builds on a tightly-knit mesh of supervisory bodies, acting in close cooperation. For national competent authorities to be part of this intra-European supervisory network implies acting with responsibility for the effectiveness and integrity of collective copyright management in the whole Union.[243]

[243] Bakardjieva Engelbrekt, 'Toward Network Governance of Collective Management Organisations in Europe: The Problem of Institutional Diversity',

This point underscores the necessary link between establishing a sufficient level of Member State cooperation and the overall success of the proposed model of EU-wide enforcement of CMO multi-territorial online licensing practices.

Therefore, for the envisioned governance structure to work properly, some convergence among Member State institutional approaches to CRM oversight is warranted. Though subsidiarity principles militate against restricting Member States' regulatory autonomy, perhaps the intrinsic constraints in the CRM Directive's requirements for a competent authority (e.g., having the ability to mete out sanctions, the power to compel disclosure of information) may "organically" lead to more convergence in institutional design among Member States. At the very least, any authority appointed at the Member State level that lacks a necessary competency under the Directive will likely gain it to properly comply with the minimum standards. The timeline of this type of institutional adaptation will most likely depend on the threat of sanctions, which would need to be sufficiently imminent to compel Member States to comply. The CRM Directive is currently in its initial assessment stages post-implementation, which should verify the true effectiveness of the Commission's envisioned regulatory arrangement.[244] While the results of the study are pending, it can nevertheless be observed that Member States already adopt varying approaches to CRM oversight due to the diversity of its appointed competent authorities, and it can be reasonably inferred from this fact that these differences can create some level of policy dissonance between Member States.

In a broader sense, envisioning more coordination between Member State regulatory practices in the copyright sector in general would, in the long-run, seem beneficial for many reasons, not least of which to produce a more definitive and comprehensive assessment of the successes and pitfalls of multi-territorial online licensing practices in the EU market. To this end, in the CRM Directive the Commission has a role in coordinating the national competent authorities, but this role is notably a limited one. Part of the governance scheme envisioned in the CRM Directive involves the creation of an expert group within the Commission, specifically to,

> "(a) to examine the impact of the transposition of [the] Directive…and independent management entities in the internal market, and to highlight any difficulties;

[244] Oleksandr Bulayenko and others, Emerging Issues on Collective Licensing Practices: Final Report (2021))

> (b) to organise consultations on all questions arising from the application of this Directive;
>
> (c) to facilitate the exchange of information on relevant developments in legislation and case-law, as well as relevant economic, social, cultural and technological developments, especially in relation to the digital market in works and other subject-matter."[245]

With this taken into account, the degree of intervention that the Commission may use in the regulatory cycle is rather limited. According to Article 38 of the Directive, the Commission will assume a "steering" role in coordinating the information submitted by competent authorities in the development and monitoring of online multi-territorial licensing practices, and will further engage with relevant stakeholder groups such as CMOs, users, and rightholder representative groups.[246] However, this relatively restrained role for the Commission may not be enough to ensure coordination among such a wide variety of national approaches.

To ensure Member State compliance and facilitate the implementation of the CRM Directive at the national and supranational levels, perhaps a separate, specialized authority in the form of an EU level regulatory actor may be useful. Having a separate EU level authority tasked with coordinating national-level actors can help to converge national regulatory approaches over the long term, as well as ensure accountability over the competent authorities themselves as they promote an EU-wide regulatory objective. Such an actor would ideally be independent (i.e., an agency) and specialized enough to appreciate both the differences in national approaches, as well as accurately assess the efficacy of Member State regulatory efforts. This proposal is further discussed in the final sections of the thesis (Policy Options).

2. THE MARKET

In this next Section, the market for creative goods will be discussed. Although it is more difficult to define a specific institution tasked with regulating the market as a whole, there are several important institutional actors who contribute to the overall regulation of the EU market for creative goods, each equipped with their own motivations and their own institutional mandates. These institutional mandates, as argued below, may at times limit their ability to regulate in this arena effectively.

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[245] Art. 41, CRM Directive. See also, Ibid; Register of Commission Expert Groups and Similar Entities.
<https://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetail&groupID=3634>.

[246] Art. 38, CRM Directive.

2.1 Regulating the Market: Competition and IP

The market can be viewed conceptually as a process of stakeholder participation, by which societal outcomes result from an aggregate number of transactions.[247] Participation in the market process is determined by parties transacting (or not), with each transaction having some effect on the marketplace, and more indirectly, on society.[248] This type of participation is in some ways analogous to voting or lobbying in the political process, where transactions serve as the indicators of collective preferences. Unlike the political process, however, individuals are not necessarily concerned with the aggregate social effect of their transactions.[249] This itself may be enough to argue for at least some level of market regulation, as too many exploitative behaviours on behalf of individual actors in the marketplace can potentially skew the overall distribution of wealth among the most powerful individuals, and reduce the amount of opportunities available to others.

When under the scrutiny of decisionmaking institutions, determining the overall "efficiency" of the marketplace (in terms of, e.g., the amount and quality of the transactions that take place) may motivate a choice between government or judicial intervention, or simply leaving the market to achieve efficient outcome through its own devices. Poor market efficiency can be evidenced by abuse of a dominant position or market concentration, which may indicate that governmental regulation or sanctions are required to deter or punish such behaviour. By contrast, an "optimal" or efficient outcome in economic terms can mean several different things, and can be promoted or safeguarded by the decisionmaking institutions to varying degrees. Optimal market-based outcomes, such as attaining a consumers' surplus, producers' surplus, total surplus or attaining overall social welfare can be articulated by political actors or courts as a means to justify taking a particular regulatory approach or permitting a certain practice.[250] There are also a number of theories which help to further specify the conditions necessary to achieve an optimal outcome, e.g., by aiming for a "Pareto-efficient" outcome which specifically centres on an optimal allocation of resources (and thereby achieving overall social welfare).[251]

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[247] Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy* 98
[248] This perspective generally reflects microeconomic theory.
[249] One basic theory that underpins this conception is the "rational choice" theory of market participation, which is premised on actors behaving in ways that are individually advantageous.
[250] Tuomas Mylly, *Intellectual Property and European Economic Constitutional Law: The Trouble with Private Informational Power* (Publications of IPR University Center 4 2009) 408
[251] If the economy is "pareto-efficient," the allocation of resources is optimized, meaning that no resources could be reallocated which would make any individual better or worse off.

In practice, competition laws rarely articulate the economic theory that underpins the adopted regulatory approach, which often leads to the impression that there is a lack of consistent theory in the application of efficiency reasoning at the highest policy levels. In the EU this seems to have been the case over the years with regards to CMO regulation. Examining historical perspectives on the development of the market regulations in the EU, namely through the lens of competition policy, can perhaps begin to shed some light on how the EU political actors have perceived efficiency over time (2.1.1). This can later serve as the basis for forming the general picture of the regulation of copyrighted goods by various actors participating in the market, particularly with regards to the activities of CMOs (2.2).

As an aside on the current institutional organization of competition regulators in the EU, at the EU level there is no self-standing competition authority.[252] Instead, the Commission, as the executive body responsible for the application of EU law, can bring actions as necessary, and can also remove cases from a national competition agency to be decided at the EU level.[253] The CJEU also plays a significant role in competition cases brought before it by the Commission, and Parliament has been known to weigh in on the decisionmaking on occasion. Otherwise, the role of national competition authorities remains rather significant in the EU.

The enforcement of EU competition rules among national competition authorities is unique in that it is facilitated through a "European Competition Network," consisting of national competition authorities which are empowered to enforce both national competition laws and EU antitrust rules.[254] Under a non-binding notice, the general rule is that the Commission will intervene and assume jurisdiction in matters involving more than three jurisdictions.[255] The interesting structure and functioning of the ECN, and its relationship with the Commission, will be revisited in the context of proposing new potential institutional arrangements for EU copyright regulation in Part III. For now, the role of the Commission,

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[252] Yannis Karagiannis, 'Why the EU does not have an independent competition agency: French Interests and Transaction Costs in Early European Integration' (*Barcelona,* 2008)
[253] Imelda Maher, 'The Networked (Agency) Regulation of Competition' in Peter Drahos (ed), *Regulatory Theory: Foundations and Applications* (ANU Press 2017)
[254]'Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty' (2003) OJ L 1 . See also, European Commission. "Competition > Overview" https://ec.europa.eu/competition/general/overview_en.html>. ("The Commission is often well placed to pursue…trans-EU cases. The Commission has the power not only to investigate but also to take binding decisions and impose substantial fines.")
[255] Commission Notice on cooperation within the Network of Competition Authorities, OJ C 101, 27 April 2004.

and its historical justifications in the area of competition regulation, will be of particular interest for the ensuing discussion.

2.1.1 The Aims of EU Competition Law and Market Regulation

According to Maher, speaking of the "regulation of competition" is somewhat contradictory, as regulation and competition are "classically viewed as alternatives or opposites."[256] Whereas a competitive market is supported through *limiting* restraints on behavior, regulation is often viewed as controlling, ordering or influencing conduct through, *e.g.*, setting standards or monitoring compliance with rules.[257] Nevertheless, supporting a well-functioning competitive market has historically entailed some level of regulation. To ensure that the market continues to function as intended, competition laws have generally served to establish the outermost boundaries of the freedom of parties to enter into agreements with each other, demarcated only at the point where competition is likely to be impeded.

Essentially, competition law is implemented as a very specialized regulatory tool. In a competition-centred regulatory regime, high thresholds of anti-competitive action (or inaction) should be reached before state intervention can be justified. One key underlying theory of competition-centred regulatory regimes is that (rational) actors within the market should be able to freely compete with one another and, in so doing, generate optimal arrangements. Behaviors that are perceived as anti-competitive, i.e., activities that create unfair advantages or barriers in what is supposed to be a "level playing field," are the only instances in which the state will actively work to "correct" such behavior to ensure that no one firm or group of stakeholders receives preferential treatment.

The development of early competition policy in the European Economic Community (EEC) was influenced in large part by practical needs in developing a functioning cross-border market between state actors. Namely, regulation centred on preventing the use of private trade barriers between countries, in efforts to establish an open and functioning "internal market" for trade.[258] This was reflected in part through the CJEU's early interpretations of Treaty competition rules, citing general market integration as a goal "rather than the protection of the competitive process as such."[259]

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[256] Maher, 'The Networked (Agency) Regulation of Competition', 693
[257] Ibid
[258] Mylly, *Intellectual Property and European Economic Constitutional Law: The Trouble with Private Informational Power* 428
[259] Ibid

Early EEC competition policy likewise drew from the influence of German competition law, which emphasized competition as an essential element for attaining overall economic welfare, and therefore, economic freedom.[260] Particularly, the architects of German competition policy were concerned with the ability of an unregulated market to fulfil social security and social justice goals.[261] The concentration of private power was a phenomenon that they believed could not be dealt with by the market alone.[262] By the same token, excessive governmental interventions into the market was also viewed as undesirable to achieve a true sense of economic freedom. Fundamentally, in their view, competition law should respond not only to economic needs *per se,* but should acknowledge the impact of economics within political and social contexts.[263] A desirable economic system therefore required the formation of a strong set of rules, and institutions empowered to enforce those rules.[264] As such, the perception of competition was not as a naturalistic process, but as a blend of economic and institutional influences to produce optimal social outcomes.[265]

Though EU competition laws of today found its early inspiration from this strand of theory, over time it has been observed that conceptions of the role of competition regulation have been adapted from U.S. practices, particularly the Chicago School of welfare economics.[266] EU competition policy thus notably diverges from its initial approach to adopt a much more market-liberalizing stance in modern times. Particularly, under Art. 101 TFEU, aside from enforcing explicit prohibitions against certain types of conduct, the Commission is believed to be more likely to permit agreements executed by a dominant entity that was acting in a pro-competitive manner, targeting only those agreements which place “actual constraints” on competition.[267] In qualifying conduct as an actual constraint on competition, the Commission centres its assessment on a “market-oriented and effects-based” evaluation. Simply put, agreements are assessed by their restrictive effect in a specific market, and as long as they can be viewed as “pro-competitive,” those agreements may be allowed.[268]

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[260] Ibid 414
[261] This group was known as the German “ordoliberals.” Ibid
[262] Ibid 47
[263] Ibid
[264] Ibid
[265] Ibid
[266] On the interplay of these two schools of thought in the context of the development of EU competition policy, see ibid 417-26
[267] For a more detailed discussion on this standard, see Josef Drexl, 'Is there a 'more economic approach' to intellectual property and competition law?' in J. Drexl (ed), *Research Handbook on Intellectual Property and Competition Law* (Edward Elgar Publishing, Incorporated 2010) 29
[268] Ibid

2.1.2 The Compatibility of EU Competition Law Objectives and IP

It should first be acknowledged that the market for IP goods can be differentiated from the market for other types of goods. Generally speaking, as opposed to other types of property, IP rights exist foremost as rights to exclude, and the exercise of this right can actually restrict others from exercising their freedoms (i.e., by restricting access or preventing creative reuses). Moreover, producing "innovative" outputs – unique or high quality outputs – may be just as important, if not more important, of a benchmark than the sheer quantity of creative goods that a society is able to produce.[269]

With further respect to copyright in relation to other IP rights, defining "innovation" is not a straightforward task. Unlike patents or trademarks, which require registration and therefore encounter some level of an "innovativeness" threshold prior to the grant of protection, creative works have a very minimal threshold, and rights automatically vest in the work. As a further consequence of registration, while the volume of registered patents and trademarks can serve as an indicator of the innovative capacity of a country, for creative works it is much more difficult to 1) understand how many creative works are generated at any given time, and 2) judge what the value of these works are. From a cultural welfare perspective, a rich and varied selection of creative works is highly valued by society, but this is not necessarily reflected in standard economic arrangements: one does not necessarily pay more to listen to one song over another, for example.[270] With these differences in mind, the complexities inherent in regulating a creative market begin to emerge.

Turning now to the link between EU competition policy and IP regulation, in the early days of the EC, IP laws were only regulated to a limited extent through EC Treaty rules regarding competition and the free movement of goods.[271] In fact, establishing effective IP rights were still considered a national priority, and was therefore chiefly left to Member States.[272] However, territorially-established IP rights were soon recognized to affect the EU internal market, proving to be an impediment to the free movement of goods in a number of cases. It was on this basis – in promoting the functioning of the internal market, as well as

[269] This distinction is captured by the "static" vs. "dynamic" efficiency debate, elaborated below.
[270] Of course, economic "signals" of value can be sent in other ways; many people may decide to buy an album or watch a movie, which eventually results in more revenues for popular works over unpopular ones.
[271] Hugenholtz, 'The European Concern with Copyright and Related Rights',
[272] Ibid

improving the competitiveness of the EU market – that the idea of establishing an EU competence in the area of IP eventually came into view.

Despite the EU's gained competences in this area, the application of EU competition laws in the regulation of creative markets has not been straightforward. A well-functioning creative market, like other markets, relies on the efficiency of the channels of distribution to connect works with consumers. Yet, objectives such as ensuring diversity of works, broad access, and even what is considered "fair remuneration," can run counter to the idea of promoting a competitive environment for creative content. For example, if mere market efficiency were the goal of regulation, the most efficient allocation of resources would be considered the "best" outcome: market actors would be incentivized to only carry those works that are most popular and most likely to generate the highest revenues, to the disadvantage of undiscovered talents or less-mainstream works.

To articulate it in a different way, while competition laws are aimed at preserving the integrity of the market by limiting anti-competitive behaviour and safeguarding against "market failure" scenarios, they are also not sector-specific: the nuances of how a "creative" market functions versus a market for other types of property, is often not captured by competition law. Differentiations in the type of organization regulated (for-profit vs. not-for-profit) are also not reflected by competition regulation in some cases, as will be demonstrated in the discussion on the regulation of CMOs. While copyright and competition laws have been generally accepted to complement one another, some tensions still exist between the exclusivity principles of copyright as a private right and the goals of competition law, the latter of which are aimed at creating a more open and freely-competitive market.[273]

Granted these challenges, there are still some opportunities to appreciate how the role of economics and economic theory can better contribute to the regulation of IP. Indeed, the aims of competition laws, when articulated properly, can help support the underlying goals of a well-functioning system of IP. Some scholars have attempted to address the unique characteristics of the creative market through economic analysis, and particularly through the lens of competition law. As contended by Kolstad, despite the potential for conflicts between the conceptions of IPRs and competition laws, achieving "dynamic competition" or "dynamic

[273] Josef Drexl, Copyright, Competition and Development, 2013)

efficiency" remains a common ground between the two regulatory regimes.[274] Drexl further develops the concept of "creative competition" in the context of collective management, modifying the use of the word "dynamic" to describe the unique type of efficiency required in the regulation of creative goods.[275] Very basically, this approach, which prioritizes the preservation of culture and the promotion of cultural diversity, would limit the ability of CMOs to discriminate against smaller or non-mainstream artists in its repertoire offerings.[276] And Mylly, in speaking of the regulation of the communications, media and broadcasting sectors, holds that "interpretive flexibility in market definition and other competition law analysis should be utilized to favor an outcome being consistent with communicative diversity."[277] Again, approaching concurrent applications of competition law and IP law principles need not be inapposite objectives, but this conclusion critically depends on how competition policy is articulated. As maintained by these scholars, in light of the current EU situation, there is still much room for improvement on this front.

2.1.3 Challenges: Regulating the Creative Market within Conventions

As mentioned in the section on EU political actors, at the EU level there is a long-established prevalence of market-oriented justifications towards regulating in the sphere of copyright. The necessity of finding a legal basis in the treaties, namely in the creation or better functioning of the internal market, has guided the overall direction and scope of copyright measures adopted by the EU legislature. The aims of the "Digital Single Market" strategy in particular, which prioritizes dismantling of the principle of territoriality to stimulate greater levels of cross-border commerce, have strongly influenced recent developments in the regulatory practices applied to the online market for creative content. While there is emphasis on the formation of a "single" market, in a well-functioning competitive environment, the market for creative goods must nevertheless allow for some forms of discrimination to occur.

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[274] Olav Kolstad, 'Competition law and intellectual property rights - outline of an economics-based approach' in J. Drexl (ed), *Research Handbook on Intellectual Property and Competition Law* (Edward Elgar Publishing 2010) 9

[275] Drexl, 'Competition in the Field of Collective Management: Preferring 'Creative Competition' to Allocative Efficiency in European Copyright Law',

[276] Ibid 274

[277] Tuomas Mylly, 'Intellectual property and competition law in the information society' in C. Geiger (ed), *Constructing European Intellectual Property: Achievements and New Perspectives* (Edward Elgar 2013) 108-9

Part of the difficulty in building a truly "single" market in the EU arises from the drafting of IP laws themselves, which are written with narrow conceptions of national IP practices and reflect a territorial scope of enforcement. It further seems to be the case that national policies do not tend to give equal consideration to cross-border and single-country scenarios when drafting legislation, nor do they seem to address relevant conflicts of laws rules, creating a situation of legal uncertainty in relation to how rights should be administered and enforced.[278] Geoblocking practices for example, which enable price discrimination between different consumers in different countries, is still a permissible practice despite its potential to create artificial barriers in the digital marketplace.[279] Many online business models subsist on the ability to target certain consumer markets at a time – predating the internet age, this was (and remains) the practice in the motion picture industry. And, on a practical level, geoblocking does make some sense: pricing which reflects differences in consumer purchasing power is perceived as an economically-optimal arrangement, providing rightholders with the ability to negotiate more directly over users' willingness and ability to pay in a certain territory with the value of the good or service. Yet this same principle can be taken to a counterproductive extreme where, in the digital environment, this practice creates legitimate barriers which restrict the use and access of content across borders. This obviously runs contrary to the objectives of the DSM strategy, and negatively affects social and cultural interests that play an essential part of the copyright system. While geoblocking practices are not necessary in all transactions or to enforce all licenses, these practices seem rooted in the limitations of negotiating rights at the national, as opposed to European, level.

What this brief discussion has demonstrated is that, essentially, important competing public interests which lie at the intersection of market-driven rationales and copyright objectives, are rarely dealt with in a comprehensive fashion through market regulation alone. In the following sections, this will be demonstrated by the EU's adopted regulation strategy towards collective management organizations (CMOs).

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[278] Marketa Trimble, 'Advancing National Copyright Policy in Transnational Context' (2015) 74 Maryland Law Review

[279] Some forms of geoblocking, i.e., those considered to have anti-competitive effects, have been addressed in CJEU caselaw and by a Regulation passed in 2018 (See Joined cases C-403/08 & C-429/08, Football Association Premiere League et al. v. QC Leisure et al. & Murphy v. Media Protection Services Ltd; Regulation 2018/302 of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC, O.J. L. 60I.).

Again, of present interest is the role of the EU institutions enforcing competition law (i.e., the Commission, CJEU) to address copyright-related issues. This relationship is well demonstrated in the regulation of collective management organizations (CMOs). After certain characteristics of CMOs are discussed, (2.2), a more specific discussion on the Commission's competition-based approach to the regulation of multi-territorial online music licensing will take place (2.3), ending with some highlights and conclusions on the limitations of the competition approach with respect to CMO regulation (2.4).

2.2 CMOs

2.2.1 The Role of CMOs in the Creative Market

It is evident that participating in the market for creative goods today is not as straightforward as concluding a series of simple one-on-one, one-off transactions. On the producing side, the ownership shares of rights in many creative goods can be split between many different actors, and these shares can change over time.[280] This makes pricing creative goods "notoriously difficult," and leaves room for error in terms of ensuring that remuneration is carried out efficiently and effectively.

On the consuming side, this complexity is furthered by the fact that commercial users may have distinctive characteristics and require licenses for certain rights and not others.[281] Commercial users, for example TV broadcasters or online content services, are especially interested in bulk licensing of specific rights, or "blanket" licensing, to reduce the amount of negotiations into a single or few transaction(s) to acquire only the necessary rights.[282] High transaction costs are inherent in licensing massive amounts of copyrighted works at a time, as difficulties locating the correct parties that are due remuneration, locating parties that are interested in licenses, negotiating licensing terms between multiple parties, and managing changes in ownership shares proves a costly and complex task. Errors can likewise result in significant legal liabilities if content is reproduced but improperly licensed. Cumulatively,

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[280] For an overview of the so-called rights "fragmentation" issue, see, e.g., Gervais, 'Collective Management of Copyright: Theory and Practice in the Digital Age', . For a current take on the rights fragmentation issue in particular and proposed legislative solutions, see, forthcoming, Lucius Klobučník, 'Innovative Models for Multi-territorial Licensing of Musical Works for Online Use: An Answer to Rights' Fragmentation Problem?', Queen Mary University of London, University of Augsburg (MIPLC) forthcoming, 2021)

[281] Christian Handke and Ruth Towse, 'Economics of Copyright Collecting Societies' (2007) 38 International Review of Intellectual Property and Competition Law 937-57

[282] Reference to "users" in this section will generally refer to commercial organizations as opposed to private, individual users/consumers. This is due to the fact that these organizations are most likely to be the "licensee" in the types of agreements managed by CMOs.

these high costs are perpetuated by the many informational gaps and licensing inconsistencies that exist in the marketplace.

To address many of these difficulties, Collective Management Organizations (CMOs) have proven to be instrumental. CMOs have long been charged with setting appropriate tariffs, negotiating licenses, collecting royalty payments, and redistributing collections to rightholders and publishers. CMO licensing capabilities are centred around the offer of a "repertoire," or an aggregation of many rights entrusted to the CMO by rightholders and publishers on a voluntary or compulsory basis.[283] These rights are then typically licensed altogether in a "blanket license," which is offered to users as a solution to the individual licensing dilemma. The collective nature of this type of licensing is emblematic of CMOs, allowing authors to leverage the power of a repertoire offering to negotiate on more equal footing with institutional users.[284] Royalties from the administration of these licenses are then collected and redistributed to rightholders, either those directly represented by the CMO, or by another CMO via agreement. In addition to these main activities, the role of CMOs has evolved over time to encompass additional functions such as monitoring copyright compliance and engaging in social and cultural efforts.[285] Altogether, CMOs are uniquely positioned as both the "champions of the rights of their members" by recognizing the value of administering rights from a human rights or natural rights standpoint, and as businesses tasked with ensuring the "economic livelihood of many an author."[286]

Structurally, CMOs take on many different organizational forms, whether charitable, for profit, not for profit, corporate, private or government-mandated. National legislation may define the appropriate form and functions of CMOs, and their establishment is often approved by a state authority. Depending on the country, there may be either strict or *de minimis*

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[283] CMOs typically not entitled to license or clear the rights for unrepresented rightholders, or rightholders that are not represented by an affiliated society through agreement. In some Nordic countries, the practice of "extended collective licensing" enables CMOs to administer the rights of non-member rightholders through a combination of collective agreement and a statutory legal provision which allows the collective agreement to have a unique "extended" effect on non-parties. See, e.g., Thomas Riis, Ole Andreas Rognstad and Jens Schovsbo, 'Collective Agreements for the Clearance of Copyrights – The Case of Collective Management and Extended Collective Licenses' in Thomas Riis (ed), *User Generated Law: Re-Constructing Intellectual Property Law in a Knowledge Society* (Edward Elgar 2016)
[284] Gervais, 'Collective Management of Copyright: Theory and Practice in the Digital Age', 5
[285] Ibid
[286] Ibid 15

government supervision over CMO activities.[287] In some jurisdictions, such as in the Nordic countries, CMOs are granted a highly deferential status and its authority is subjected to few oversight measures.[288] In contrast, Germany, for example, has traditionally maintained very detailed and strict public regulation of CMO activity.[289] To address some of these differences in CMO oversight, the 2014 CRM Directive includes provisions regarding transparency obligations of CMOs, as well as assigning other governmental tasks to contribute more uniformity in the regulation of CMO activities in the EU.[290] In the Directive, CMOs are defined as not-for-profit organizations which are owned or controlled by its members.[291] CMO "membership" consists of rightholders and publishers, and it is generally acknowledged that CMOs advocate for the positions of creators and authors in their policy agendas.

Member States of the EU each have their own national CMOs which administer the rights entrusted to it by rightholders and publishers. There is often more than one CMO in a Member State tasked with the licensing and management of only certain categories or groups of rights.[292] With the exception of the US, these organizations typically maintain either *de jure* or *de facto* monopoly status in the territory that they operate in part due to the territorial nature of the copyright laws that underlie the licenses they administer.

National CMOs do not operate in a vacuum, however, and are interconnected due to the presence of international agreements and rights management agreements between "sister societies." These agreements are known as "reciprocal representation agreements" (RRAs),

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[287] L. Guibault and Stef van Gompel, 'Collective Management in the European Union' in Daniel J. Gervais (ed), *Collective Management of Copyright and Related Rights*, vol 3rd Ed. (Kluwer Law International 2016)

[288] Related to this point, for further discussion on the implementation of the 2014 CRM Directive in Sweden, see Bakardjieva Engelbrekt, 'Toward Network Governance of Collective Management Organisations in Europe: The Problem of Institutional Diversity', (breaking down the implementation plan of Sweden and highlighting the government's approach as one which limits, and perhaps undermines, the supervisory and oversight provisions in the 2014 CRM Directive).

[289] See Jörg Reinbothe, 'Collective Management in Germany' in Daniel Gervais (ed), *Collective Management of Copyright and Related Rights* (Wolters Kluwer 2015); Lucie Guibault and Stef van Gompel, 'Collective Management in the European Union' in D. Gervais (ed), *Collective Management of Copyright and Related Rights* (Kluwer Law International 2015)

[290] One of these additional tasks involves the appointment of a "national competent authority" to oversee CMO activity and participate in EU-level discussions on the functioning of the multiterritorial online music licensing scheme. For discussion, see, supra, 1.1.2.3 §2.

[291] Directive 2014/26/EU, "Collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market" 26 February 2014 OJ L 84 p. 72–98 (hereinafter CRM Directive), Recital 14, Art. 3(a).

[292] For example, in one jurisdiction a CMO may administer rights relevant to music (performing rights, mechanical rights), whereas a different CMO would handle licensing in the television/radio broadcasting sector (reproduction right, right to communication to the public). Each CMO has a monopoly (*de facto* or *de jure*) on licensing those rights within its respective jurisdiction.

and allow CMOs to administer the rights of foreign CMOs as well, typically accompanied by an administrative fee.[293] This helps to solidify the monopoly positions of national CMOs while enabling them to offer a more expansive blanket license to users. Put differently, each CMO can license a broad repertoire which includes the repertoire offerings of other CMOs, but the license issued by the CMO would only apply for uses occurring within its own territory. It was therefore the custom that service providers wishing to distribute in all EEA countries still needed to negotiate on a country-by-country basis, even though the task was still considerably streamlined through the presence of RRAs.[294] This arrangement takes advantage of the "economy of scale" inherent with licensing a large number of identical individual rights, and reduces overall transaction costs within the licensing process.[295]

Again, CMOs typically attain a monopoly status within the specific sector and territory that they operate in, and this generally brings CMO activity under the scrutiny of competition regulation.[296] A series of EU cases have established that CMOs are considered "undertakings which hold a dominant position," and are therefore regulated by competition law provisions, as embodied in article 101 TFEU (concerted practices) and 102 TFEU (abuse of dominant position).[297] However, the Court has recognized that CMOs serve public interests, and should therefore not be subjected to rigid applications of competition law.[298] Specific competition law-styled remedies that were imposed on CMOs as a result of CJEU rulings over the years have included applying the principles of equal treatment of members,

[293] Simone Schroff and John Street, 'The politics of the Digital Single Market: culture vs. competition vs. copyright' (2017) 21 Information, Communication & Society 1305-21

[294] In the realm of licensing online music rights, multi-territorial licensing has become a new practice, enabling certain CMO joint ventures (e.g., ICE) to administer a multi-territorial license for a large repertoire of rights. It is also the subject the CRM Directive which represents an attempt to broadly incentivize and regulate the practice at the EU level.

[295] Handke and Towse, Economics of Copyright Collecting Societies

[296] At the national level, some jurisdictions explicitly recognize the character of CMOs as monopoly actors. In Germany, for example, CMOs are expressly exempted from competition law in recognition of their monopoly status. Instead, potential abuses of its monopoly position are raised in an arbitration board within the German Patent Office, and claims against CMOs must be raised before the board prior to civil litigation. See, Reinbothe, 'Collective Management in Germany',

[297] Morten Hviid, Simone Schroff and John Street, 'Regulating Collective Management Organisations by Competition: An Incomplete Answer to the Licensing Problem?' (2016) 7 JIPITEC (citing Case C-395/87 Ministère Public v Tournier [1989] ECLI:EU:C:1989:319; Joined Cases C-110/88, 241/88 and 242/88 Lucazeau v SACEM [1989] ECLI:EU:C:1989:326; Case 7/82 GVL v. Commission [1983] ECLI:EU:C:1983:52; Case 127/73, Belgische Radio en Televisie v. SV SABAM [1974] ECLI:EU:C:1974:6.)

[298] Ibid

and requiring CMOs to license to users (as far as it did not limit the ability of the CMO to function) on a non-discriminatory basis.[299]

From this overview, the analysis turns to two specific aspects of CMOs worth closer consideration. First, the role and functions of CMOs on the market for creative goods will be outlined through a discussion of CMO tariff-setting practices (2.2.2). Second, it is worth understanding the historical role of CMOs in relation to their unique social and cultural functions, especially in determining whether or not these functions can subsist in light of recent changes to the licensing landscape (2.2.3).

2.2.2 CMOs and Tariff-Setting: Passive Intermediaries or Market Shapers?

The early development of collective management in Europe centred on the needs of rightholders to receive adequate remuneration for exploitations of their creative works. Between the late 1700s and 1900s, the first authors societies emerged in Europe. Beginning in 1777 within the French theatre sector, the "Agence Framery" was initiated by famous playwright Beaumarchais, who assembled a group of playwrights in protest of the exploitative practices of powerful theatre companies.[300] These early efforts culminated not only into the first legal recognition of authors' rights in 1791, but also to the formation of collectives in other creative sectors, and in other countries. As far as collective licensing in music, in 1851 the French society SACEM (Society of Authors, Composers and Music Publishers) was the first collecting society of its kind established to administer public performance rights in musical works.[301] A few years after, following the Berne Convention in 1886 which recognized authors' rights on an international scale, collecting societies in other European countries began to proliferate. By the early 1900s, CMOs were established in Germany, the UK, and Sweden, taking on the responsibilities of managing rights at a national scale.

Since these early beginnings, CMOs have operated by virtue of a "two-sided" market; supporting the interests of their rightholder-members on the one hand, and negotiating licenses for institutional/commercial users on the other.[302] In this respect they also help to reduce costs on both sides, facilitating a large number of rightholders and users on either side of the transaction to be able to locate each other (search costs), conclude multiple contracts

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[299] Schroff and Street, The politics of the Digital Single Market: culture vs. competition vs. copyright
[300] CISAC, 'The History of Collective Management'
<https://fr.cisac.org/content/download/1127/19620/file/CISACUniversity_The_History_of_Collective_Management_FINAL.pdf.>
[301] Ibid
[302] Drexl, *Copyright, Competition and Development*,

(contracting costs), and maintain licensee accountability under the terms of the licensing arrangement (monitoring and enforcement costs). CMO services likewise extend to meet the needs of both sides, facilitating rights monitoring and enforcement on the rightholder side, and aiding users as they attempt to identify rightholders to avoid conflict.[303] Though conflicts may occasionally arise between rightholders, CMOs, and users, the arrangement is efficient overall, and requiring a consensus ensures that all parties mutually benefit.

One salient feature of CMOs is their ability to set tariffs and negotiate licensing rates for the territory in which they operate. As pointed out above, CMOs provide for the scalability licensing solutions, saving many different costs in doing so. To be effective in facilitating the market for creative goods, it must be ensured that these savings will be passed on as opposed to captured at the CMO level.[304] Since CMOs have monopolies, there is the threat of abuse of its position in setting rates that outweigh the true costs of licensing and users' ability and/or willingness to pay. However, there are several mitigating factors which tend to counteract the threat of abuse of power as a monopolist actor.

First, CMOs are obliged to comply with competition rules as "undertakings" within the meaning of Art. 102 TFEU, as well as national competition rules.[305] An additional layer of regulation is imposed by national laws which apply differing levels of CMO oversight. These measures usually include the possibility of judicial or administrative review of CMO conduct, rate setting practices, and finances. Jurisdictions may also provide supplementary legal obligations related to tariff-setting procedure, such as imposing an affirmative duty on CMOs to license on fair and non-discriminatory terms.[306] In these respects, most CMOs at the national level tend to be publicly-regulated, especially in light of their monopoly positions, though historically there have been inconsistencies in the means by which this regulation occurs throughout the EU.

To bridge some of these inconsistencies, the CJEU played a role in defining some relevant criteria for all Member States to take into consideration when calculating tariffs. In *SENA* and *Lagardère*, while the basic notion of full Member State discretion in determining

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[303] Handke and Towse, Economics of Copyright Collecting Societies
[304] Ibid
[305] Art. 102 TFEU, in part, Chapter 1: Rules on competition - Section 1: Rules applying to undertakings, ("Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States…") Art. 101 TFEU is also relevant to CMO activities with regards to the prohibition against "concerted practices."
[306] This was later codified in Recital 31 and Art. 16(2) of the 2014 CRM Directive.

the criteria and methodology for tariff calculation is reinforced, the Court emphasizes that this autonomy is nevertheless qualified by limitations laid down by Community law.[307] In determining whether remuneration can be considered "equitable," in interpreting Directive text, the Court holds that the economic value of the use of right in trade is a relevant and necessary condition on Member States' tariff setting. These rulings in part precipitated the 2005 Recommendation and the regulatory provisions contained in the 2014 CRM Directive, which served to codify CJEU caselaw at the EU level.[308] The 2014 CRM Directive ultimately solidifies most of the basic CJEU-established criteria in tariff-setting, namely that licensing must be based on objective and non-discriminatory criteria, and that tariffs must be reasonable in relation to the economic value of the use in trade by taking into account the nature and scope of the use, as well as the economic value of the service provided by the CMO.[309]

This considered, CMOs still maintain a great deal of authority in national tariff-setting processes. Rather than serving as passive intermediaries in the licensing process, CMOs play a significant role in monitoring changes in the creative market, directly negotiating with users/user groups, and advancing domestic licensing practices to keep pace with emerging services and new types of users, among many other functions. To appreciate the extent of CMO authority in this area, the role of GEMA, a German collecting society, may serve as a useful example. [310] As a CMO dealing with musical performing and mechanical reproduction rights administration, it handles one of the largest musical work repertoires in Europe and represents roughly 74,000 members.[311]

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[307] Case C-192/04, Lagardère Active Broadcast v SPRE and GVL ECLI:EU:C:2005:475 (2005) , para. 48 (Relating to the Rental and Lending Rights Directive 92/100, "It is therefore for the Member States alone to determine, in their own territory, what are the most relevant criteria for ensuring adherence to the Community concept of equitable remuneration.") (citing Case C-245/00 SENA [2003] ECR I-1251, para. 34). In both cases, the CJEU does mention that a relevant criterion for determining the value of the remuneration shall include an assessment of the value of that use in trade. Ibid

[308] Commission Recommendation of 18 May 2005 on collective cross-border management of copyright and related rights for legitimate online music services (2005/737/EC) OJEU L 276 of 21 October 2005 [2005 Recommendation].

[309] Art. 16(2)(2) and Recital 31, CRM Directive.

[310] To develop the discussion, the following section will incorporate information and examples drawn from a series of interviews with legal staff conducted by the author during a research stay at the Gesellschaft für musikalische Aufführungs und mechanische Vervielfältigungsrechte, German society for musical performing and mechanical reproduction rights (GEMA), in 2018.

[311] Music Business Worldwide. "German Collection Society GEMA Generated Revenue of €1.02bn in 2018." (Figures as of April 2019). https://www.musicbusinessworldwide.com/german-collection-society-gema-posts-revenue-of-e1-02bn-in-2018/

In Germany, the regulation of collecting societies are subject to a separate legal regime under the 2016 Collective Management Organizations Act (Verwertungsgesellschaftengesetz), previously the German Copyright Management Act (Urheberrechtswahrnehmungsgesetz), which is distinct from the Act on Copyright and Related Rights (Urheberrechtsgesetz). As opposed to some jurisdictions that embed their CMO regulations within their copyright provisions, the separate and distinctive place of the CMO provisions in the German code advance the idea that "CMOs [are] much more than just private agents; their activities were clearly considered to be in the public interest and located in the neighbourhood of State agencies or…Unions."[312] As organizations entrusted with an important public function, CMOs are closely regulated by the government through the DPMA, the German Patent and Trademark Office. Being a national IP office chiefly responsible for the administration of patents and trademarks, the DPMA has a narrowly-defined mandate in regards to copyright, focusing primarily on CMO oversight and on the operations of the Arbitration Board for CMO and tariff disputes.[313]

Turning to the specifics of tariff-setting in Germany, GEMA has "full tariff autonomy," meaning GEMA has the authority to announce or revise tariffs, lead the tariff-setting procedure and ultimately publish the new or revised tariff. In Germany, the law requires that agreements must be concluded with one or more user associations, and that the amounts negotiated in the agreements serve as tariffs. As a result, the process is highly collaborative between the CMO, rightholders and licensees.

To provide a brief example of what is meant by tariff-setting in this context before moving on, commercial users (licensees) interested in obtaining a license for music have different characteristics and require different types of licenses for the uses they wish to engage in. These users, when assembled into an industry group, collectively negotiate the tariff rates which will apply for that category of user. For the category of restaurants, for example, tariffs may be set on the basis of the size and occupancy of the premises. While larger restaurants may pay more than smaller restaurants, the amount per seat remains consistent among all users of this type. There are numerous similar metrics used to calculate

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[312] Reinbothe, 'Collective Management in Germany',

[313] German Patent and Trademark Office (DPMA), 'Collective Management Organizations, Copyright' accessed 2018 <https://www.dpma.de/english/our_office/about_us/further_duties/cmos_copyright/index.html> (Specifying that the DPMA is the appointed supervisory authority under the German CMO act, also in charge of managing the Arbitration Board, registering anonymous/pseudonymous works, out of commerce works, and other tasks related to the European Orphan Works Database.)

tariffs which are unique to both the user and the types of licenses sought. In total, GEMA manages over 600 collective agreements with associations, which each require periodic revaluation. Though most agreements have a term between 1-5 years, most agreements are re-reviewed with associations on a regular basis.

In terms of adjusting an existing tariff, GEMA's goal is to maintain a "linear" progression of tariff rates over time. Sometimes tariff rates will fall into a depression, at which point the tariff must be rebalanced to ensure that payment obligations remain fair. Factors that would have to be considered in rebalancing such a tariff might include the type of establishment, size and capacity of venue, attendance of the event, and other similar relevant factors. GEMA uses a system of "tariff IDs," which represent these various data points. For each agreement, hundreds of these "IDs" are carefully balanced and counterbalanced against each other to achieve a consistent, "linear" tariff progression over time. In addition, the basis for a tariff is reflective of a "historical" rate, or if new is based on some similar usage of content. Though the rates are typically based on historical rates as implemented in Germany, there have been some instances of general exchange where foreign CMOs were consulted on tariffs. Occasionally, other EU CMOs also consult with GEMA on its rate-setting procedure and tariff calculation. Finally, like other CMOs in the EU, tariff rates may be further adapted by way of agreement. In particular, GEMA offers rebates for certain types of cooperation (e.g., using GEMA's reporting tools, providing proper documentation of works being played etc.).

In practice, copyright tariffs are the subject of ongoing discussions between GEMA and the associations. Though the negotiated tariffs last for a finite period of time i.e., term of the contract, some associations meet annually (at a minimum) to discuss whether the terms of the agreement and the tariff obligation remain fair and appropriate. With some of GEMA's most important associations, there is often direct and constant connection.

With respect to introducing tariffs for new user types or new uses, although there are no formal procedures to propose new tariffs, introducing a new tariff involves a high level of coordination. GEMA's business field department is responsible for negotiating with user organizations on new (and existing) tariffs. The Director of this department, along with GEMA's authority, sets up the terms of the new tariff which is then published on GEMA's website. Both GEMA and user organizations constantly observe the market, and when a new tariff or a new usage (by way of a new technology) should be addressed, GEMA will propose the tariff, usually in cooperation with such organizations. At times the DPMA can also

propose its own suggestions or create tariff proposals to be considered, for example if a certain type of tariff should be set for a specific new usage. Nonetheless, GEMA ultimately maintains the right to announce the publication of a new tariff. Tariffs will usually not be published or imposed without an exchange of information beforehand, and the cooperation of associations when proposing and negotiating tariff rates is considered "essential." Collected tariffs are also subject to certain social and cultural deductions, as elaborated on below.

There are also times when tariff negotiations are unsuccessful, at which time the DPMA-administered Arbitration Board will assist the rate-setting process. The amount in question for the tariff dispute is usually held by a trustee in escrow during proceedings before the Arbitration Board. In the case that the parties reach an agreement, the payment amount is released. To provide a real example, the negotiations for the live music tariffs between GEMA and the relevant industry groups (BDV [*Bundesverband der Veranstaltungswirtschaft*, Federal Association of the Event Industry]; VDKD [*Der Verband der Deutschen Konzertdirektionen,* Association of German Concert Promoters]), resulted in the Board's intervention when the negotiations between the parties became deadlocked. The Board proposed a settlement agreement in 2016, which forced the negotiations to resume once again. Based on some aspects of that proposal, a final agreement was able to be negotiated in 2017. As of 2018, there were very few proceedings pending with the Board and between user associations.

From this overview of GEMA's tariff setting process, it can be concluded that EU CMOs can maintain a powerful position in shaping the progression of tariffs as they apply to national licensing practices. In Germany, once agreements have been reached between relevant user associations, the amounts negotiated are bound as "strict rules which apply by virtue of law," and cannot be circumvented or ignored by parties.[314] CMOs in other Member States are similarly treated with a level of deference in both their relationship with national supervisory authorities, and by provisions of national law which support their tariff-setting authority. Understood more broadly, the discretionary power allocated to CMOs in the area of tariff-setting in the EU has a clear impact on how the market for creative content operates. Recounting a previous point, the pricing of creative goods is "notoriously difficult," and determining the "right" price for content is a difficult task for any stakeholder due to

[314] Romana Matanovac Vučković, 'Implementation of Directive 2014/26/EU on Collective Management and Multi-Territorial Licensing of Musical Rights in Regulating the Tariff-Setting Systems in Central and Eastern Europe' (2016) 47 IIC - International Review of Intellectual Property and Competition Law 28-59

information costs.[315] Collective administration is then seen as not merely an efficient solution on a large-scale market, but realistically as an "only" option for users, at times making it difficult to heavily scrutinize or challenge rates once set.[316] This considered, government-mandated oversight over CMOs via national regulatory bodies, courts, or competition authorities, serves to insulate users from the threat of exploitative practices in rate-setting.

As stakeholders move towards the multi-territorial licensing, beginning with the administration of online music rights, there has been a marked shift away from the established national licensing paradigm. Though the Commission's approach to increasing competition among CMOs in administering multi-territorial licenses was intended to open up the market past its territorial limits, it is still the case that the terms of the licenses are bound by the application of national law. In this regard, perhaps one of the biggest ambiguities left to be dealt with is the lack of clarity regarding to what extent national tariff-setting procedures are sustained in multi-territorial licensing.[317] Since CMOs are meant to compete for both rightholders and users on the European market under the Commission's "regulation by competition" approach, domestic law aimed at regulating the national monopoly position of CMOs does not seem to correspond with this new practice.[318] This may leave open other important questions regarding the tariff-setting obligations of collectively-managed rights administered by CMO joint ventures, as well as independent management entities (IMEs).[319] So far it is yet to be seen how effectively national authorities may be able to deal with conflicts that involve interpreting the adequacy of tariffs set from the perspective of another Member State's law.[320] This specific issue will be revisited in Part III.

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[315] Handke and Towse, Economics of Copyright Collecting Societies 6
[316] Ibid
[317] Matanovac Vučković, Implementation of CRM Directive, Tariff Setting Systems
[318] Ibid
[319] Regarding rate setting for multi-territorial licenses, the joint venture ICE will appoint a "licensing committee" comprised of member representatives. The Committee will be tasked with the development of a "standard rate card" which serves as a baseline for tariff negotiations, and establishes the core terms and conditions of the administered licenses. "Commission Decision of 16.6.2015 declaring a concentration to be compatible with the internal market and the EEA agreement (Case M.6800 - PRSfM / STIM / GEMA / JV)" (Public Version), Brussels, May 16, 2015 C(2015) 4061 final, para. 61.
https://ec.europa.eu/competition/mergers/cases/decisions/m6800_20150616_20600_4523168_EN.pdf
[320] In *BBC Worldwide*, a case concerning a conflict of legal terms in the licenses negotiated between PRSfM and BBC, the UK Copyright Tribunal was called to rule on a preliminary issue concerning its own ability to enforce the terms of copyright licenses "insofar as they concerned copyrights subsisting under the laws of jurisdictions other than the United Kingdom." In the appeal (High Court), Sections 124 and 126 of the Copyrights Designs and Patents Act 1988 was cited as limiting the Tribunal's jurisdiction against setting the terms of licences under foreign copyright laws. According to the High

2.2.3 Social and Cultural Functions of CMOs

Traditionally, collective management in the EU has had a strong basis in promoting important social and cultural objectives in addition to fulfilling copyright administrative functions. As mentioned previously, CMOs in the EU have been characterized by their not-for-profit status, and their public-oriented organizational missions have placed them on similar grounds with "state agencies" or "unions." Embedded into their statutes are rules which may oblige them to make contributions to either social welfare funds for creators, fund pensions, or engage in public outreach efforts. Though the procedures for distributions of such funds vary between Member States, in some jurisdictions the impact of the amounts collected can be quite significant.[321]

Primarily, national laws in some Member States explicitly permit CMOs to make deductions (usually a fixed percentage) to be redistributed for social or cultural purposes. Collections resulting from the administration of private copying levies, for example, contribute in large part to various social and cultural projects in many Member States.[322] In the case of private copying levy collections, which are traditionally collected and distributed on a collective basis, a percentage of these revenues is deducted and redistributed by measure of law. In Austria, up to 50% of the collections may be reallocated towards a social and cultural fund.[323]

CMOs are also allowed to reward certain types of works in their distribution schemes, representing a unique type of administration which is culturally-motivated. According to the German Copyright Management Act, it is compulsory for CMOs to support "culturally

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Court, the UK Tribunal is nevertheless able to determine the "lawful extent of the license, i.e., whether it covers both UK copyrights and/or foreign copyrights," under specific circumstances. The outcome of this case could have implications for the efficacy of dispute resolution relating to multi-territorial licenses, specifically on the ability of a court to rule on the terms of licenses which relate to foreign jurisdictions. Tellingly, the Judge concluded by identifying the pressing need to review and overhaul the statutory provisions regarding the jurisdiction of the Copyright Tribunal. See *BBC Worldwide Ltd v. Mechanical-Copyright Protection Society Ltd and PRS; Sky Ltd and ITV Networks Ltd intervening* [2018] EWHC 2931 (Ch) 6 November 2018 J. Arnold. http://www.bailii.org/ew/cases/EWHC/Ch/2018/2931.html.

[321] According to the website aidescréation, which tracks the use of cultural funding derived from private copying levies collected by French collecting societies, over 37,000 cultural and social projects were funded in 2019 alone. See Aidescréation, "La base unique contenant l'ensemble des financements attribués au titre de l'action culturelle." Accessed 28 Aug 2020. http://www.aidescreation.org/consultationaides-aides_culturelles_versees_base_des_actions_soutenues-libre_de_droits.html

[322] CISAC, Private Copying Global Study, 2017)

[323] Ibid

important works" (e.g., works of classical music), and to establish a social welfare fund.[324] As it functions in GEMA, with regard the main portion of cultural funding, a rating system is implemented which awards more "points" to works of classical or "serious music" as opposed to works of entertainment music, as a way of preserving and promoting the cultural importance of the genre.[325] With regards to social welfare funds, there is a general welfare fund that is used to support GEMA's full members in case of poverty, and the pension fund which is available to all full members.[326]

The possibility to make social and cultural deductions also takes up a part of the representation agreements between CMOs, as it is included within the CISAC model contracts.[327] Collections of such funds take place on the basis of reciprocity, i.e., both societies will make agreed-upon deductions from the royalties they collect in their respective territory. There are typically no cross-border issues at stake with these types of collections because of the way the rights are administered: statutory rights, particularly in regards to tariffs and distributions, are assessed while taking into account the location of the use.

Aside from either government-mandated obligations to preserve and promote culture, and efforts made as a result of a CMO's code of best practices, CMOs as representatives of their members can further leverage their status as organizations to benefit its members in a number of other ways. CMOs can be well-positioned defend members' interests by way of legal action, and can take on the costs of monitoring for infringements which would otherwise be prohibitively high for individual rightholders. In cases of infringement, CMOs may initiate legal proceedings on behalf of its members to stop unauthorized uses from occurring.[328]

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[324] Act on the Management of Copyright and Related Rights by Collecting Societies of 24 May 2016 (Federal Law Gazette I p. 1190), as last amended by Article 14 of the Act of 17 July 2017 (Federal Law Gazette I p. 2541). "Section 32 Cultural promotion; welfare and assistance schemes." http://www.gesetze-im-internet.de/englisch_vgg/englisch_vgg.html#p0174. This scheme maintains the mandatory nature of the obligations as set forth previously in § 7 UrhWG.

[325] The process of evaluation, guided by a committee of elected members, is known as "Wertung." Wertungsverfahren Kulturelle Verpflichtung der Verwertungsgesellschaften ("Evaluation Process: Cultural Commitment of the Collecting Societies."), https://www.gema.de/musikurheber/tantiemen/wertungsverfahren/.

[326] "Pursuant to [GEMA's] Distribution plan…10% of the distributable amount for performing and broadcasting rights are allocated to social and cultural purposes. The GEMA social fund has been created to help fulfil the social purpose. A social compensation fund which grants benefits in old age, and in cases of illness, accidents and need. The relevant requirements for the granting of benefits are listed in the Statutes of the GEMA Social Funds." *See* GEMA Social Funds, https://www.gema.de/en/music-authors/membership-account/gema-social-funds/

[327] Confirmed via Interview with GEMA representative (2018).

[328] CISAC, *The Role of Collective Management Organisations*

Furthermore, CMOs provide a means for influencing policies at both the national and international levels. This helps to unite diffuse interests and draw upon the power of the collective to advance the positions of rightholders in the political arena. National CMOs are also empowered at the EU level through organizations like CISAC and GESAC, which draw upon the same concept of collective influence to forward interests more effectively in the EU legislature. At the international level, CMOs may play a representative role in relation to intergovernmental bodies such as WIPO and the WTO.

Finally, the model of blanket licensing itself is a beneficial arrangement for smaller or niche artists, who would otherwise have difficulties in obtaining favourable licensing terms for use of their content or receiving sufficient revenues. For these artists in particular, the costs of individual administration of rights can be prohibitive, and the option of collective management can provide the cheapest and most efficient means of receiving remuneration for uses of their works. On the other hand, such a system can be viewed as less ideal for popular artists, whose revenues are used to cross-subsidize commercially less attractive works.[329] In all of these respects, CMOs uniquely take into consideration cultural and social issues faced by its members, and provides a strong example of how regulators can combine economic missions with the promotion of optimal cultural and social outcomes.

2.3 CMOs and Multi-territorial Online Music Licensing: The Competition Approach

In terms of regulating the activities of CMOs, digitization as caused EU level actors to reconsider the market position of CMOs with respect to the online environment.

In the analogue era, the use of reciprocal representation agreements to grant multi-repertoire licenses for a single territory at a time was justified in large part by the nature of the use: national CMOs were typically better placed to monitor the exploitation activities occurring within its own jurisdiction, and therefore granting a single-territory license made some practical sense. By the conditions of the reciprocal representation agreements, CMOs importantly did not have to deal with the threat of competition of foreign CMOs within its territory. This practice was validated by the CJEU in recognition of the practical difficulties of "organiz[ing] their own management and monitoring system in another country."[330]

[329] Handke and Towse, Economics of Copyright Collecting Societies 7
[330] Case C-395/87 Ministère Public v Tournier [1989] ECLI:EU:C:1989:319, para. 24; Joined Cases C-110/88, 241/88 and 242/88 Lucazeau v SACEM [1989] ECLI:EU:C:1989:326, para. 2.

However, the same monitoring difficulties arguably do not exist in the borderless online environment. In response to digitization, internet services were especially interested in securing licenses with a cross-border effect across multiple territories. To fulfil this need, in the early 2000s CMOs began to offer simulcasting agreements providing such a license for broadcasting over the internet (radio). The "Simulcasting Agreement," which was originally negotiated between the collecting societies of 31 countries, enabled broadcasters to negotiate once and obtain a multi-repertoire, multi-territorial license.[331] This license would enable broadcasters to transmit terrestrial programs "simultaneously" over the internet across multiple countries.

According to the original version of the agreement, collecting societies would only be able to license to broadcasters whose signals originated in its territory (the "customer allocation clause").[332] Thus, broadcasters were not completely free to approach any collecting society operating in the EU for a multi-territorial license. This clause was the subject of scrutiny to the European Commission, which it viewed as in contravention of Art. 101 TFEU. Again, some of the practical difficulties that were inherent in the previous system of territorial licensing seemed to the Commission unconvincing, and in the interest of competition the Commission maintained that the monopoly power of CMOs in granting a multi-territorial license should not be extended. After the removal of this clause, the agreement was approved for use.

As the demand for cross-border licenses grew in other sectors, so did the scrutiny placed on CMOs by the Commission. CISAC, an umbrella organization for CMOs, coordinated efforts to draft model contracts which would extend the existing system of reciprocal representation agreements to multi-repertoire, multi-territorial licenses. The model contracts drawn up by CISAC were referred to as the *Santiago* (CISAC, Performing Rights) and *Barcelona* (BIEM, Mechanical Rights) Agreements. While the representation arrangements contained in the agreements were not new, the Commission seemed wary of the justifications for the territorial nature of the agreements made between collectives, especially in terms of enforcing so-called exclusivity and membership clauses in reciprocal

[331] Enrico Bonadio, 'Collective management of music copyright in the Internet age and the EU initiatives: from reciprocal representation agreements to open platforms' (World Library and Information Congress: 78th IFLA General Conference and Assembly)
[332] Ibid

representation agreements.[333] Thus, the Commission's aim was to counteract the territorial nature of the collective management of rights as much as possible to promote a "competitive" environment and incentivize competition among CMOs for digital exploitations.

At first the Commission opted for a "soft law" approach to facilitate cross-border licensing practices by way of Recommendation.[334] The Recommendation, a non-binding instrument, advocated for the "…abandoning [of] all territorial restrictions and introduced new basic principles for cross-border online management such as the freedom of choice (substantive and territorial, regardless of nationality) of the CMO by the right holders, the right to withdraw online rights from any existing reciprocal representation agreement concluded, transparency of the repertoire, distribution and deductions."[335] This approach was not adopted without scrutiny, notably from the European Parliament, observing that the Commission's decision to reject the application of the Santiago and Barcelona Agreements would have the effect of further restricting choice and would foreclose on an approach that might result in a system of clearing rights at the European level.[336]

Following the release of the 2005 Recommendation, major publishers immediately started to withdraw the mechanical rights for online uses of their UK and US content from national CMOs. Publishers then entered into agreements with major European CMOs (PRS, GEMA, SACEM and SGAE) which gave way to several new licensing entities for managing

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[333] The Commission took issue with CMOs negotiating reciprocal representation agreements with exclusive representation clauses and membership clauses, which it claimed was anti-competitive and contributing to national territorial limitations in the "CISAC Decision." However, the basis for this rejection of exclusive representation clauses were weak, in that collecting societies had little incentive to compete with another collecting society in its own territory – such behavior would inevitably result in retaliation. Though the CJEU later annulled part of the Commission's decision relating to supposed "concerted practices" of CMOs, the business model of collective management had already undergone significant changes due to the Commission's previous ruling. *See* Matanovac Vučković, Implementation of CRM Directive, Tariff Setting Systems 410 fn. 1. (citing Commission Decision of 16 July 2008 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement, [Case COMP/C2/38.698 – CISAC]; CJEU case T-442/08(CISAC), [20013 ECR-2013-00000]).

[334] Commission Recommendation of 18 May 2005 on collective cross-border management of copyright and related rights for legitimate online music services (2005/737/EC) OJEU L 276 of 21 October 2005 ("2005 Recommendation").

[335] Guibault and van Gompel, 'Collective Management in the European Union',

[336] European Parliament, "Resolution of 25 September 2008 on collective cross-border management of copyright and related rights for legitimate online music services." P6_TA (2008)0462 (2010/C 8 E/105, para. 3. ("…the effect of the decision taken in this regard will be to preclude all attempts by the parties concerned to act together in order to find appropriate solutions – such as, for instance, a system for the clearing of rights at the European level – and to leave the way open to an oligopoly of a number of large collecting societies linked by exclusive agreements to publishers belonging to the worldwide repertoire…(T]he result will be a restriction of choice and the extinction of small collecting societies to the detriment of minority cultures.")

their online rights (SOLAR, PEDL).[337] Large-scale pan-European joint ventures of CMOs also began to take shape, such as ARMONIA and ICE, which have become major online licensing players. These new arrangements of CMOs, created in response to the Commission's new competition policies announced in 2005, represent a dramatic shift in the way online rights are administered.

The eventual passage of the 2014 Directive on Collective Rights Management imposed minimum standards for the transparency and supervision of CMOs by members, and like the Recommendation focused on allowing rightholders to have a high degree of autonomy in the ways in which their rights could be administered.[338] However, the Directive arguably did not manage to address some crucial aspects of collective management of online music rights which were dealt with by the previous regulatory regime. By focusing on competition between CMOs regarding the administration rates attached to licensing practices, it has been argued that this approach may not necessarily lead to better performance or increased efficiency in CMO practices.[339] Particularly, questions relating to the classification of new types of licensing entities (IMEs), as well as the applicability of social and cultural deductions in the implementation of multi-territorial licenses, are just a few of the issues that currently lack clear answers.

2.4 Limitations of the Competition Approach to CMO Regulation

Considering the numerous social and cultural functions of CMOs, it becomes questionable whether the regulatory approach adopted by the Commission is most supportive of the traditional role of CMOs in fulfilling social and cultural objectives. In making this point, while it is acknowledged that the realm of social and cultural policy has been historically attributed to Member States, it is also the obligation of the EU legislator to "contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore."[340] To accomplish this, the legislator must, "take cultural aspects into account in its action under other provisions of the Treaty, in particular in order to respect and to promote the

[337] Matanovac Vučković, Implementation of CRM Directive, Tariff Setting Systems 42
[338] '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' (2014) OJ L 84 72–98 [CRM Directive]
[339] Hviid, Schroff and Street, Regulating CMOs by Competition
[340] Art. 167(1), TFEU

diversity of its cultures."[341] Since national CMOs play a uniquely influential role in the preservation of social and cultural interests, these functions in particular should not only have been considered, but strengthened, to be able to subsist within a competition-centred regulatory backdrop.

Following the ongoing discussion of the thesis, which identifies the lack of policy coherence in the field of copyright among various EU institutional actors in the decisionmaking arenas, it becomes clear that market-oriented and economic-based justifications for the regulation of copyright presents a very limited and incomplete basis for protecting its important social and cultural functions. Likewise here, the regulation of CMOs in the 2014 CRM Directive, based closely on incentivizing a high level of competition among national CMOs, at the same time does not adequately recognize the importance of preserving the cultural functions of CMOs in such a regime. This may be the case for three reasons.

First, in the 2014 CRM Directive, there is no obligation for Member States to provide cultural funding through their CMOs.[342] Member States have the option to allow CMOs to allocate cultural funding by agreement, but choosing this option – especially in a competitive environment – would inevitably be viewed to lessen the competitiveness of the rate that can be offered by a CMO.[343] Although the Commission has anticipated that CMO competitiveness should chiefly derive from differences in administrative and management fees, as pointed out by Vučković,

> "…the organizations that deduct for cultural purposes will certainly be less attractive, both to the right holders and to the users, because their tariffs would reflect the fact that those deductions exist…a system of norms whereby competition between CMOs is introduced without the protection of their cultural and social role will inevitably induce competition in tariffs."[344]

Since these types of deductions are not mandatory in the Directive, Member States that have mandatory domestic provisions such as Germany may have a difficult time sustaining the mandatory nature of its provisions in relation to social and cultural deduction obligations placed on CMOs.[345]

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[341] Ibid, Art. 167(4)
[342] In Art. 12 (Deductions), for example, there is no obligatory language regarding the collection of social/cultural/educational funding.
[343] See Art. 12(1) and 15(1), Recitals 28 and 30, CRM Directive.
[344] Matanovac Vučković, Implementation of CRM Directive, Tariff Setting Systems 51
[345] In discussions leading up to the passage of the VGG (2016), members fought strongly for mandatory language regarding CMO obligations to make social and cultural deductions, and rejected the draft legislation proposed by the German government which had used more passive language

Second, the cross-subsidization of smaller or niche artists, as was previously possible under the blanket licensing regime, will now be more difficult to achieve. A blanket license offering is only as strong as its underlying repertoire, and allowing rightholders to withdraw certain rights has the corollary effect of fracturing a repertoire offering, as well as increasing overall administrative costs for those rightholders that remain.[346] As larger rightholders leverage their positions to withdraw certain rights and seek alternative representation, the most commercially valuable works are no longer used to cross-subsidize lesser known works in a repertoire. Over time, smaller and medium-sized CMOs will especially encounter some difficulties competing against other CMOs that are able to offer larger (more complete) repertoires for a lower administration cost. It has been hypothesized that one route of progression could entail smaller CMOs either reducing the amount of their remunerations in order to compete in the multi-territorial online music licensing market, or relinquishing the management of their repertoires to larger CMOs.[347] In the long term, a super-monopoly of one or two large CMOs in the EU in this sector may eventually result from such an arrangement.

Third, independent rights management organizations (i.e., licensing Hubs) that have emerged by agreement with publishers and CMOs, have a distinct function tied to "clearing" rights, but they may not prioritize the social and cultural functions as the case with traditional CMOs.[348] It will be up to the entity itself whether or not to consider measures which, for example, promote certain types of creative works through offering slightly higher remunerations.[349] Related to this point, while the CRM Directive contemplates these new forms of licensors (and attempts to regulate them), the extent of the obligations regarding transparency are still not clear from the text. This, combined with the previous point, reinforces an overall sense of doubt regarding the continuation of cultural and social considerations in multi-territorial licensing specifically, and for CMO tariff setting practices more broadly.

("can" vs. "shall"). Interview with GEMA representative. For the revised act, see Act on the Management of Copyright and Related Rights by Collecting Societies of 24 May 2016 (Federal Law Gazette I p. 1190), as last amended by Article 14 of the Act of 17 July 2017 (Federal Law Gazette I p. 2541). "Section 32 Cultural promotion; welfare and assistance schemes." <http://www.gesetze-im-internet.de/englisch_vgg/englisch_vgg.html#p0174>.

[346] Schroff and Street, The politics of the Digital Single Market: culture vs. competition vs. copyright 12

[347] Matanovac Vučković, Implementation of CRM Directive, Tariff Setting Systems 51

[348] Hviid, Schroff and Street, Regulating CMOs by Competition

[349] See, above, *2.2.3 Social and Cultural Functions of CMOs* on the example of GEMA and works of "serious music."

Overall, preserving the role of national CMOs, especially in terms of maintaining their social and cultural functions, will be vital for sustaining both the welfare of creators, as well as the welfare of the consuming public. Though preserving the richness and variety of culture in the EU is a goal underlies every major copyright directive, the regulatory approach taken in the CRM Directive does not seem to take proper consideration in achieving this goal. While on the one hand CMOs are not able to reject a request from another CMO to represent a small or niche repertoire, on the other hand the application of cultural and social deductions have been made completely negotiable between CMOs. Therefore, these deductions may become a point of competition as well. As time progresses, and smaller CMOs are increasingly unable to compete in the online market, a hegemony of a few large CMOs may emerge in this sphere, which could limit the opportunities for smaller rightholders to seek representation. Regulating CMOs on the same level as for-profit organizations may be both too restrictive and too short-sighted of an approach if maintaining their social and cultural functions is to remain a goal.

To return to Reinbothe's characterization of German CMOs as "closer to state agencies or trade unions," the evolution of the role of CMOs in recent years has begun to erode this image by conceptualizing these organizations as competitive profit-seeking entities. As conceived by the Commission, collecting societies are to be regulated as market-centred undertakings. Yet it is clear that CMOs do not solely act in the interest of achieving the most competitive margins for publishers or larger rightholders; as a pivotal player on a "two-sided" market, CMOs perform a very delicate and complex set of negotiations which must be viewed as properly balanced by both sides, including commercial licensees. On a practical level, then, CMOs must be transparent with both sides in order to be perceived as legitimate. The oversight measures in place at the national level further ensure that CMOs do not over-leverage their position to the disadvantage of one party. As the model shifts towards multi-territorial licensing, the traditionally cooperative nature of CMO relations, both between rightholders and users, and between the CMOs themselves, has been undermined by a competition-centred regulatory paradigm that does not preserve fundamental CMO functions.

Academics over the years have cautioned against applying competition rules too strictly, which may fail to properly account for social and cultural objectives by focusing on generating economic value.[350] There is a consensus that a diverse choice of cultural products is beneficial to society, irrespective of the inherent economic value of those products. In other

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[350] See, e.g. Drexl, 'Competition in the Field of Collective Management: Preferring 'Creative Competition' to Allocative Efficiency in European Copyright Law',

words, there is a cultural and social "value" in niche works, works produced by unknown artists, and works created in non-mainstream languages, which is not tied to how much revenues those works generate. From the preceding analysis, it is apparent that regulation in the sphere of copyright must successfully take into account the need for a broad availability of cultural goods as an optimal objective, rather than necessarily focusing on solutions that prioritize the interests of largest copyright stakeholders in generating the highest revenues. This objective ought to be ensured more explicitly and consistently by institutions operating at the EU level.

3. The Judicial Arena

The European integration process provides some insights into the current functioning of the EU institutional order, and sheds light on the historical role of the Court of Justice of the European Union ("CJEU"). Pressures exerted from this process onto the institutions constrained their activities in some respects, while revealing new avenues for policy coordination. In examining the development of the role of the CJEU as a judicial actor in modern policy debates, this historical backdrop becomes especially relevant.

In the early stages of European integration, a central objective of the early European Economic Community was the creation of a functioning trade union between its members. It was the hope that successful economic integration in the form of a common market would lay the groundwork for future political integration.[351] Economic integration could be achieved either through intergovernmental agreement on Treaty amendments, or through legislation initiated by the Commission and adopted by the Council of Ministers, with both procedures requiring a high level of consensus. Importantly, at the early stages of integration, Member States maintained much of their authority in the areas of "social regulations, social transfers, public services and public infrastructure functions."[352] Consequently, Member States were able to exert control over the speed and extent of the integration process: accepting some level of economic unification and market liberalization, but retaining the ability to define the limits of integration when it came to matters of domestic policy.

At the time of the first enlargement of the Community, the distinctive legal traditions of the UK, Denmark, and Ireland challenged the policymaking capabilities of the institutions.[353]

[351] Fritz W. Scharpf, The double asymmetry of European integration: Or: why the EU cannot be a social market economy (MPIfG Working Paper, 2009)
[352] Ibid
[353] Ibid

As the new Members brought with them vastly different legal traditions and differing stages of economic development, reaching a political consensus at the EU level became more challenging. Further harmonization of national rules started to edge out of the reach of legislators, as efforts to address market fragmentation began to stagnate in the Council of Ministers.[354] Attention then turned to the role of the European Court of Justice, and especially in its power to interpret the Treaties "in ways that would propel European integration."[355]

In the face of political deadlock, the Court therefore emerged as the institutional actor capable of delivering on the promise of harmonization where the legislature could not. By confirming the binding effect of the Treaty of Rome over Member State law, and establishing the legal supremacy of European law over national law in two landmark decisions of the 1960s, the Court also began to cement its own role in European political processes.[356] Its influence on policy was achieved through the "backdoor" of lawmaking through interpretation. Some have gone as far as to name this phenomenon "a strategy of using law as a mask for politics," or "judicial legislation."[357]

The preliminary reference procedure in particular offered a way to carve new legal pathways through the interpretation of existing legal instruments. As used by national courts, the procedure could allow national judiciaries to test the integrity of the legislation generated by the political process.[358] At the same time, it would be very difficult for Member States to challenge a ruling once passed down by the CJEU, even on the basis of its potential political implications at the MS level. CJEU decisions interpreting either primary or secondary European law cannot be "corrected" easily either, and require either a Treaty amendment or an initiative of the Commission with the support of the Council and Parliament. As put by Scharpf, "such corrections were and are in theory improbable and in practice nearly impossible."[359] Hence, "judicial legislation" carved out by the CJEU was, and continues to be recognized as a particularly powerful and far-reaching tool, capable to continue to build up EU integration by harmonization.

Predictably, the use of the judicial process to counteract political inertia was not a completely acceptable practice to Member States. The complex decisionmaking structure and

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[354] Ibid
[355] Ibid
[356] Ibid
[357] Ibid (citing Burley, Anne-Marie/Walter Mattli, 1993: Europe Before the Court: A Political Theory of Legal Integration. In Institutional Organization 47(1), 41-76).
[358] Ibid
[359] Ibid

high consensus requirements of the European political process ensures that legislative measures adopted at the EU level are basic, minimal and unobtrusive in relation to national law. Yet some of the more "innovative" judgements of the Court have presented a threat to Member States which disagree with its decisions, especially in terms of the judgements' potential political consequences. And, as noted, CJEU judgements are extremely difficult to challenge. Over time, the preliminary ruling procedure itself has shifted from a means to allow individuals to challenge EU law in national courts into a mechanism allowing individuals to challenge national law in national courts.[360] As such, this procedure has garnered attention from individuals and firms who, failing in the political process, seek expansions of legal doctrine by way of courts.

As detailed in the following sections, in relation to the development of copyright law in the EU, the CJEU has played a pivotal role in harmonizing Member State practices.[361] Nevertheless, not all Member States have always approved of the extent of its reach into national practices. The role of national courts and national governmental interventions will also be discussed in this section to highlight the impact of their decisionmaking on the overall development of copyright law in the EU.

3.1 CJEU

The CJEU serves as the foremost authority on the application and interpretation of EU law. Its primary role is to ensure consistency in the application and interpretation of the Treaties, EU law, and national law, and is called upon by Member States' judicial authorities to perform this task.[362] Article 267 TFEU provides the legal basis for a referral procedure, allowing national courts, tribunals or other similar bodies to seek preliminary judgements from the CJEU to ascertain whether or not a conflict exists between the application of national law in relation to EU law.[363] National courts will formulate questions, establish relevant facts of the case at hand, and outline the relevant applicable national law.[364] Once the CJEU has

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[360] Karen Alter, 'Who Are the "Masters of the Treaty"?: European Governments and the European Court of Justice' (2003) 52 International Organization

[361] The Court of Justice of the European Union (CJEU) is comprised of three separate courts (European Court of Justice, the General Court and specialized courts). Reference to judgements of the CJEU in this section is generally in relation to the ECJ.

[362] Art. 19, TEU

[363] Art. 267 TFEU

[364] Art. 267(2)-(3) TFEU also establishes whether a national court or tribunal may have the discretion to choose to refer a case to the CJEU, and when it is obliged to do so. In relevant part, any court "*may*, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon." Article 267(3) TFEU provides that national courts or

delivered a preliminary ruling, the case is turned back to the national court to decide the final outcome of the case. National courts are then obliged to provide adequate remedies to ensure that legal protection promised by EU law is given full effect, yet nevertheless bears the ultimate responsibility for making a final ruling. Hence, although national courts are bound by the rulings of the Court, the relationship is not necessarily a hierarchical one. Since both the national courts and the CJEU can be said to perform distinctive functions, the relationship is rather characterized as an "alliance" between the courts. In turn, this has served to naturally reinforce the legal supremacy of EU law.[365]

The CJEU may also deliver rulings on the validity of the acts of other institutional actors (i.e., the European Commission), EU administrative bodies, offices, or other agencies of the Union.[366] It serves as a powerful counterbalance to the authority of EU political actors. With respect to this role, it maintains its legitimacy among the EU institutions through its independence. Unlike political actors, the Court is generally immune from the influences of lobbyists and interest groups. It is therefore at times better suited for delivering balanced rulings which address the need for consistency at the EU level, while exhibiting an awareness for the unique legal traditions of Member States. Given its relative independence, it is worth recognizing that it has had a profound impact on policy outcomes at multiple levels of government.[367] Unlike courts in other jurisdictions which are bound by the judicial principle of *stare decisis,* the CJEU is not similarly obliged to abide by precedent. In reality, however, the Court tends to draw upon its previous rulings as a matter of consistency.[368]

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tribunals 'against whose decisions there is no judicial remedy in national law . . . *shall* bring the matter before the Court of Justice." [emphasis added]. Thus, any court that lacks a further appeals procedure *must* make a reference to the Court if it must decide on a matter involving a point of EU law. Furthermore, it is exclusively the national court's decision whether or not to refer the case, and neither the parties to the litigation, nor the Court of Justice itself, may make that decision. See Karen Davies, *Understanding European Union Law* (Taylor & Francis Group 2013) 90-91

[365] S. Siegel, *The Political Economy of Noncompliance: Adjusting to the Single European Market* (Taylor & Francis 2011)

[366] Ibid

[367] A. Stone Sweet, 'The European Court of Justice and the Judicialization of EU Governance' (2010) Living Reviews in EU Governance ("[a]t crucial moments, the Court's case law has shaped market integration, the balance of power among the EU's organs of government, the 'constitutional' boundaries between international, supranational, and national authority, and literally thousands of policy outcomes great and small.")

[368] Davies, *Understanding European Union Law* 89 (citing the Court's dicta in Cases 28–30/62, Da Costa, following a previous ruling)

It is widely held that the CJEU has fulfilled a significant role in contributing to more harmonized practices in copyright among Member States.[369] Over the years, it has utilized a variety of judicial "tools" to accomplish this. First, the CJEU may address normative gaps in the application of national copyright laws by way of "negative integration," which is achieved by ruling against the application of certain national laws that pose as a barrier to the internal market.[370] In this way, the CJEU provides a means for supplementing certain regulatory gaps where unilateral action is preferable over searching for a consensus in the Council.[371] Second, the Court's influence in harmonizing copyright practices can clearly be observed in its ability to interpret key notions of copyright and define them as "autonomous concepts" of Union law to be interpreted uniformly across Member States.[372] More discreetly, the Court further shapes the contours of copyright protection by recognizing criteria for assessing the scope and application of rights in different scenarios. This is apparent from its jurisprudence in the area of "communication to the public," for example, where it has defined multiple criteria to aid courts in defining a "public."[373] Third, aside from its task of interpreting primary and secondary EU law, a number of legal issues involving intersections of general EU policies and copyright law enable the Court to address some contentious copyright-related issues indirectly. These include cases on the principles of free movement of goods and services, non-discriminatory treatment (trade), and competition law, where copyright has nevertheless played a role. Given the numerous intersections of copyright and other areas of EU policy, it is unsurprising that the role of the CJEU in shaping EU copyright *acquis* has expanded over time.[374]

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[369] Xalabarder, The Role of the CJEU in Harmonizing EU Copyright Law ; Thomas Drier, 'The Role of the ECJ for the Development of Copyright in the European Communities' (International Study Days of the Association Littérature et Artistique (ALAI))
[370] This justification demonstrated in, e.g., "Tobacco Advertising." (See Case C-376/98 Tobacco Advertising I.)
[371] Georgopoulos, 'The Legal Foundations of European Copyright Law', ("[For example,] ... market-making regulations are difficult to achieve through agreement in the Council of Ministers, but seem to depend on unilateral action by the European Commission and on decisions of the European Court of Justice.")
[372] See, e.g., Case C-245/00, SENA ECLI:EU:C:2003:68 (2003) (interpreting "equitable remuneration" as a concept which must be given autonomous and uniform interpretation); Case C-467/08 Padawan SL v SGAE [2010] ECLI:EU:C:2010:620 (interpreting "fair compensation" as an autonomous concept of European Law); Case C-201/13 - Deckmyn ECLI:EU:C:2014:2132.
[373] See, Xalabarder, The Role of the CJEU in Harmonizing EU Copyright Law 635-36
[374] For an empirical study on copyright jurisprudence in the EU (until 2014), see M. Favale, M. Kretschmer and P. Torremans, 'Is There a EU Copyright Jurisprudence? An Empirical Analysis of the Workings of the European Court of Justice' (*Glasgow,* 2015) <https://zenodo.org/record/29673/files/CREATe-Working-Paper-2015-07.pdf>. See also, Drier, 'The Role of the ECJ for the Development of Copyright in the European Communities', .

Yet as the copyright-related cases heard before the Court have increased, so have the critical stances on the CJEU's authority to adapt the copyright *acquis* in relation to challenges posed by digitization. Pursuing a "harmonizing agenda" outright would seem at times to be in direct conflict with the role of the EU legislator, casting the CJEU in the undesirable light of "judicial activist" or *de facto* political actor.[375] While it is widely recognized that the CJEU has played an active role in confronting copyright-related issues in the EU, in reality its rulings have not necessarily led to "more" harmonized laws, nor increased legal certainty. Despite its efforts, fragmentation of copyright law in the EU persists.

Recognizing its considerable authority and autonomy in the EU institutional order, the CJEU's powers are also constrained in several respects. Procedurally, the Court is limited to resolving issues on a case-by-case basis, and shall not deliver rulings on the factual situations presented to it.[376] It is also pointed out as a flaw or limitation of the Court that it lacks an IP specialization, and that judges are typically generalists.[377] As far as copyright, while the large majority of cases it rules on relate to the proper functioning of the internal market, some broader conceptions of copyright law, such as matters relating to contract, and setting appropriate levels of remuneration, are likely to remain out of its reach. Furthermore, unlike the open norm systems of the U.S. and Canada, in the EU it is understood that the closed list of exceptions or limitations to copyright may only be added to via legislative act.[378] This leaves little room to introduce flexibilities into an existing system that is increasingly strained by novel legal questions. In this respect, open norm systems are perceived as more adaptable, as it is more accepted that judicial balancing can occur more actively in light of preserving overarching principles of fairness over exclusivity. As demonstrated below, the CJEU is reluctant to recognize such far-reaching flexibilities in the interpretation of the scope of exclusive rights. Considering these judicial constraints over the long term, what might their effect be on the CJEU's ability to be the key institution responsible for ensuring the proper functioning of the copyright system in the EU?

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[375] Matthias Leistner, 'Europe's copyright law decade: Recent case law of the European Court of Justice and policy perspectives' (2014) Common Market Law Review 559-600; ; Xalabarder, The Role of the CJEU in Harmonizing EU Copyright Law

[376] Article 267 TFEU does not give the Court the authority to decide the final outcome of cases, and must strictly limit its judgements to the interpretation of EU law.

[377] However, there are observable trends in the allocations of judges and AGs to copyright cases which may account for some level of "indirect" specialization. See, Favale, Kretschmer and Torremans, 'Is There a EU Copyright Jurisprudence? An Empirical Analysis of the Workings of the European Court of Justice' (2015) <https://zenodo.org/record/29673/files/CREATe-Working-Paper-2015-07.pdf>

[378] Art. 5, Recital 31 InfoSoc Directive

In the following sections, aspects of both the CJEU's activism and judicial conservativism in the field of copyright will be discussed. In 3.1.1, the Court's ability to craft judicial doctrine will be analysed. In 3.1.2, the Court's more conservative stance on the use of fundamental rights to rebalance copyright-related interests is examined. In these sections, the Court's reflections on these subjects will help to conceptualise the limits of its willingness to introduce flexibilities in the copyright system, and will point to some of its own institutional limitations in doing so. Additional limitations are discussed in 3.1.3.

3.1.1 Judicial Activism: Originality and other Copyright Doctrines

It is initially difficult to conceive of the role of the Court as a "creative" one. As an institution strictly bound by its mandate to interpret the Treaties and ensure conformity of Member State measures with European primary law, it is further restricted in the substance of its rulings, drawing conclusions solely on the interpretation and application of the law as opposed to ruling on the disputes-in-fact. Yet, particularly in the field of copyright, the Court's decisionmaking has been characterized as inventive, innovative, and even creative.[379] Over the years, it has drawn from an array of judicial tools and principles to address areas of copyright that were either previously undefined by EU level legislation, or required recontextualization for the digital age.

Certain legal interventions made by the Court have been pointedly referred to as "judicial lawmaking" or "judge-made law." This seems to arise when the Court's normative interpretations and/or application of legal norms to disputes result in a new, binding legal practice that often carries with it political consequences.[380] In light of preserving national autonomy in particular, this form of judicial intervention perceived as intrusive, and capable of expanding the reach of EU institutional intervention beyond that which is prescribed by the Treaties. This criticism is made even more persuasive when considering the difficulties of reversal – CJEU decisions based on EU primary law can only be corrected through a Treaty amendment requiring full Member State consensus, and decisions based on the interpretation of EU secondary law would require the initiative of the Commission, and majorities in the

[379] See, Christophe Geiger, 'The Role of the Court of Justice of the European Union: Harmonizing, Creating and Sometimes Disrupting Copyright Law in the European Union' in I. Stamatoudi (ed), *New Developments in EU and International Copyright Law* (Kluwer Law International 2016); Xalabarder, The Role of the CJEU in Harmonizing EU Copyright Law
[380] Scharpf, *The double asymmetry of European integration: Or: why the EU cannot be a social market economy*,

Council and Parliament, to be effectively overridden.[381] On the side of Member States, raising a challenge to a CJEU ruling risks undermining its own judicial system, and would require that Member State to essentially renounce respect for the rule on law on which the legitimacy of their own government depends.[382]

Intergovernmentalists are likely to raise the above issue in their assessment of the extent of the CJEU's decisionmaking authority in political spheres. From an intergovernmentalist's perspective, the Court is beholden to the will of powerful Member States, and adapts its decisionmaking accordingly.[383] Its rulings in the face of threats of non-compliance by MS and legislative override at the national level are perceived as enough to compel the Court to adopt stances that are favourable to Member States' positions.[384]

Neo-functionalists, on the other hand, argue that the powerful decisionmaking capabilities of the Court within the EU institutional framework are necessary to advance the entire EU political process. These theorists suggest that, "the difficulty in reaching consensus among EU Members prompts a 'judicialisation' of the EU governance, whereby the Court sets legal principles that induce policy reforms, which in turn underpin further European jurisprudence, in a virtuous circle."[385] This model is based on the assumption that the legitimacy of the Court is not merely secured through initial delegation of decisionmaking power, but also through the perceived legitimacy of the rulings themselves. In this way, the judge may seek compromise rulings which might best elicit compliance from MS, and invoke norms and norm-based reasoning which is not only responsive to the parties of the dispute, but also to certain wider social interests, which is a reflection of its perceived legitimacy in the EU institutional framework.[386]

In the realm of copyright in particular, the neofunctionalist conception of the CJEU's decisionmaking seems accurate for a few reasons. First, the breadth of the judicial tools used by the Court to define (and add) criteria vital to the development of uniform conceptions of

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[381] Ibid
[382] Ibid
[383] Clifford J. Carrubba, Matthew Gabel and Charles Hankla, 'Judicial Behavior under Political Constraints: Evidence from the European Court of Justice' (2008) 102 American Political Science Review 435
[384] Ibid
[385] Favale, Kretschmer and Torremans, 'Is There a EU Copyright Jurisprudence? An Empirical Analysis of the Workings of the European Court of Justice' (2015) <https://zenodo.org/record/29673/files/CREATe-Working-Paper-2015-07.pdf> (citing Stone Sweet, The European Court of Justice and the Judicialization of EU Governance
[386] Stone Sweet, The European Court of Justice and the Judicialization of EU Governance

copyright law in the EU has been remarkable.[387] Second, as evidenced by a recent empirical study conducted by Favale et. al., the Court's preference towards teleological methods of interpretation and normative lines of argument seem to point rather in the direction of its progressiveness rather than its concern with Member State non-compliance.[388] In some copyright-related cases, the Court has even acted against the Member State in question, compelling it to overturn or change its domestic law to comply with the ruling.[389] While this is not to say that the CJEU does not consider Member States' interests in its rulings, at least in the period following the passage of the InfoSoc Directive its classification as an "activist" court seems to correspond more readily to this strain of theory.

From this perspective, the Court is conceived as a powerful institutional actor, and one which is not averse to engaging in "judicial rulemaking." Indeed, some of the more "creative" rulings in the field of copyright have perhaps only been achievable through the Court's willingness to engage in more normative reasoning and teleological interpretations of the law. The style of reasoning employed by the Court has as much to do with the nature of copyright conflicts as it does with the overall indeterminacy of European law – the fact that European law lacks specific criteria regarding the interpretation of its own legislation and legal norms lies in contrast to most other legal systems.[390] As detailed in an empirical study on copyright jurisprudence conducted by Favale, et. al., the Court's use of teleological (dynamic) argumentation, as well as its use of unique patterns of reasoning such as "the *effet utile* doctrine, the proportionality principle, the uniform application of the EU law, etc.", all seem to at least indicate the roots of an activist, upwardly harmonizing "agenda."[391]

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[387] Xalabarder, The Role of the CJEU in Harmonizing EU Copyright Law ; Favale, Kretschmer and Torremans, 'Is There a EU Copyright Jurisprudence? An Empirical Analysis of the Workings of the European Court of Justice' (2015) <https://zenodo.org/record/29673/files/CREATe-Working-Paper-2015-07.pdf>

[388] "The teleological style of interpretation is based on the purpose, direction or design of the text/legislation faced by the courts."

[389] In the case of private copying levies, for example, the *Padawan* decision caused the Spanish government, and numerous other Member States, to repeal and reconfigure their domestic legal provisions regarding the differentiation of professional users in levy calculation and redistribution.

[390] Favale, Kretschmer and Torremans, 'Is There a EU Copyright Jurisprudence? An Empirical Analysis of the Workings of the European Court of Justice' (2015) <https://zenodo.org/record/29673/files/CREATe-Working-Paper-2015-07.pdf>

[391] Ibid 34-35. It is worth noting that the empirical results based on this hypothesis were mixed. ("The data show indeed a clear prevalence of teleological topoi, but this finding is tempered by the presence of complex patterns of accumulation (e.g. cumulative use of several approaches without a hierarchical order). This points rather to a more complex explanation, supported by the finding that the outcomes of the judgments do not (systematically) expand copyright protection…we found recurrent patterns of reasoning, but outcomes from that reasoning remain unpredictable.")

But why might the Court intervene so actively in the form of "judicial lawmaking" when such a move was still risky from a legitimacy standpoint? In observing the breadth and scope of copyright-related issues brought before the Court in the last twenty years, it becomes clear that a key impetus behind the Court's activism in the field of copyright has stemmed from the passage of the InfoSoc Directive.

Between 1991-2001, harmonization efforts in the field of copyright were mostly concentrated in the legislature. Of the seven copyright-related Directives developed and passed within this short timeframe, most were "vertical" in nature and on the subject of related rights.[392] The notable exception was the InfoSoc Directive, a "horizontal" measure aimed at harmonizing some basic economic rights (reproduction, communication to the public, distribution) and addressing the use of digital rights management systems.[393] In a period of rapid technological development ushering in a wave of digital consumption, a significant amount of lawmaking activity was underway in jurisdictions worldwide to pass regulations on the exchange of content online. On the international stage, the passage of touchstone IP instruments such as the Berne Convention, Rome Convention, and the WIPO "Internet Treaties,"[394] all served as key drivers towards formulating an EU level legislative response. On top of the necessity to regulate in this relatively new area, it provided a natural opportunity for harmonizing Member State copyright laws – in a previously unregulated sphere like the online environment, the task of approximating national laws was made much easier.

Yet despite its ambitions, the InfoSoc Directive received criticisms on several fronts, especially concerning the level and extent of the legislative compromises that were included in the final text.[395] Certain provisions of the Directive soon generated more novel issues for national legislators and courts to deal with, many relating to the interpretation and scope of Article 5 exceptions and limitations. This area of the law produced numerous preliminary references to the CJEU in the years following the passage of the Directive. In this area, the CJEU's jurisprudence was crucial; through the Court's jurisprudence, it became apparent that

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[392] This included the Computer Programs Directive (1991); Rental and Lending Rights Directive (1992); Term Directive (1993); Satellite and Cable Directive (1993); Database Directive (1996); Information Society Directive (2001); Resale Right Directive (2001).

[393] Hugenholtz, 'The European Concern with Copyright and Related Rights',

[394] (1982) ; 'WIPO Copyright Treaty' (1996) WIPO ; 'WIPO Performances and Phonograms Treaty ' (1996) WIPO

[395] See, e.g., Bernt Hugenholtz, 'Why the Copyright Directive Is Unimportant, and Possibly Invalid' (2000) 11 European Intellectual Property Review

the harmonization goals of the InfoSoc Directive could not be accomplished simply through the harmonization of rights, but also required harmonization, to a degree, of exceptions and limitations.[396]

As such, the Court has implemented a variety of judicial tools to approach harmonising this area. In one of its bolder judicial manoeuvres, the CJEU is said to have achieved "express harmonization" by declaring the list of Article 5 exceptions and limitations as "autonomous concepts of EU law."[397] This maintains the option for Member States to freely adopt exceptions or limitations into their domestic law, but stipulated that the scope of such exceptions or limitations were limited, or rather "standardized," among Member States that did choose to implement the exception or limitation. This result was reinforced in the cases *Painer* and *Deckmyn*, relating to the scope of limitations of quotation and parody. [398] In those cases, the Court set aside the stricter requirements imposed by national law in favour of harmonizing their scope among Member States. Other concepts embedded within exceptions or limitations, such as the meaning of "fair compensation" in relation to Article 5(2) InfoSoc, have also been determined "autonomous concepts of EU law" and therefore must be interpreted uniformly.[399] Along these lines, the Court has also devised its own criteria for the assessment of specific legal concepts to assist in reaching a uniform interpretation of law among Member States. Its extensive jurisprudence in the area of fair compensation[400] and acts of communication to the public,[401] have yielded specific criteria to be applied and interpreted by national courts and legislatures uniformly.

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[396] See, e.g., Case C-201/13, Johan Deckmyn v. Helena Vandersteen ECLI:EU:C:2014:2132 (2014) at para. 16 ("an interpretation according to which Member States that have introduced that exception are free to determine the limits in a non-harmonised manner, which may vary from one Member State to another, would be incompatible with the objective of that Directive.")(citing Padawan, EU:C:2010:620, para. 36, and Case C-435/12, ACI Adam and Others ECLI:EU:C:2014:254 (2014) para. 49)

[397] Xalabarder, The Role of the CJEU in Harmonizing EU Copyright Law

[398] Case C-145/10, Painer ECLI:EU:C:2011:798 (2011) ;Deckmyn,

[399] Case C-467/08, Padawan [2010] ECLI:EU:C:2010:620 para. 37; Case C 572/13, Hewlett-Packard Belgium SPRL v Reprobel SCRL ECLI:EU:C:2015:750 (2015)

[400] On the criterion of harm as it relates to the calculation of fair compensation, see, inter alia, Case C-467/08, Padawan [2010] ECLI:EU:C:2010:620; Case C-462/09, Stichting de Thuiskopie v. Opus Supplies Deutschland GmbH ECLI:EU:C:2011:397 (2011) ; Case C 572/13, Hewlett-Packard Belgium SPRL v Reprobel SCRL,

[401] On the criterion of "new public" as it relates to acts of communication to the public, see, inter alia, Case C-306/05, SGAE v Rafael Hoteles ECLI:EU:C:2006:764 (2006) ; Case C-162/10 Phonographic Performance (Ireland) v Ireland ECLI:EU:C:2012:141 (2012) ;Case C-466/12, Svensson and Others v Retriever Sverige AB ECLI:EU:C:2014:76 (2014) ; Case C-160/15, GS Media v Sanoma Media Netherlands BV and Others ECLI:EU:C:2016:644 (2016)

To give a specific example of the reach of its decisionmaking, the CJEU's jurisprudence goes much further than the EU legislature in defining the concept of originality. Though there did not seem to be the legislative impetus for harmonizing this area among EU political actors,[402] the Court was proactive in creating a definition of original works to be applied uniformly across Member States: "the author's own intellectual creation."[403] In *Infopaq,* its earliest decision in this area, though the Court attempts to link its definition to an interpretation of Article 2(a) InfoSoc Directive, the article in question rather references the protection of the reproduction right "for authors, of their works" which presupposes originality is met without defining what originality means.[404] For the UK in particular, which still adhered to "skill and labour" theory regarding intellectual property rights, the doctrine developed by the CJEU was perceived to align more closely with that of the continental European "author's rights" tradition, rather aimed at considering whether intellectual creations bear the personal "stamp" of the author.[405] Its jurisprudence is made even more striking when considering that national copyright statutes are also "silent as to the nature of originality and leave its definition to case law, such as the UK or France, and, from a practical perspective, in fact also Germany, despite its statutory definition of originality."[406] Though some scholars emphasize a distinctive divergence in legal conceptions of originality which have resulted from the rulings,[407] others find that the rulings have not significantly upset the continental and common law conceptions of originality and believe the CJEU's rulings to be

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402 European Commission, Commission Staff Working Paper on the review of the EC legal framework in the field of copyright and related rights, 2004) 13 ("Whether the requirement of originality should be harmonised regarding all types of works remains a debated issue. In theory, divergent requirements for the level of originality by Member States have the potential of posing barriers to intra-Community trade. In practice, however, there seems to be no convincing evidence to support this … legislative action does not appear necessary at this stage.")
403 Case C-5/08, Infopaq International ECLI:EU:C:2009:465 (2009) ;Case C-393/09, Bezpečnostní softwarová asociace ECLI:EU:C:2010:816 (2011) ; Case C-145/10, Painer [2011] ECLI:EU:C:2011:798; Case C-604/10, Football Dataco and Others ECLI:EU:C:2012:115 (2012) .
404 Andreas Rahmatian, 'Originality in UK Copyright Law: The Old "Skill and Labour" Doctrine Under Pressure' (2013) 44 IIC - International Review of Intellectual Property and Competition Law 4-34
405 Ibid
406 Ibid
407 Estelle Derclaye, 'Football Dataco: skill and labour is dead!' 2012) accessed 2019 < http://kluwercopyrightblog.com/2012/03/01/football-dataco-skill-and-labour-is-dead/> ; Estelle Derclaye, 'Infopaq International A/S v Danske Dagblades Forening (C-5/08): wonderful or worrisome? The impact of the ECJ ruling in Infopaq on UK copyright law'' (2010) 32 European Intellectual Property Review ; E. Rosati, 'Originality in US and UK copyright experiences as a springboard for an EU-wide reform debate. IIC 41(5):524' (2010) 41 IIC - International Review of Intellectual Property and Competition Law 524-43.

compatible with both.[408] Nevertheless, establishing this type of general rule seems to clearly exceed the CJEU's authority to set standards extending past the wording of the relevant Directives. It has therefore been criticized for adding qualifications to the threshold of originality that do not appear anywhere else in the law.[409] Though this concept of originality in copyright is now generally considered harmonized primarily through CJEU caselaw,[410] it remains debated whether or not the CJEU's judicial "means" in this area have been justified by the "ends."

Collectively, the CJEU has been an important institutional actor capable of pushing the boundaries of traditional copyright law further than what could have been accomplished through intergovernmental or EU political processes alone. Since matters are raised before the Court on the basis of a pending legal proceeding, issues considered by the Court are usually very timely, and can be dealt with "faster" than seeking recourse through the legislative process. Court rulings have also served as the basis for new legislation, showing that there is a great deal of forward momentum in the EU political process which is generated by the CJEU, even in its interpretive role. At the same time, the CJEU's authority is limited to the interpretation of currently disputed legal instruments, and cannot go far in terms of directing national actors how to define their domestic laws. The ability of the Court to intervene in the area of copyright in particular has certainly shifted national laws towards more harmonized territory. Yet, as discussed in the following section, the CJEU has also exhibited caution in providing rulings which have a strong political element, at times in spite of its available authority or ability to intervene.

3.1.2 Judicial Conservativism: Defining the Scope of Exclusive Rights through Fundamental Rights

Technological innovations have challenged many foundational aspects of the application and enforcement of copyright, not least of all pertaining to the scope of exclusivity. In the analogue world, the "exclusive" quality of copyright could be more easily managed – the practicalities of distributing physical, tangible media were an important factor in this sense. Eventually, better copying technologies and the internet changed this, enabling

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[408] Rahmatian, Originality in UK Copyright Law: The Old "Skill and Labour" Doctrine Under Pressure

[409] This phenomenon was coined by Prof. Lionel Bently as "harmonization by stealth." Bently, L. (2012) "Harmonization By Stealth: Copyright and the ECJ" PowerPoint Presentation. <https://www.competitionlawassociation.org.uk/docs/harmonisation_bently_slides_01_05_12.ppt>.

[410] E. Rosati, *Originality in EU Copyright: Full Harmonization through Case Law* (Edward Elgar Publishing, Incorporated 2013)

lossless copying and sharing to occur on an immense scale in the unregulated online sphere. By the same token, rightholders were no longer limited to controlling uses of their works, but could now control access to their works as well. As copyright law developed further, more rightholder protections and higher levels of enforcement were introduced. This, combined with the use of restrictive agreements and various forms of technological protection measures, started to erode the "internal" balancing capabilities of copyright. This internal balance has traditionally been achieved through the application of exceptions and limitations to copyright.

The general purpose of exceptions and limitations within a copyright system is to ensure that both rightholders and the public are able to benefit from the availability of creative works. In the absence of exceptions and limitations to exclusive rights, rightholders would be able to abuse their exclusivity by implementing unreasonable restrictions or limitations on works to the detriment of society. Recognizing this, as reflected in Article 5 InfoSoc Directive, the scope of exclusive rights is limited by a closed list of exceptions and limitations.[411] These exceptions and limitations are narrowly interpreted based on the three-step test found in Art. 5(5), which qualifies the application of exceptions and limitations to apply only in special cases which do not conflict with a normal exploitation of the work, and do not unreasonably prejudice the legitimate interests of the rightholder.[412] As such, the three-step test expresses another essential "balancing" function within the Directive, and has even been used to introduce flexibilities in some cases.[413] But there is still a need to consider more flexibilities in the law considering the particularities of the digital environment.

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[411] Art. 5 InfoSoc Directive.

[412] Art. 5(5) InfoSoc Directive. This embodiment of the test is to be contrasted from its potentially more expansive role in defining the scope of the application of exceptions and limitations, as expressed in Art. 9(2) Berne Convention, Art. 13 TRIPS, and Art. 10 WIPO Copyright Treaty. See Christophe Geiger, Daniel Gervais and Martin Senftleben, 'Understanding the 'three-step test'' in Daniel Gervais (ed), *Research Handbook on International Intellectual Property Law* (Edward Elgar Publishing 2014). It is suggested that the original purpose of the introduction of the test in Article 9(2) of the Berne Convention was a legislative compromise to enable member states to legislate more flexibly towards a reproduction right. M. Senftleben, *Copyright, Limitations, and the Three-step Test: An Analysis of the Three-step Test in International and EC Copyright Law* (Kluwer Law International 2004). Historically, the "test" has served as more than just a tool by which legislators may define the scope of proposed exceptions or limitations, as its application extends frequently into judicial interpretation of law. It is argued that national judges must also apply the three-step test (under the InfoSoc Directive) when evaluating the application of a particular exemption or limitation, even if the three-step test has not been implemented *per se* into national legislation. See Eleanora Rosati Richard Arnold, 'Are National Courts the Addressees of the InfoSoc Three-Step Test?' (2015) 10 Journal of Intellectual Property Law & Practice 741-49

[413] See Ibid

Other than the exceptions and limitations found in the InfoSoc Directive, there exist other potential "external" balancing mechanisms which can address the issues associated with the growing protectionist sweep of copyright, and can serve to effectively rebalance interests. To be sure, the CJEU has not been averse to using concepts and principles extrinsic to the copyright system to resolve copyright issues. For example, with regards to classifying hyperlinking or retransmissions of digital content as acts of communication to the public, the CJEU turned its attention towards whether or not the use was contemplated by the initial authorization (a.k.a. the "new public" criterion), effectively relying on a concept that was previously outside the scope of existing international instruments.[414]

One of these external balancing mechanisms that has gained particular importance within the CJEU's copyright jurisprudence is the application of fundamental rights, as embodied in the EU Charter of Fundamental Rights (CFR) and the European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR). The CFR is recognized alongside the Treaties as a form of primary law, and the provisions of the ECHR constitute "general principles of Union law."[415] In the CJEU's jurisprudence, fundamental rights have become an indispensable tool for striking a balance of interests in often contentious copyright cases.

There have been numerous cases heard before the CJEU thus far in which fundamental rights have been addressed in interpreting the meaning and scope of exclusive rights and exceptions and limitations to copyright embodied in the InfoSoc Directive.[416] The number of

[414] For additional discussion, see G. Westkamp, 'One or Several Super-Rights? The (Subtle) Impact of the Digital Single Market on a Future EU Copyright Architecture' in K.-C. Liu and R. M. Hilty (eds), *Remuneration of Copyright Owners* (Springer 2017)

[415] Article 6(1) TFEU. "The Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties."; Article 6(2)-(3) TFEU. "2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties. 3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law."

[416] See, *inter alia*, Case C-467/17 Pelham GmbH and Others v Ralf Hütter and Florian Schneider-Esleben [2019] ECLI:EU:C:2019:624; Case C-516/17 Spiegel Online GmbH v Volker Beck [2019] ECLI:EU:C:2019:625; Case C-469/17 Funke Medien NRW GmbH v Bundesrepublik Deutschland [2019] ECLI:EU:C:2019:623; Case C-201/13 Johan Deckmyn and Vrijheidsfonds VZW v Helena Vandersteen and Others [2014] ECLI:EU:C:2014:2132; Joined Cases C-403/08 and 429/08 Football Association Premier League [2011] ECLI:EU:C:2011:631; Case C-145/10 Eva-Maria Painer v Standard Verlags GmbH and Others [2011] ECLI:EU:C:2013:138; Case C-70/10 Scarlet Extended v SABAM [2011] ECLI:EU:C:2011:771; Case C-275/06, Productores de Música de España (Promusicae)/Telefónica de España SAU [2008] ECLI:EU:C:2008:54. For additional discussion on

these cases have increased in recent years, as difficult and novel questions are continuously presented to the Courts relating to new technologies. With dramatic changes in the way creative content is accessed and consumed, the regulatory influence of laws as they were originally conceived are being tested; navigating pre-existing notions of where the proper balance of rightholder and public interests should be struck likewise pose new challenges for the Court to address.

In addressing this challenge, it should not be inherent that, in cases of conflict, one stakeholder group should preferentially receive the benefit of the right or the exception. Yet there seems to exist an implied hierarchy of interests, where, "…in the field of copyright, the majority of authors has long held, and still holds, that the exclusive right of the author (or of the holders of neighbouring rights) is the principle that can *only* give way within the conditions listed exhaustively by the legislature."[417] This notion of expansive protection for rightholders has been challenged, as it does not seem to comport with the essential character of copyright as a right that is "limited by nature."[418] As the scope of the exclusive right has expanded over time, this notion seems to have persisted, notably within the CJEU's jurisprudence. The Court's reasoning in the following cases demonstrates its consideration of exceptions and limitations to copyright as "derogations from the general rule" of protection.[419] What effect might this have on reaching a balance of interests – and ensuring the protections of fundamental rights – in light of novel issues generated by technology?

As we have seen in the previous section, the CJEU has played an important role in defining the contours of abstract copyright-related concepts embodied in the InfoSoc Directive, at times devising how criteria to facilitate uniform implementations and interpretations of EU law among MS. It has also clearly recognized the non-absolute nature of IP rights in cases like *Metronome Music* and *Scarlet Extended*, indicating a necessity to find a

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balancing copyright in light of other fundamental rights, see Jonathan Griffiths, 'Constitutionalising or Harmonising? The Court of Justice, the Right to Property and European Copyright Law' (2013) 38 European law review 65-78; P. B. Hugenholtz, 'Flexible copyright: Can the EU author's rights accommodate fair use?' in Ruth Okediji (ed), *Copyright Law in an Age of Limitations and Exceptions* (Cambridge University Press 2017).

[417] Christophe Geiger, '"Constitutionalising" Intellectual Property Law? The Influence of Fundamental Rights on Intellectual Property in the European Union' (2006) 37 International Review of Intellectual Property and Competition Law 371-406 (emphasis added)

[418] Ibid .

[419] Thom Snijders and Stijn van Deursen, 'The Road Not Taken – the CJEU Sheds Light on the Role of Fundamental Rights in the European Copyright Framework – a Case Note on the Pelham, Spiegel Online and Funke Medien Decisions' (2019) 50 IIC - International Review of Intellectual Property and Competition Law 1176-90

"balance" of IP protections with countervailing social and public interests.[420] Based on its previous jurisprudence, it was even predicted that an eventual "constitutionalization" of copyright would eventually take place, effectively lending interpretive flexibilities to copyright norms by way of fundamental rights considerations.[421] Yet the result of three recent cases – *Pelham, Spiegel Online* and *Funke Medien* – rather exhibit a more cautious approach of the Court, this time in terms of its narrow approach to introducing flexibilities in interpreting the scope of exclusive rights.

In a series of rulings, the CJEU essentially narrows the application of fundamental rights considerations to apply only in terms of interpreting the scope of the existing closed list of exceptions and limitations embodied in Article 5 InfoSoc; it does not regard fundamental rights as an autonomous, "external" ground for limiting copyright protection.[422] The Court's reasoning emphasizes the interest in promoting legal certainty and supporting the harmonization objectives of the Directive, as opposed to "opening the door" to challenging the sufficiency of the Directive's (and copyright's) internal balancing mechanisms.[423] But in pursuing this aim, it obscures how national courts and legislatures must ensure that a "fair balance" is achieved between copyright and fundamental rights, leaving many other questions unresolved. Though there are many interesting aspects of these three cases (*Pelham, Spiegel Online* and *Funke Medien)*, for the purposes of the current discussion it is sufficient to focus on some general aspects of the rulings.

As previously mentioned, by now the Court has applied a fundamental rights analysis in relation to copyright cases on multiple occasions.[424] Though in most cases the referring

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[420] The development of the "proportionality" test in the CJEU's jurisprudence has played a key role in the resolution of constitutional conflicts. According to Art. 52(1) of the CFR, "[a]ny limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms." Limitations can be made "only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others." As mentioned, the existence of the idea of proportionality in IP disputes is premised on the non-absolute nature of the protection offered by IP rights. *See*, Case C-200/96, Metronome Musik v. Music Point Hokamp, EU:C:1998:172 [1998]; Case C-70/10, Scarlet Extended v. SABAM, ECLI:EU:C:2011:771 [2011].

[421] Geiger, "Constitutionalising" Intellectual Property Law? The Influence of Fundamental Rights on Intellectual Property in the European Union ; C. Geiger, 'The constitutional dimension of intellectual property' in P. Torremans (ed), *Intellectual Property and Human Rights* (Kluwer Law International 2008)

[422] As identified by Snijders and van Deursen, fundamental rights may still be invoked as an autonomous ground for challenging copyright enforcement measures. *See*, Snijders and van Deursen, The Road Not Taken

[423] *I.e.*, Closed list of exceptions and limitations, idea/expression dichotomy

[424] See n. 296 above.

national court has raised the issue of the application of fundamental rights on its own, in some circumstances the CJEU has done so of its own volition.[425] It is also worth stressing that the CJEU is obliged to interpret EU legislation in a manner which is compatible with fundamental rights, and that the Court is tasked with monitoring the discretion used by national courts to further ensure that fundamental rights have been protected.[426] In fulfilling this role, perhaps what has been most interesting about the Court's jurisprudence in this area is its development of specific legal concepts – e.g., "fair balance" and proportionality – to assist national legislatures and courts to form an interpretive framework for its domestic law where the Directive is vague or silent.[427]

Although these legal concepts have become an important part of the assessment of rights, exceptions and limitations, the Court's overall application of fundamental rights considerations has been relatively inconsistent. In cases involving Art. 17 relating to the protection of property, for example, the "fair balance" test is applied in a detailed manner in some cases but vaguely in others, limiting its effectiveness as an interpretive tool. As argued by Griffiths, the Court's application of the "fair balance" test in *Scarlet Extended* and *Luksan* was relatively superficial, and merely used to bolster a conclusion conforming to the Court's "harmonizing agenda."[428] He maintains that, "[a] thorough assessment of the 'fair balance' requirements in the specific circumstances of the case [Scarlet Extended] ought to have involved much closer attention to the respective weights of the rights at issue within the framework of established jurisprudence on fundamental right."[429] The danger of this lack of clarity is in letting the true relevance of the "fair balance" test slip back into a more superficial realm, in which case even its potential harmonizing effect is dulled.

Other scholars identify the long-term risks of the Court when it engages in unclear balancing exercises. Sganga broadly identifies the interpretive practices of the Court as a continuation of the property logic which underlies EU copyright legislation, but finds that the Court fails to properly articulate a consistent set of property principles, concepts and rules

[425] Notably, it has also foregone fundamental rights analysis in cases where it may have been relevant. See Case C-301/15, Soulier [2016] ECLI:EU:C:2016:878.
[426] Griffiths, Constitutionalising or Harmonising? 3
[427] Geiger, 'The Role of the Court of Justice of the European Union: Harmonizing, Creating and Sometimes Disrupting Copyright Law in the European Union',
[428] Griffiths, Constitutionalising or Harmonising?
[429] Ibid 19

across its rulings.[430] Derclaye also emphasizes that, while the Court's rulings are not overly unpredictable, the onus is still on the Court to use its own interpretive methods more consistently – especially if it insists on "strict" interpretations of limitations and exceptions to copyright.[431] And, returning to the ability of the Court to establish a balanced application of fundamental rights in particular, Mylly also takes a critical stance of the Court, this time from the perspective of courts in general. In acknowledging that the outcome in *Promusicae* contained some "promising formulations" with respect to Member States' obligations to reach balanced fundamental rights outcomes, he observes that, "courts tend to be much less sensitive to freedom of expression arguments when the context is characterised as private rather than public, or involves property rather than censorship."[432] This statement comes back to the heart of the issue in terms of ensuring consistency in the CJEU's fundamental rights jurisprudence: whether or not the Court is willing to actually articulate this sort of criteria (private vs. public nature of the use, presence of censorship) for evaluating situations when copyright as a private right of property must be weighed against countervailing freedom of expression and other fundamental rights considerations.

In *Pelham, Spiegel Online* and *Funke Medien*, the Court arguably misses the mark again, this time by failing to clarify how national courts should negotiate between the application of the EU Charter on Fundamental Rights and the InfoSoc Directive. It has been observed that the caselaw of the ECtHR may in fact be at odds with the assessment of the CJEU because the ECtHR regularly subjects copyright law to the external freedom of expression (Art. 10(2) ECHR) scrutiny.[433] In so doing, the ECtHR rather seems to "frame[] copyright enforcement measures in general as derogations from the freedom of information and freedom of expression; on that view, all copyright enforcement measures must be in accordance with Art. 10 ECHR."[434] While AG Szpunar in *Funke Medien* finds that not all cases may merit similar scrutiny under Art. 10 ECHR, he adds that there should still be room

[430] C. Sganga, *Propertizing European Copyright: History, Challenges and Opportunities* (Edward Elgar Publishing Limited 2018)
[431] Estelle Derclaye, 'The Court of Justice copyright case law: quo vadis?' (2014) 36 European Intellectual Property Review (EIPR) 716-23
[432] Mylly, *Intellectual Property and European Economic Constitutional Law: The Trouble with Private Informational Power* 221 ("Even the Promusicae case, albeit containing some promising formulations by requiring the interpretation and implementation of intellectual property directives in member states so that the balance of fundamental rights is secured, operates on a safely abstract level.")
[433] For analysis, see Christophe Geiger and Elena Izyumenko, 'Freedom of Expression as an External Limitation to Copyright Law in the EU: The Advocate General of the CJEU Shows the Way' (2019) 41 European Intellectual Property Review
[434] Snijders and van Deursen, The Road Not Taken 1185

for the consideration of fundamental rights depending on the specific circumstances of each case.[435] According to him, in exceptional cases, copyright "must yield to an overriding interest relating to the implementation of a fundamental right or freedom."[436] Taking future developments of the legal landscape into account, as expressed by Geiger and Izyumenko, "[a]n external freedom of expression limitation on copyright is crucial for allowing to address all the legitimate uses that are emerging but that are not subject to an existing limitation."[437] They also make the important point that, in the interest of safeguarding legitimate uses that are emerging but are not subject to an existing copyright limitation, "…a categorical exclusion of any external FoE review of copyright law would result in the creative stretching of certain legal concepts that are not best suited for targeting the harm at issue."[438] At its worst, excluding fundamental rights review from copyright-related issues could result in consequences for matters of general public interest and the democratic discourse at-large, particularly when the works at issue are deemed "unpublished" (and therefore outside the scope of copyright's internal balancing mechanisms).[439]

For several reasons, then, recognition of an external balancing mechanism would allow for a coherent and adaptable body of copyright law that is in conformity with the overall European legal order, while concurrently safeguarding public interests. The CJEU, however, chooses not to follow this line of reasoning. In its decisions, the Court limits the role of fundamental rights considerations to the interpretation and implementation of the existing Art. 5 exceptions and limitations. Thus, the CFH may not serve to justify exceptions or limitations not specifically contemplated by the Directive. Though the CJEU arguably

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[435] AG Szpunar accepts that "If it became apparent that there were systemic shortcomings in the protection of a fundamental right vis-à-vis copyright, the validity of copyright would be affected and the question of legislative amendment would then arise. However, there may be exceptional cases where copyright, which, in other circumstances, could quite legitimately enjoy legal and judicial protection, must yield to an overriding interest relating to the implementation of a fundamental right or freedom." Opinion of AG Szpunar in *Funke Medien* para. 40. Agreeing with this approach, see, Geiger and Izyumenko, Freedom of Expression as an External Limitation to Copyright Law
[436] Ibid
[437] Geiger and Izyumenko, Freedom of Expression as an External Limitation to Copyright Law 17.
[438] Christophe Geiger and Elena Izyumenko, 'The Constitutionalization of Intellectual Property Law in the EU and the Funke Medien, Pelham and Spiegel Online Decisions of the CJEU: Progress, but Still Some Way to Go!' (2020) 51 IIC - International Review of Intellectual Property and Competition Law 282-306 299
[439] Ibid 300 ("The absence of any FoE provision that could shield access to certain unpublished documents when such access is crucial for ensuring an open public discussion on matters of general interest might…result in a significant impediment to freedom of expression and freedom of information in a situation where internal copyright exceptions only apply to published works…In this regard, the CJEU's unconditional rejection of applying FoE externally to EU copyright law might be incompatible with the EU Charter.")

liberalizes its interpretation of the internal scope of existing exceptions and limitations in its recent rulings, as cautioned by Geiger and Izyumenko, "…certain cases can arise where even a very liberal interpretation of the norms of copyright law (its subject-matter, scope and exceptions) might not be sufficient to properly safeguard the freedom of expression and information."[440]

Ultimately, these judgements leave some important unresolved issues for national courts, which are bound to adhere to the standards of both the ECHR and the InfoSoc Directive within its domestic laws. Since Member States are bound to the ECHR as signatories, and since the ECHR provisions relating to the protection of property, the freedom of expression and information are also embedded in the CFR (EU primary law), the relevant ECHR provisions will have a direct legal effect on, as well as primacy over, EU Member State's domestic laws.[441] It is then unclear how Member States should balance relevant interests to ensure that both the Directive and the CFR are given their full legal effect. After these judgements, relying on the principles of one legal instrument over the other may yield contradictory, and therefore less predictable, outcomes.[442]

As an aside, it bears mention that the CJEU, as one of the guarantors of the CFR, is obliged to uphold an equal, if not greater, standard of protection of fundamental rights within Union law than that which can be offered by the ECtHR.[443] Article 52(3) of the CFR establishes a baseline of protections which "requires the Luxembourg Court to interpret the fundamental rights enshrined in the EU legal system corresponding to the rights protected by the ECHR (including the authorised limitations or exceptions to them) in a way that would offer protection no less than that warranted by the Strasbourg Court."[444] While this should ensure consistency between the decisionmaking of the two courts, the cases discussed above may reveal a potential lack of coordination between the CJEU and the ECtHR which could have future consequences in the realm of copyright.

These recent judgments form a clear picture of the Court's conservative approach to utilizing external balancing mechanisms to address the scope of the author's exclusive rights, but in the end this result is far from surprising. The Court has a history of cases in which it

[440] Ibid 299
[441] Snijders and van Deursen, The Road Not Taken
[442] Ibid
[443] Sergio Carrera, Marie De Somer and Bilyana Petkova, 'The Court of Justice of the European Union as a Fundamental Rights Tribunal: Challenges for the Effective Delivery of Fundamental Rights in the Area of Freedom, Security and Justice' 2012)
[444] Ibid

similarly exercises self-restraint in "correcting only perceived excesses of national legislation."[445] Taken as a whole, these decisions deliberately put the onus back on the European legislature given that "…the Court was unable to react…as long as the area remained unharmonized."[446] Indeed, as far as understanding these rulings in light of institutional competencies, it seems that the application of fundamental rights as an extrinsic limitation to the scope of copyright is to remain a consideration primarily reserved for the legislator.[447] However, passing the burden back to the legislator does not guarantee that the issue will be solved, or even addressed, in a timely manner. And, as demonstrated by the legal uncertainty left in application of fundamental rights considerations to copyright enforcement mechanisms, even strict interpretations of EU legal instruments in courts may fail to produce harmonious results.

The Court's so-called "activist" harmonizing motivations, when founded on the basis of the harmonizing objectives embodied in existing EU legal instruments, ironically expose its own limitations in achieving harmonized results in practice. Being bound to interpreting the Directives, and therefore averse to questioning the ability of such legal instruments to accommodate a changing legal context, demonstrates the consequence of a Court faithfully adhering to its institutional mandate within the EU framework. At its worst, this practice can entrench legal norms far past the point that they are truly fit-for-purpose. In relation to its recent rulings, its approach is perhaps far too limited to give full meaning and effect to fundamental rights considerations in copyright disputes. Indeed, much still has to be accomplished before copyright law can be considered "constitutionalized" within the EU legal order.

Collectively, the rulings demonstrate the degree of caution that the Court exerts to maintain its legitimacy within the EU institutional framework – its legitimacy perhaps maintained at the expense of an adaptable body of copyright law.

3.1.3 Additional Limitations

Building on the previous section, there are many other instances of the CJEU's limitations in addressing uncertainties in the law.

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[445] Drier, 'The Role of the ECJ for the Development of Copyright in the European Communities',
[446] Ibid
[447] Geiger and Izyumenko, Freedom of Expression as an External Limitation to Copyright Law (citing Opinion of AG Szpunar in *Pelham* para. 94; and Opinion of AG Szpunar in *Spiegel Online* para. 62).

To address the more general points first, questions considered by the Court will inevitably represent a limited sample of all issues that deserve judicial consideration. Since it takes a considerable investment of time, resources, and organization for litigants to follow through with the judicial process, only those individuals or firms with high economic or personal stakes in the outcome will remain in the pool of potential litigants. This is likely to create an overrepresentation of certain interests before the court, and can have the long-term effect of "ratcheting" the development of the legal discourse in a singular, liberalizing direction.[448] According to Scharpf,

> "Since a favourable decision will encourage other parties to exploit the newly granted liberty from national regulation, and to push for its extension to other areas, the evolution of the case law will not tend to a stable equilibrium in which opposing interests are fairly accommodated…independently from any liberal preferences the judges might entertain, [the law's] dynamic expansion will be driven by the persistent push of liberalizing interests searching for new obstacles to remove."[449]

While difficult to anticipate or counteract this phenomenon, over the long term, the effect of CJEU decisions could exacerbate internal tensions between the legislative and judicial functions in promoting coherent policy goals at the EU level.

That is not to say that CJEU rulings are completely incoherent with the policy objectives forwarded by EU political actors; in fact, there seems to be a considerable degree of correlation between the two. Prior to the delivery of a final ruling, the Commission and Member States are entitled to submit written observations to the Court as per the procedure outlined in Article 23 of Protocol 3 on the Statute of the Court of Justice of the European Union.[450] In analysing the effects of these submissions on the CJEU's rulings in the field of copyright law, according to an empirical study conducted by Favale, et. al., the Court seems to take into consideration the policy direction of the Commission.[451] According to the study,

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[448] Scharpf, *The double asymmetry of European integration: Or: why the EU cannot be a social market economy*,

[449] Ibid

[450] Statute of the Court of Justice of the European Union (Consolidated Version), Protocol 3.

[451] Marcella Favale, Martin Kretschmer and Paul Torremans, 'Who Is Steering the Jurisprudence of the European Court of Justice? The Influence of Member State Submissions on Copyright Law' (2018) Modern Law Review [preprint version] . On the existence of a policy direction in EU legal submissions, see *forthcoming* Eleanora Rosati, 'What Does the European Commission Make of the EU Copyright Acquis When It Pleads Before the CJEU? The Legal Service's Observations in Digital/Online Cases' (2020) 45 European Law Review 67-99 (currently unavailable for download) For summary, see Eleanora Rosati, 'New paper: What does the European Commission make of the EU copyright acquis when it pleads before the CJEU? The Legal Service's Observations in digital/online cases' 2019) accessed 2020 <http://ipkitten.blogspot.com/2019/09/new-paper-what-does-european-

there is a high level of correlation between the submissions of the European Commission and the final rulings of the Court.[452] While it would be tricky to speculate further on the meaningfulness of this finding without running into the territory of logical fallacy, given the high amount of interventions submitted on behalf of the Commission versus those submitted by individual Member States, this particular correlation at least reveals that the Commission maintains a high success rate in its interventions before the Court.[453] As the Court is widely perceived as autonomous and independent from the influences of political actors, this finding evidently deserves further scrutiny.

As a final note on procedure, unlike the Commission and Member States, non-state actors (third parties) are typically not allowed to submit written observations to the Court in proceedings. In indirect actions before the Court (preliminary ruling procedures), interested civil society and human rights organizations, for example, cannot directly address the CJEU.[454] The exception is if the parties were involved in national judicial proceedings, which may allow them to submit files and contributions to the Court. This is in contrast to the practice of the ECtHR, which regularly accepts the submissions of third parties such as NGOs, international and regional human rights organizations.[455] Disallowing third party submissions may be in the interest of the litigating parties on the one hand as it limits the potential outside influence of politically-interested parties, but on the other hand it prevents relevant perspectives from being considered in a decision which will have political consequences. And, especially in cases involving the intersections of copyright and fundamental rights, this procedural shortcoming could translate into very real consequences for the public.

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commission.html>). (In the study, Rosati asks whether it can be concluded that the Legal Service of the European Commission forwards an “agenda” in its submissions to the Court, and confirms this finding through an empirical study of observations submitted to the Court in digital/online copyright cases.)

[452] Favale, Kretschmer and Torremans, Who Is Steering the Jurisprudence of the European Court of Justice? The Influence of Member State Submissions on Copyright Law 28(“The most striking feature exposed by this diagram [‘Figure 9 – Cartesian diagram illustrating Member State/Commission influence and promotion of Rightholder or User/Intermediary interests’] is the closeness of the Commission to the Court. Submissions by the Commission correlate highly with the Court’s rulings and the Commission appears to intervene particularly effectively on behalf of user interests.”)

[453] Ibid 31 ("The extraordinary closeness of the Commission to the Court of Justice stands out...")

[454] Carrera, De Somer and Petkova, 'The Court of Justice of the European Union as a Fundamental Rights Tribunal: Challenges for the Effective Delivery of Fundamental Rights in the Area of Freedom, Security and Justice' (2012)

[455] Art. 36(2) of the ECHR grants the president of the ECtHR the discretionary power to request or allow third parties to intervene “in the interest of the proper administration of justice.” This practice has been likened to the submission of “amici curiae” briefs to the court, as in the U.S. ibid .

Moving into some specific examples of the limitations of the CJEU's influence in the regulation of copyright law in the EU, it is worth recognizing that the CJEU is an unsatisfactory mechanism for altering legislation once passed at the EU and national levels. The case of the 2014 decision rendered by the CJEU on the invalidity of the 2006 Data Retention Directive is illustrative of this point.[456] By the time of the invalidity ruling on the Directive, Member States had already introduced laws requiring blanket storage of user data from internet service providers; the ruling neither eliminated existing national data retention laws, nor reset them to their status pre-implementation. The re-balancing capabilities of the CJEU do not extend as far as to rewrite an invalid law, and in this respect may not be entirely satisfactory as a means of re-balancing excesses of the legislative process in the favor of the public interest. Member States are expected to comply with CJEU rulings at the risk of being subjected to infringement proceedings, but in this particular case the revisions to domestic law were slow, and even inadequate. [457]

In some other examples, the CJEU is cautious against providing regulatory direction or guidance to Member States, even when such direction can usefully contribute to more harmonized practices. In relation to the contentious issue of the interpretation of exception embodied in Article 5(2) on private copying, the CJEU's rulings in two cases are narrow and do not necessarily lead to increased legal certainty.

In *Stichting*, a case involving the dispute between Dutch collecting society and a German-based company selling to Dutch customers, the notion of "harm" is discussed in terms of *locus*: since the purpose of the levy is to remedy rightholder harm caused by private users engaging in private copying activities, it follows that compensation should be paid by

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[456] *See* Joined Cases C-293/12 and C-594/12, Digital Rights Ireland Ltd. v. Minister for Communications, Marine and Natural Resources of Ireland, et. al., 8 April 2014. (holding that Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC is invalid. Ibid)

[457] For an example of the criticisms drawn from the continued lack of compliance to this ruling, see IT-Pol/EDRi (2019). "EU Member States willing to retain illegal data retention." EDRi. 16 January 2019. https://edri.org/eu-member-states-willing-to-retain-illegal-data-retention/. Technically speaking, the Commission may have the option of bringing infringement proceedings against Member States for noncompliance under certain conditions (Article 258 TFEU (ex-Article 226 TEC)), but politically is generally disincentivized to do so (must be qualified as a "last resort"). This enforcement lacunae is partly addressed in the Commission's "Rule of Law" agenda: European Commission, 'Communication From The Commission To The European Parliament, The European Council And The Council: Further strengthening the Rule of Law within the Union State of play and possible next steps' (European Commission, 2019) *But see*, Andreas Hofmann, 'Compliance or 'Rule Gain'? The Commission's Goals in the Infringement Procedure' (CES)

the ones who commit the harm, where the harm occurs.[458] In other words, the final user of the copying equipment/media, regardless of where the commercial sale of the equipment/media occurs, should be responsible for compensating rightholders for private copying activities in the territory in which they reside.[459] Due to the practical difficulties associated with locating private users, these costs are permissibly levied on manufacturers/importers, who will then "pass on" those costs to the final user. This interpretation is certainly in line with the intent and purpose of the levy scheme, but in terms of guiding the practicalities of such an arrangement, the Court stops short. In cross-border transactions particularly, national courts are given the task of interpreting the sufficiency of enforcement measures adopted in other Member States for the recovery of compensation from manufacturers/importers of copying media and technology. This becomes a challenge considering the difficulties of this assessment in situations involving multiple parties that may be responsible for paying the levy (manufacturer, importer, and wholesaler of a single product).[460] The result has been the continued practice of EU manufacturers and importers paying levies twice – once in the Member State in which the product is manufactured, and once in the "country of destination" where the product is eventually sold.[461] One example of how the CJEU could have been more nuanced in its ruling would have been if the Court established that the "country of destination" principle is binding – this principle would have flowed naturally from its ruling that harm should be calculated closest to the final purchaser. However, such a harmonizing step was instead left in the hands of the legislator.

The CJEU also tends to focus narrowly on the characteristics of the case before it, avoiding general rules or delivering additional guidance where it may be useful. As discussed by Quintais and Rendas, the CJEU decision in *VCAST* (2017) addresses the legal status of cloud-based services (*i.e.*, nPVR) as it relates to the application of the private copying exception, but the case concludes without a clear indication of whether acts of cloud copying

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[458] Case C-462/09, Stichting de Thuiskopie v. Opus Supplies Deutschland GmbH, 2011 E.C.R. I-05331 [Stichting]. The main holding of this case relates to the calculation of fair compensation and the necessity to distinguish the lawfulness of source.
[459] For further analysis, *see* T.E. Synodinou, 'ECJ: Private copying levies II – the Stichting de Thiuskopie v. Opus Supplies Deutschland GmbH case' 2011) accessed <http://copyrightblog.kluweriplaw.com/2011/06/26/ecj-private-copying-levies-ii-the-stichting-de-thuiskopie-v-opus-supplies-deutschland-gmbh-case/.>
[460] Stichting at para. 42(2).
[461] Vitorino, *Recommendations from PCL Mediation*, 10-11

generally qualify for the exception.[462] In *VCAST*, a case involving the applicability of the levy on free-to-air TV programs stored in private cloud storage spaces, the case was complicated by the fact that some VCAST users recorded programs which they did not have legal authorized access to in the first place.[463] In terms of third-party cloud storage providers such as VCAST, the Court ultimately does not reach the issue of whether or not acts of cloud copying can be covered by the private copying exception, instead resting on the preliminary issue of whether or not rightholder authorization was necessary for the act of communication performed by VCAST.[464] Since the Court found that a separate rightholder authorization was necessary for the communication performed by VCAST and was not obtained, it effectually missed the opportunity to address the subsequent question of the applicability of the private copying exception to cloud copying, leaving Member States to decide on the issue.[465] In 2020, a preliminary reference has been made to the Court on this exact issue.[466] Should the Court deliver a definitive ruling this time, it may set a troubling precedent of seeking CJEU confirmation over regulating new technologies or business models – a role which a generalist court at the EU level is ill-suited for.

These examples demonstrate that the CJEU, while having played a pivotal role in the harmonization of copyright law, cannot on its own provide EU-wide guidance or recommendations on some contentious copyright issues. By creating new criteria for the assessment of rights, exceptions and limitations, and autonomously interpreting some copyright concepts, the Court has undoubtedly forwarded the mission of harmonization by giving Member States some ability to frame and nuance their reasoning in legislation and caselaw in a more coherent way. But in inconsistently applying some criteria, and failing to prioritize the development of a broader perspective of copyright law which is able to respond to new regulatory challenges, the Court seems bound to the same short-sightedness of

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[462] *See* João Pedro Quintais and Tito Rendas, 'EU copyright law and the Cloud: VCAST and the intersection of private copying and communication to the public' (2018) 13 Journal of Intellectual Property Law & Practice 711-19

[463] Case C-265/16, VCAST Limited v RTI SpA ECLI:EU:C:2017:913 (2017)

[464] Pedro Quintais and Rendas, EU copyright law and the Cloud: VCAST and the intersection of private copying and communication to the public 715

[465] Some other relevant open questions that remain include "...how to define the relevant copier, how to differentiate between types of cloud-based services for purposes of the private copying exception, and how to articulate the scope of the right of the communication to the public with that of the exception." *Ibid* at 719.

[466] 33 R 50 / 20w Austro-Mechana (Oberlandesgericht Wien (Federal Chancellery of Austria, Higher Regional Court Vienna)) (2020) <https://rdb.manz.at/document/ris.just.JJT_20200907_OLG0009_03300R00050_20W0000_000>

legislation it is tasked with interpreting. With regard to the Court's inconsistent application of fundamental rights described above, Mylly makes a similar point:

> Where fundamental rights protection could have its greatest significance – the judicial review of European Union intellectual property legislation, the interpretation and systematisation of all Union norms and direct control of private informational power – their effects are insufficient, or worse, merely legitimate the choices of the Union legislator and further strengthen the proprietarian bias underlying the relevant laws.[467]

As scholars debate on the nature of political constraints on the court and whether or not they explain its periods of activism or conservatism, what is clearer is that the only way the Court may maintain its legitimacy within the EU legal order is directly through its rulings. Developing an "activist" reputation or developing its own "agenda," therefore, would seem to outwardly violate its institutional mandate, which requires maintaining a balance between promoting higher levels of integration and respecting Member State autonomy. In other words, envisioning a more progressive or politicized role for the Court is bound to lead to disappointment, even when factoring in its capability and/or authority to intervene. As succinctly put by Stone Sweet, "[e]ven a Court that engages in creative, 'expansionist' lawmaking cannot, in itself, judicialize policymaking."[468] The Court can only do so much to affect the entrenched and systematic deficiencies of a copyright system tested by a new, digital reality.

In acknowledging these limitations of the CJEU, a considerable regulatory vacuum is left to be filled by national courts and legislatures. Yet even these institutions may not always be well-equipped to make such decisions, specifically when those decisions involve weighing the effects of potential discrepancies between the regulatory approaches adopted by other Member States. As a result, the regulatory landscape for copyright-related issues among EU Member States remains in a fragmented state, as the pressures of rapidly-evolving technologies continue to challenge the ability of Member States to regulate efficiently, and predictably.

3.2 National Courts

The role of national courts in the formation of the EU copyright *acquis* is of course a significant one. National courts are the first contact between copyright disputes and questions

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[467] Mylly, *Intellectual Property and European Economic Constitutional Law: The Trouble with Private Informational Power* 221

[468] Stone Sweet, The European Court of Justice and the Judicialization of EU Governance

of enforcement, and are therefore usually the first institutions in the lawmaking process charged with issuing an authoritative interpretation of a law once passed. While a comprehensive review of every national court's practice regarding copyright may produce some interesting insights, for the current analysis it suffices to take into consideration a few stand-out examples.

The role of the French *Cour de Cassation*, the highest ordinary court for civil and criminal matters in France, has had a distinctive impact on the interpretation of copyright rules both domestically and at the EU level. One unique group of rulings related to the copyrightability of fragrances, on which the French Court was one of the first among the Member States to issue a ruling which effectively denied granting protection.[469] This same caselaw had an effect on a preliminary ruling reference to the CJEU, notably in Case C-310/17, *Levola Hengelo*. In that case, involving the copyrightability of the taste of food, the Dutch court specifically cited the caselaw of the Court de Cassation and its judgements regarding the refusal to grant copyright protection to fragrances.[470] In its subsequent decision, the CJEU ultimately adhered to position of the Cour de cassation.[471]

Another active jurisdiction in the field of copyright is Germany, where important cases have recently been decided, and important preliminary ruling request have been made, on the highly controversial issue of intermediary/ISP liability. On this particular issue, Member States take vastly different approaches, which has in turn generated some extensive caselaw in national courts. In a highly-anticipated ruling, the German Federal Court of Justice (Bundesgerichtshof) in 2018 answered the question of whether platforms such as Youtube commit an act of public performance on its own, or if it is the user carrying out the copyright-relevant act, holding that the platform can only rely on E-Commerce Directive (2000/31) safe harbour provisions the user uploading the content (not the platform) is carrying out the copyright-relevant act.[472] In this judgement, several questions were raised and submitted to the CJEU for preliminary ruling, and includes the BGH's own indications of how the questions should be answered.[473]

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[469] Cour de Cassation, n°02-44.718 of 13 June 2006, 1st civ; n°11-19872 10 of December 2013, com.
[470] Daniel Segoin, 'A French Government View of Recent CJEU Case Law on Literary and Artistic Property' (2020) RIDA 41 (citing Case C-310/17, Levola Hengelo BV ECLI:EU:C:2018:899 (2018)).
[471] C-310/17, Levola Hengelo BV [2018], para. 47.
[472] See BGH *YouTube* (2018) I ZR 140/15.
[473] Ibid

In both examples, the importance of the arguments employed by the national-level court has been brought to the larger European stage on multiple occasions, indicating that national-level court decisionmaking can be a bellwether for emerging regulatory issues in Europe that may be identified to the CJEU as well as the EU legislator.

It is also worth considering that the national courts, while important, do not handle all copyright-related issues in a jurisdiction. Again, as a general limitation of courts, the issues it confronts is limited to what is raised by litigants, who must have a well-defined legal challenge at hand, as well as the financial resources to launch and sustain a claim. Additionally, some countries may offer specialized dispute resolution mechanisms depending on the nature of the dispute, and thus some issues may never make it onto the public stage. On tariff rate disputes, for example, there are arbitration boards or tribunals set up in some jurisdictions specifically for the resolution of such issues, granted that the national court is still usually competent to hear an appeal of such rulings.[474] Lastly, national courts tend to be generalist courts, and may lack the specialization or expertise necessary to adjudicate some disputes.

Though rare, it has certainly been the case that the CJEU's rulings have led to the overturning of some national decisions (and national laws) in its history, which reinforces the idea that national court-level decisionmaking is not wholly infallible. One such instance was the *Padawan* decision in 2010, which triggered many Member States to change their national laws to differentiate between the costs of products used for private and professional copying purposes, the latter of which should not be levied at all.[475] In the wake of this decision, in 2011 the Spanish High Court favoured the annulment of the levy system in place, which had previously been indiscriminately applied to any equipment or media commercially distributed in Spain.[476] However, the replacement collection mechanism implemented in 2012, which allocated a portion of the General State Budget to fund the levy, was also eventually found to be incompatible with EU law in that it, "…did not ensure that the cost of the private copy levy

[474] M. J. Freegard, 'Quis Custodiet? The Role of Copyright Tribunals' (1994) 16 Eur Int Prop Rev
[475] L. Guibault, 'Private copying levy: The aftershocks of Padawan' 2013) accessed 2020 <http://copyrightblog.kluweriplaw.com/2013/09/17/private-copying-levy-the-aftershocks-of-padawan/> (noting that, "France appear[ed] to be one of the few (if not the only) Member States that addressed the problem of the indiscriminate application of levies on blank media purchased by professionals.")
[476] Osborne Clark Legal, 'Private copy levy system: how do recent developments in Spain compare with other EU jurisdictions?' 2017) accessed 2020 <https://www.osborneclarke.com/insights/private-copy-levy-system-how-do-recent-developments-in-spain-compare-with-other-eu-jurisdictions/>

is borne by the actual users of the private copies."[477] In the case of Spain, the "aftershocks of *Padawan*" lasted for many years through multiple revisions to the law.[478] Hence, while national courts can be viewed as competent to interpret the domestic applications of its national laws, and retains a strong deferential treatment from the CJEU on such decisionmaking, there are still cases where these interpretations are inconsistent with EU norms, and are therefore overturned.

Conclusion Part I: A Comparative Analysis of EU Institutions Regulating Copyright

i. Re-appraising Existing Issues in Regulating Copyright in the EU

It is worthwhile to briefly recapture some of the key takeaways of the preceding sections before moving into a comparative analysis of the EU institutions. From the outset of the analysis conducted in this Part, it is clear that there exists very weak connections between the idealistic copyright discussions conducted at the EU level and regulatory realities of Member State implementation. This is due in part to the faulty assumption that regulation is still successfully promulgated from the "top-down" in a digital society, and that policy objectives manifested at the EU level are translated smoothly and coherently into Member State law. On the contrary, there exists many actors, both internal and external to the network of EU institutions, which have had a distinctive influence on policy dissemination at all levels. The result is fragmented approaches towards regulating copyright in the EU, perpetuating the illusion of a "single market" for creative goods.

As demonstrated from the discussion of this Part, it is difficult to identify a single, cohesive policy direction among EU and national institutional actors when it comes to establishing appropriate copyright regulation. In fact, the existing legal and regulatory framework for copyright in the EU reveals several inconsistencies due to a lack of Member State coordination with regards to enforcement; differing Member State rules on corollary legal issues such as contract and competition law; and even a lack of common approaches adopted by national courts with respect to preserving fundamental rights and freedoms. Collectively, the depth and extent of regulatory fragmentation in the field of copyright in the EU is the natural result of national institutions formulating distinctive regulatory solutions within the narrow context of their jurisdictions, as opposed to considering approaches that

[477] *See* Case C-470/14, EGEDA and Others ECLI:EU:C:2016:418 (2016)
[478] L. Guibault, 'Private copying levy: The aftershocks of Padawan' 2013) accessed 2020 <http://copyrightblog.kluweriplaw.com/2013/09/17/private-copying-levy-the-aftershocks-of-padawan/>

would benefit the EU at-large. These institutions are also bound by strictly-defined institutional competencies, as delineated by the Treaties and their institutional mandates, which leaves a considerable regulatory vacuum left to be filled.

In the EU's political arena, the constraints in regulating cultural and social policies at the EU level are bound up in the Treaty language, and strongly favour national approaches as opposed to EU level action. While it can be said that the EU legislators are obliged to ensure the "flowering of EU cultures," in practical terms this has only meant acknowledging the impact of Directives or Regulations on cultural and social objectives within the non-binding language of preambles, recitals, and corollary "soft-law" instruments such as Memorandums of Understanding or Recommendations. It therefore remains questionable to what extent EU legislators can actively utilize cultural and social rationales directly to regulate aspects of copyright law. Related to this point, thus far the primary basis for regulating copyright has centred on internal market considerations per the Treaty, mooring the resulting legislative efforts to economic and property-based rationales which do not necessarily afford copyright regulation in the EU much room for manoeuvre. With the lack of a clear and coherent regulatory plan for the future direction of copyright rules in a digital age, certain stakeholders lobbying for stronger protections of copyrighted works as property will continue to pressure the system to advance in a direction which will likely undermine the many non-economic characteristics of copyright works. This outcome may disproportionately benefit the strongest economic players in the creative market, to the detriment of smaller creatives who are necessary for ensuring that a diverse and rich body of cultural works is available to the public. As a final point on the limitations of political actors in relation to the regulation of copyright, the absence of a specialized EU level administrative institution for copyright-related issues cements the overall impression that the ability of EU political actors to forward cohesive copyright regulation at the EU level is still very restricted, with little room to consider more innovative regulatory solutions in a modern era.

In the marketplace, only the demands of market participants are ever addressed, and there seems to be very limited means available to regulators to introduce more diverse approaches to regulation. In the example above, the Commission's view on the use of competition to regulate CMOs in the EU has already had several consequences. Maintaining the competition approach could potentially jeopardize the operation of small and medium-sized CMOs in the EU in relation to the online market for musical works because, in taking competitiveness as the main measure of success, such entities may not be able to participate in

the same way as bigger and more financially-capable organizations. The important cultural and social functions of CMOs in the multi-territorial licensing context can also be potentially undermined in lieu of achieving competition objectives, which are rather oriented towards attaining better margins for large rightholders. Another consequence is that national tariff-setting practices, which were developed by Member States as a means to balance the role of CMOs as natural monopolies, will be affected in light of this new EU-wide competition approach among CMOs. It is also easy to anticipate that national regulators will have a considerable task in regulating the tariff-setting practices of their domestic CMOs, on the one hand, and also reviewing the conduct of foreign MS CMOs administering multi-territorial licenses under the foreign territory's national laws, on the other. Without any guidance on achieving more uniform CMO enforcement strategies in the EU, the system proposed by the CRM Directive could potentially generate some friction among national-level regulators reviewing the conduct of foreign CMOs. In short, the competition approach forwarded in the CRM Directive both undermines the benefits of maintaining a diverse community of national CMOs, and places enormous new pressures on national regulators in stretching the extent of their oversight capabilities far past what they should be.

In the judiciary, the future of the interpretation of copyright law also rests on uncertain grounds. As an initial matter, issues that reach the CJEU do not represent all issues that arise in copyright, and the opportunity to litigate a case may not be within the reach of the average citizen. In addition, the CJEU reviews on a case-by-case basis, not necessarily adopting a greater general policy direction that it will advance through its rulings. Furthermore, CJEU rulings, especially in relation to balancing copyright interests with fundamental rights, perhaps do not go far enough to establish workable principles or guidance as to how exactly this balance should be struck. Its approaches wavering between judicial activism and conservativism in copyright cases prove it to be an unreliable institution to forward broader policy objectives. Of course, granted that setting policy should not be its role in the first place, many have placed great emphasis on the capabilities of the CJEU to fulfil a quasi-political role in steering, redirecting, and adding flexibilities into existing copyright doctrine. Exerting this type of pressure on the Court to deliver in this way threatens to bend its institutional role as one which is autonomous and independent from political influence, and can therefore erode its legitimacy within the EU legal order over time. The term "judicial activist" is not one which comports with the necessary insulation of the Court against answering political questions, and its reputation as such has been noticeable in the field of copyright in particular.

If a trend can be discerned from its recent pattern of decisionmaking related to the limited application of fundamental rights considerations to copyright, it is that the Court seems to appreciate precisely this threat of becoming a de-facto political actor. Lastly, by relegating issues back to national courts without clear or precise interpretive guidance, it is uncertain how consistent rulings will be among MS, and ensures the constant threat of Member States' rulings on similar issues diverging dramatically from one another.

With these general institutional shortcomings in mind once again, the analysis now focuses on comparing the quality of stakeholder engagement between existing EU institutional actors.

ii. Comparing EU Institutions

Embedded in every law and public policy analysis, according to Komesar, is a judgement that the agreed-upon goal is to be carried out by a particular institution.[479] While this choice may be unarticulated, it is a crucial determination that can mean the difference between an effective policy and a nominal one.

To understand the performance of institutions, and to ultimately weigh the benefits and consequences of certain institutional choices on the fulfilment of societal goals, it is useful to identify whether, and to what extent, stakeholders may represent their own interests in the "arenas of decisionmaking." The stakeholders common to all the institutions can have very different experiences in terms of representing their interests in one decisionmaking arena over another, and therefore their experiences can begin to inform a substantive basis for comparing institutions. While Komesar opts to focus on "consumers, producers, voters, lobbyists and litigants" as the core stakeholders for comparative institutional analysis, this thesis (preliminarily) defines the stakeholders as the following, related to the copyright-related issues discussed above: Creators (Individual/Independent); Industry (Large Rightholders); Large Intermediaries; Small/New Intermediaries; Public (Individual Users).[480] While this list is not exhaustive of all stakeholders relevant to the copyright discourse, and is not industry-specific, it should serve to roughly illustrate some of the main benefits and consequences of current institutional choices on stakeholder representation, and ultimately its effect on copyright policy, in the EU.

[479] Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy* 5

[480] This thesis provides only a very basic demonstration of how comparative institutional analysis may be practically applied for assessing EU institutions dealing with copyright related legal issues. Ideally in the future, further quantitative and qualitative research can be built upon the comparative institutional analysis framework and basic observations reached here.

The "benefits and consequences" of institutional choices can be determined through assessing the quality of stakeholders' opportunities to participate in decisionmaking processes. The benefits and consequences of institutional choices are defined collectively as "participation benefits" and "participation costs" in the analytical framework suggested by Komesar, called "participation-centered comparative institutional analysis."[481]

Participation benefits are measured by the relative ease of participation (low costs, accessibility) for stakeholders when engaging with the decisionmaking process. More concretely, this variable measures how benefits, or "stakes", are distributed across the population of the stakeholder group.[482] The distribution of the stakes is often determinative of the successfulness of a stakeholder group's participation, where "[a]n even distribution of stakes on both sides of the transaction and a relatively low number of parties involved are suggestive of high benefits and thus of high probability of participation. In contrast, distribution with concentrated stakes on one side and dispersed stakes on the other reflects a problematic transaction situation."[483]

The "costs" of participation considers informational and organizational costs, with the primary of these being informational costs.[484] The main determinants of informational costs include "the complexity or difficulty of understanding the issue in question, the numbers of people on one side of the other of the interest in question, and the formal barriers to access associated with institutional rules and procedures."[485]

The following Table will serve to illustrate the researcher's initial conclusions drawn from comparative institutional analysis, while the sub-sections that follow will aid in channelling the concepts derived from comparative institutional analysis into a broader picture of the functioning of the current institutional framework for the regulation of copyright in the EU. It is emphasised that these conclusions are only preliminary, and that further research would be required in order to bolster these initial impressions.

[481] Ibid 7
[482] Ibid 8
[483] Bakardjieva Engelbrekt, Copyright from an Institutional Perspective: Actors, Interests, Stakes and the Logic of Participation 68
[484] Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy* 8
[485] Ibid

Fig. 2: Weighing the Benefits and Costs of Participation of Copyright Stakeholders in EU Decisionmaking Arenas[486]

		Stakeholders				
Arenas of Decisionmaking		Creators (Individual/ Independent)	Industry (Large Rightholders)	Large Intermediaries	Small/New Intermediaries	Public (Individual Users)
	Political Arena (Legislature)	-/-	+/+	+/+	-/-	-/-
	Political Arena (Administrators)	+/+	+/+	+/+	+/+	+/+
	Market	-/+	+/+	+/+	-/-	+/-
	Judiciary	-/-	+/+	-/+	-/-	-/-

[Key:]

(Participation benefits) / (Participation costs)

	(Participation benefits)	(Participation costs)
+	*high quality/many opportunities to participate, low/evenly-distributed stakes*	*low informational/organizational costs of participation*
-	*low quality/few opportunities to participate, high/unevenly-distributed stakes*	*high informational/organizational costs of participation*

First, in the political arena (top row), successes of stakeholder participation are typically skewed by the influences of the most organized and vocal groups in the political process. Large rightholders organizations and big technology industry groups have become especially successful in getting their interests recognized at the EU level through heavily investing in lobbying efforts in the legislature, while the quality of engagement and opportunities for representation of small/independent creators and the public-at-large remains less certain. Stakes can be high and unevenly distributed among individual rightholders when seeking representation of their interests in legislatures, as with smaller intermediaries/new market entrants and individual users. Again, this is most likely linked to their limited ability to organize under lobbies, and therefore advocate for favourable changes to the law. On the other hand, public engagement with and awareness of copyright-related legal issues has been increasing in recent times, and may shift the ability of individuals and the public-at-large to

[486] This Stakeholder Chart is loosely based on the model presented in Stanford Law School, *Tips for Writing Policy Papers: A Policy Lab Communications Workshop*

unify their position and therefore engage more effectively with the political/legislative process.

Administrative actors (second row from top) also occupy a position in the political arena, but formalistically are very different from legislative bodies, and undertake very distinct functions from that of a legislature. Administrative processes can be very different in terms of how they are designed, as well as which mechanisms they make available to stakeholders to encourage participation. If an administrative actor, or the design of an administrative process, ensures a high level of transparency and accountability in the transactions it oversees, this can help to "level the playing field" effectively between stakeholders, and reduce informational costs overall.

The Administrators (i.e., agencies, offices, councils, etc.) exhibit a high degree of flexibility in their rulemaking, and are positioned to interact with a wider range of stakeholders than the other decisionmaking arenas, making them more ideal candidates in terms of developing effective and balanced regulations. From a stakeholders' perspective, stakes are relatively low when interacting with an administrative authority in comparison to an opposing litigant (judiciary) or opposing lobby (political arena), and so are the costs. However, it is worth pointing out that large stakeholder groups (Rightholders/Intermediaries) having too much influence on the rulemaking and activities of the administrative actor can lead to a situation of "regulatory capture," and may therefore render the administrator ineffective in carrying out balanced copyright goals if not properly checked.

Turning to the Market (third row from top) as an arena of decisionmaking, understanding "participation" is a relatively straightforward proposition, as the focus is on the relative opportunities/costs of stakeholders in selling, purchasing, and otherwise circulating content on the creative market. Most obviously, it follows that the market offers the fewest opportunities for quality stakeholder participation by limiting engagement opportunities to engaging in commercial transactions. That is, "money speaks," with little to no consideration for achieving the most ethical or equanimous social outcomes. Here, larger stakeholders (large rightholders, large intermediaries) are best able to participate in the decisionmaking process through their significant financial positions in the marketplace. If large rightholders refuse to endorse a new technology, or if a large intermediary refuses to conclude a license with a large rightholder, the effects on the marketplace (and by association, society) can be volatile and destabilizing. Stakes are also high and unevenly distributed between individual creators, as with small/new intermediaries, who may have varying abilities to sway the

commercial tides generated by the larger groups. Furthermore, though the consuming public enjoys many quality opportunities to participate in the marketplace, producing entities can maintain an informational advantage over the public which, in the end, creates higher costs for the public. As an aside, in this respect, adequate consumer protection laws can serve to correct this imbalance that would otherwise exist in a purely market-driven scenario.

Adding to the points related to evaluating the market, recognizing cultural and social aspects of copyright within market regulatory schemes is necessary, yet is still not adequately addressed in market regulations adopted at the EU level. Importantly, the recognition of cultural and social aspects of copyrighted works in the design of market regulation need not occur at the exclusion of economic considerations – they can, in fact, complement one another. This point was most vividly brought to the fore above, where the idea of dynamic efficiency, or “creative competition”, was proposed to promote innovation as it relates to the availability of creative goods.[487] Further, through the analysis related to CMO regulation, it can be seen that when an economic-oriented, pro-competition means of regulation is in play, it is uncertain how effective this approach can be at preserving the cultural diversity of content. This conclusion is also reflected in the chart above, exposing the high degree of inequity between the stakeholders that the market can serve to perpetuate absent appropriate regulatory countermeasures.

Finally, as far as conclusions to be drawn from the analysis of the role of the courts (last row), in weighing the quality of participation in the judiciary against the other arenas, there are typically high costs associated with litigation that cannot easily be borne by individuals (creators or users). Interestingly, this likewise skews the nature of the cases that are heard by the Court, particularly the CJEU as some issues have been somewhat “overrepresented” across its decisions in comparison to others.[488] At its worst, this phenomenon has been coined as “rights-creep”, a consequence of rightholders being the frequent initiators (and winners) of cases involving copyright disputes, and which has the effect of slowly advancing the interpretation of the law in favour of rightholders.[489] In comparison to the other venues for stakeholder participation, national courts also have a difficult time with advancing copyright law much outside their own jurisdictions. Generally,

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[487] See discussion, *infra*, 1.2.1.2 The Compatibility of EU Competition Law Objectives and IP.
[488] Favale, Kretschmer and Torremans, 'Is There a EU Copyright Jurisprudence? An Empirical Analysis of the Workings of the European Court of Justice' (2015) <https://zenodo.org/record/29673/files/CREATe-Working-Paper-2015-07.pdf>
[489] Litman, Real Copyright Reform, 24

recognizing the limited, specific role of courts in relation to the legislature exposes the one significant hurdle in its decisionmaking influence overall; courts cannot deviate much from the law as devised by the political actors. And, while the court certainly has the power and authority to consider how the law may be recontextualized in the face of modern challenges, at the EU level such judicial decisionmaking could be viewed as corrosive to the EU's institutional order. Even in its most basic, fundamental decisionmaking roles, e.g., in achieving consistency in one area through judicial decisionmaking by clarifying the interpretation of Directive text, may itself lead to far-reaching interpretive inconsistencies – the links between human rights law and copyright recently falling into some uncertain territory. Thus, despite its impression as a balanced venue of participation, in reality the courts offer few meaningful opportunities for participation for all copyright stakeholders, and likewise representation of all stakeholders' interests in the rulings of every case may not be feasible.

From these very preliminary observations, overall, a lack of systemized and coordinated approaches to copyright policy in the EU among its existing institutional actors has left copyright in a fragmented state, providing stakeholders with very limited avenues of representation and intervention. In reflecting on the interactions between current copyright regulation as carried out by these institutional spheres, perhaps the principal challenge is dealing with the fact that institutions are under the constraints of their mandates, and must often address issues through these narrowly-defined lenses. In the interest of creating a more responsive and adaptable body of copyright law in the EU, this rigidity can limit progress and, at its worst, can impede it. This problem is exacerbated by the fact that institutions rarely seem to coordinate among one another when it comes to forming unified policy objectives. Courts, for example, are still especially careful to "avoid" ruling on questions of general policy while their judgements inevitably have policy consequences.

Taken together, the real strengths of the European system seem to be underrecognized in all three of the core decisionmaking arenas in the EU. Particularly in the case of copyright, which has cultural and social dimensions, these characteristics can be used to add much needed flexibilities to the law. Yet the institutions in their current form do not offer many useful opportunities for all stakeholders to participate in decisionmaking processes on their own, and include high costs (informational, organizational) which are borne unevenly by some stakeholders and not others. These shortcomings, along with some ideas on how to adapt this current system of copyright regulation in the EU, will be revisited in Part III.

PART II. INSTITUTIONAL REGULATION OF COPYRIGHT: COMPARATIVE INTERNATIONAL PERSPECTIVES

In some jurisdictions outside the EU, administrative bodies exist to facilitate the regulation of copyright. With the authority to set tariffs, issue advisory opinions, coordinate some forms of dispute resolution, and engage in quasi-legislative activities such as rulemaking, these institutions draw upon a wide range of expertise in order to develop and enforce flexible and fast-moving regulatory solutions in the face of new challenges. As concluded above, the role of administrative bodies in the regulation of copyright can be significant for a vast number of stakeholders. Yet in the EU there has been little attention paid to developing this form of regulator in the field of copyright, especially at the EU level.

To provide some further insights into the role and functioning of administrative actors in the regulation of copyright law, the following sections will highlight some unique international examples of administrative bodies, operating in two jurisdictions: U.S. and Canada. Ideally these examples will help to highlight some important considerations for reforming the current state of institutional copyright regulators in the EU.

The U.S. Copyright Office, as a department officially situated within the Library of Congress, has a long history of fulfilling administrative duties related to the deposit of copyright works. However, as the age of formalities passed, it has not only survived, but acquired several new functions in response to modern regulatory challenges. Today, its role in copyright administration is the largest it has ever been, extending into many different aspects of rulemaking, management, and recently dispute resolution (administering a new department for copyright small-claims).

The Copyright Board of Canada (CBC), is chiefly tasked with setting tariffs for the statutory licenses administered by the Canadian government. Its role as an administrative body is not limited to the activities of the board itself (quasi-judicial procedures related to tariff setting, and tariff hearings), but it also oversees the establishment of CMOs and, at times, will combine tariffs in a way which “forces” CMOs to cooperate in the administration of a specific statutory license. This example, taken along with its interestingly “indirect” role in influencing Canada’s copyright policy sphere, provides a striking case in point on the breadth of utility and influence a single regulatory body can exert on a domestic copyright system.

While the following sections do not present a complete overview of all aspects of the selected authority within its respective national legal environment, as done above with the EU framework, references to each institution's legal mandate and its relationship with other institutional actors will be provided to help situate the analysis of the administrative actor as it functions within its respective regulatory environment. Following each section will be a brief assessment of transferrable principles that may be taken into account when considering the possible revisions to the EU institutional order for regulating copyright, as well as potential functions of a new EU administrative body for copyright.[490]

4. United States: The Copyright Office

In the U.S., the challenges posed by digitization have proven to be as difficult to address as in the EU. With many tech companies based in the U.S., the political arena has been an especially volatile battleground for defending the vested interests of large rightholders on the one hand, and modernizing copyright laws to incentivize the development of new business models on the other. The result has been a Copyright Act that "rival[s] the Internal Revenue Code," a lengthy and complex set of piecemeal provisions that were reactions to the perceived impact of new technologies that, in a matter of years, quickly became outdated.[491] As of today, these vestiges of the past are still embedded into the Copyright Act: legal provisions establishing the licensing framework for long-defunct technologies such as VHS and Beta format cassette tape recorders, 8mm video camcorders, and even coin-operated jukeboxes, remain.[492]

The increasingly regulatory character of copyright laws has certainly given rise to more legal uncertainties than they resolve. By way of response, lawmakers in the U.S. seem to have acknowledged the value of administrative, rather than legislative, approaches to rulemaking in the field of copyright.[493] As a result, the institutions with a connection to copyright-related legal issues have necessarily evolved to keep pace with shifting demands for a more comprehensive and responsive body of copyright law in a digital age.

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[490] It is emphasized that this assessment is subject to some qualification in that the legal systems analysed are much different from the system in the EU. Therefore, any findings drawn from the comparative analysis at the end of this section shall be limited, insofar as such findings can be appreciated regardless of the underlying legal system.

[491] A. Abbott and Adam Mossoff, Creativity and Innovation Unchained: Why Copyright Law Must be Updated for the Digital Age by Simplifying It, 2017) <https://regproject.org/wpcontent/uploads/RTP-Intellectual-Property-Working-Group-Paper-Copyright.pdf>

[492] Ibid (referencing 17 U.S.C. §§ 1201-2, 116)

[493] The legislative compromise reached by Congress that resulted in the unique "triennial" rulemaking provisions of the Digital Millennium Copyright Act (DMCA), is illustrative of this trend. See, *infra*.

To help create a better regulatory environment for supporting creativity, the evolution of the role of the U.S. Copyright Office (USCO, the Office) is particularly worth examining. Beginning with its role as a registry for copyrighted works in the U.S., its functions have expanded considerably over time to encompass a wider range of tasks, from developing studies and reports on copyright-related issues at the request of Congress, to engaging in a "quasi-legislative" rulemaking function.[494] Its institutional evolution over time has not gone without its controversies, however, as some question the expertise (and even the authority) of the Office to establish rules on very specialized and technical legal subjects. These issues and others are dealt with in greater detail below.

4.1 Historical Background and Legal Framework

In the U.S. Constitution, Congress specifically has the power to enact laws which "…promote the Progress of Science and useful Arts, by securing for limited Tımes to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[495] This "copyright clause" of the U.S. Constitution lies at the heart of the rulemaking ability of U.S. institutional actors and informs the extent of their competencies to enact laws and/or regulations relevant to copyright.

The first Copyright Act in the U.S. was adopted in 1790, aimed at "…the encouragement of learning, by securing the copies of maps, Charts, And books, to the authors and proprietors of such copies" for a limited time.[496] In this first version of the Act, there were two administrative features of the law which reflected the formal requirements for receiving copyright protection at the time, namely the deposit of copies of published works and the registration of works.[497] Originally, the deposit and registration of works were split between the Executive and Judicial branches, respectively, until those functions were unified under the Library of Congress (Legislative Branch) in 1870.[498] It wasn't until 1897 that the position of

[494] Andy Gass, 'Considering Copyright Rulemaking: the Constitutional Question' (2012) 27 Berkeley Tech LJ 1047-89 1050 ("The Copyright Office presently makes, or comes perilously close to making, public-facing, substantive copyright law in a number of respects-most notably in a role prescribed by the anti-circumvention regime of the Digital Millennium Copyright Act.")
[495] , 'U.S. Constitution' art. i, section 8
[496] U.S. Copyright Office, 'Copyright Act of 1790' 2020) accessed 21 October 2020 <https://copyright.gov/about/1790-copyright-act.html#:~:text=An%20Act%20for%20the%20encouragement,during%20the%20times%20therein%20mentioned.>
[497] Marybeth Peters, 'Copyright Administrative Institutions: The United States Copyright Office' in Ysolde Gendreau (ed), *Institutions administratives du droit d'auteur / Copyright Administrative Institutions* (Éditions Yvon Blais 2002) 547
[498] Ibid

Register of Copyrights was officially established, and that the Copyright Office began its functions as an entity situated within the Library of Congress, where it remains to this day.[499]

Although the Office has been historically associated with the registration of works, its essential role in several other areas helped to keep this institution relevant well-passed the era of formalities.[500] Its role in advising Congress on copyright-related matters, drafting legislation, engaging in policy discussion through producing recommendations and reports, and commenting on (and occasionally interacting with) international delegations and their approaches to copyright have cemented its position as an essential institution in the maintenance and development of U.S. copyright laws.[501] This considered, the extent of its authority, especially in its capacity to issue rules on the regulation of specific technical provisions within the current copyright law, has been subjected to some scrutiny. It follows that its future involvement in the copyright regulatory sphere – while broadly considered desirable – has also been somewhat uncertain. The root of this uncertainty lies in a yet-unresolved constitutional separation-of-powers question, and in its still-limited technological capacities.

4.2 Institutional Structure and Roles

The Copyright Office is a unique institution in comparison with other federal administrative agencies. As a Congressionally-established administrative agency, and as a division within the Library of Congress, it is guided by the constitutional provisions relating to the allocation of powers to the Legislature (Congress).[502] This is in contrast to other federal agencies which are either independent, or established as an executive agency (e.g., Federal Communications Commission, Department of Education). The Office further maintains a connection with the mission of the Senate judiciary subcommittee on Intellectual Property, revealing one of a few nexuses that exist between IP issues discussed in the U.S. legislature and the Office as an advisory on such issues.

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[499] Ibid

[500] The U.S.'s accession to the Berne Convention prompted changes in domestic law which phased out formal requirements for receiving federal (and state) copyright protection. According to Pallante, registration was made optional in 1976, the condition of "copyright notice' was removed in 1989, and the requirement to renew registration was removed in 1992. Maria Pallante, 'The Curious Case of Copyright Formalities' (*David Nelson Memorial Keynote Address: Reform(aliz)ing Copyright for the Internet Age? , Berkeley, CA* 2013) (citing Copyright Act of 1976 § 408, 17 U.S.C. § 408 (2012); Berne Convention Implementation Act of 1988 § 7, 17 U.S.C. § 401 (2012); Copyright Renewal Act of 1992 § 102, 17 U.S.C. § 304(a) (2012)).

[501] See, *inter alia*, 17 U.S.C. § 701(b)(1)–(4).

[502] 17. U.S.C. §701

4.2.1 Functions

The majority of the Office's functions are delineated in 17 U.S.C. §§ 701-10. In general, the Office's functions and duties are administrative in nature, including such responsibilities as advising Congress on national and international issues relating to copyright, providing assistance to other federal departments, agencies and the judiciary on copyright-related issues, participating in international and intergovernmental meetings, conducting studies, leading educational programs, and performing other responsibilities as directed by Congress.[503] Its primary functions are frequently summed up as the "registration and recordation" of copyright claims, only recently expanding into the regulatory sphere by engaging in substantive rulemaking.[504]

4.2.1.1 Registration and Recordation

As far as its primary responsibilities, the Office presides over the process of registering copyright claims and recording documents pertinent to the acquisition or transfer or rights. For the process of registration, according to Section 410 of Title 17 U.S.C., the Office performs an "examination" of copyright claims, after which the deposited material is considered "registered." Notably, not all claims are automatically registered, as the Register maintains the authority to reject a claim on the basis of being non-copyrightable subject matter or otherwise invalid.[505] Registration is a voluntary process, but in the U.S. is required before filing suit for copyright infringement or claiming certain remedies for infringement. Section 412 specifies remedies to copyright infringement, providing a further "incentive" of sorts for timely registering works with the Office, specifically to seek statutory damages instead of actual damages for an infringement claim (which can be significantly higher), as well as attorney's fees.[506] In 2019, the Office issued more than 547,000 registrations.[507]

The Office also receives documents pertaining to copyrighted works which certify that rights have been acquired or transfers of rights have been made.[508] The importance of recording transfers of rights, while starting from the 1700s, continues to be a vital aspect of

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[503] Ibid
[504] Pallante, 'The Curious Case of Copyright Formalities' (*David Nelson Memorial Keynote Address: Reform(aliz)ing Copyright for the Internet Age? , Berkeley, CA* 2013); Aaron Perzanowski, 'The Limits of the Copyright Office' (2018) 33 Berkeley Tech LJ
[505] Peters, 'Copyright Administrative Institutions: The United States Copyright Office', 553. Refusals to register may be appealed up to two times, after which the Office determination can be subjected to judicial review. Ibid.
[506] Ibid
[507] U.S. Copyright Office, United States Copyright Office Annual Report 2019, 2020) 4
[508] Peters, 'Copyright Administrative Institutions: The United States Copyright Office', 554

copyright management given the complexities of ownership that may apply for a single work. Making such information public and searchable has been an important pillar of the Office's modernization strategy.[509] Today, there remains a high demand that needs to be filled for early online access to records of transfers and ownership.[510] Over 12,500 documents were submitted to the Office in 2019 containing the information for upwards of 450k copyright titles.[511]

4.2.1.2 Research and Advisory

In its history, the Office has contributed significantly to the advancement of U.S. Copyright laws by assisting Congress in producing knowledge and gathering opinions regarding the strengths and limitations of the copyright system. Significantly, in the time leading up to the passage of the most recent iteration of the U.S. Copyright Act – the 1976 Act – then-Register of Copyrights Kaminstein prepared a report which was the product of targeted studies and discussions with the copyright bar and community, bearing similarities to today's review hearings.[512] In 1964, the copyright revision bills fielded by the House and Senate "were largely identical to the Office's working draft…[s]howing the primacy of the Office's work."[513] While the Act was considered a "substantial improvement" from the 1909 version, by the time of its passage some provisions were already considered somewhat dated.[514]

In its advisory role, Congress may request that certain issues be analysed and reported on by the Office. Identified issues are analysed in published Reports or Memorandums, as the Office delivers its "expert opinion" on the issue, as well as going as far as drafting new legislation upon which Congress can build on.[515] Somewhat linked to this advisory role is its rulemaking responsibilities, also delegated by Congress, which is discussed in more detail in the following sections.

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[509] Office, *United States Copyright Office Annual Report 2019*,
[510] Peters, 'Copyright Administrative Institutions: The United States Copyright Office', 554
[511] Office, *United States Copyright Office Annual Report 2019*, 4
[512] Joshua L. Simmons, 'The Next Great Copyright Office' (2015) 7 Landslide 23-29 24
[513] Ibid
[514] Ibid 25 (citing Barbara Ringer, "Author's Rights in the Electronic Age: Beyond the Copyright Act of 1976" 1 Loy. L. A. Ent. L. Rev. 1, 4 (1981)).
[515] 17 U.S.C. §701; Gass, Considering Copyright Rulemaking: the Constitutional Question 1051

4.2.1.3 Supervision of Statutory Licenses (CRB)

The Licensing Division of the Office facilitates the administration of several different types of statutory licenses under the Copyright Act.[516] Under the Copyright Act, the Office collects royalties from the administration of the statutory license, as well as records information necessary to administer the license and provide public notice. For example, under the statutory licensing scheme for non-dramatic musical works under title 17 U.S.C. §115, the Office records Notices of Intent (NOIs) of users to make and/or distribute phonorecords.[517] To determine the rates of the statutory licenses, the Copyright Royalty Board (CRB) operates under the authority of the Library of Congress to adjust the rates and terms of use of the statutory licensing scheme in accordance with copyright law.[518] As a quasi-administrative, quasi-judicial entity, the CRB employs three Copyright Royalty Judges with backgrounds in economics, copyright, and both, to "oversee the copyright law's statutory licenses, which permit qualified parties to use multiple copyrighted works without obtaining separate licenses from each copyright owner."[519] The CRB also "…oversee[s the] distribution of royalties deposited with the Copyright Office by certain statutory licensees and adjudicate controversies relating to the distributions."[520] Occasionally, through the recommendation of the Office, the works that fall within the ambit of the statutory compulsory license may be determined, as was the case with ringtones.[521]

4.2.2 The Office and Administrative Rulemaking: The DMCA and Anti-Circumvention Rules

The growing regulatory character of copyright is demonstrated through recent legal provisions which add a layer of specificity and technicality to the application and enforcement of copyright-related legal provisions. Such is the case with anti-circumvention rules under the

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[516] "The Licensing Division is responsible for helping to administer the various statutory licenses and similar provisions, including: secondary transmissions of radio and television programs by cable and satellite systems; making and distributing phonorecords of nondramatic musical works; and importing, manufacturing, and distributing digital audio recording devices or media."

[517] Note that this practice has been changed with the passage of the Music Modernization Act (MMA) of 2018.

[518] 17 U.S.C. §§ 801-5

[519] United States Copyright Royalty Board, 'United States Copyright Royalty Board: About Us' 2020) accessed 25 October 2020 2020 <https://www.crb.gov/>

[520] Ibid

[521] Lawrence A. Schultis, Cydney A. Tune and Meighan E. O'Reardon, 'More Ringtones To Choose Among: New Copyright Office Decision Simplifies Acquisitions With Compulsory Licensing' 2006) accessed 2020 <https://www.mondaq.com/unitedstates/publishing/43784/more-ringtones-to-choose-among-new-copyright-office-decision-simplifies-acquisitions-with-compulsory-licensing>

DMCA, as provided by the Copyright Office through a triennial rulemaking procedure.[522] These rules, subject to revisions every three years, was introduced as an alternative to a blanket prohibition against the circumvention of technological protection measures, instead aimed at introducing some periodic exceptions to the anti-circumvention laws. However, these rules have still been subjected to much public and industry criticism over the years for being insufficient and at times out-of-step with technology. Before delving further into this critique, a brief background of the concept of the administrative rulemaking, as envisioned by Congress during the negotiations over the DMCA, is warranted.

In 1998, faced with rapid technological developments and the popularization of digital services, publishers and rightholders in the U.S. pushed for legislation which could address the effects of mass infringement on the creative industry. In a bid to stymy these effects, Congress proposed legislation aimed at strengthening the effectiveness of technological protection measures employed by copyright industries, making it illegal to "“circumvent a technological measure that effectively controls access to a [copyrighted] work,” and “(separately) to traffic in tools that allow others to carry out such circumventions.”[523] However, consumer advocacy groups, libraries, universities, tech industry players, and other public bodies strongly opposed the DMCA’s blanket anti-circumvention provisions which, in their view, would erode the ability of users to engage in legitimate fair uses of copyrighted works.[524] Thus, to resolve the stalemate between the stakeholder factions, it was suggested that a periodic rulemaking process be undertaken on a continuous basis by a competent agency authority, which would offer “carve-outs” of the anti-circumvention laws in favor of specific uses of content.[525] Though this procedure was originally conceived to be carried out under the authority of the Department of Commerce (executive agency) and approved by the Secretary of Commerce, the Librarian of Congress instead approves of the final rulemaking once the proceedings have been conducted by the Register of Copyrights (Copyright Office).[526] This starts to indicate the nature of the potential constitutional challenge against the rulemaking authority of the Office under the DMCA, which will be picked up again in 2.1.3.1.

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[522] 17 U.S.C. §1201
[523] Gass, Considering Copyright Rulemaking: the Constitutional Question 1068
[524] Ibid 1072
[525] Ibid ; Perzanowski, The Limits of the Copyright Office 755
[526] This pivot was apparently “in recognition of the expertise of the Copyright Office…” Gass, Considering Copyright Rulemaking: the Constitutional Question (citing H.R. REP. NO. 105-796, at 64 (1998) (Conf. Rep.)

The §1201 rulemaking procedure is guided by the statute, and is set to occur on a fixed term basis, with the Copyright Office tabling public and industry inputs on the rules every three years. Specifically, the goal of the rulemaking process is to, "determine whether there are particular classes of works as to which users are, or are likely to be in the next three years, adversely affected in their ability to make noninfringing uses due to the prohibition on circumventing access controls."[527] Based on stakeholder inputs submitted to the Office, the Register will recommend categorical exceptions to the anti-circumvention law, which are reviewed and (usually) ratified by the Librarian of Congress.[528] However, developments in the meantime, which may include court cases or new technologies, may disrupt this cycle and necessitate an earlier revision to the regulatory framework. On the other hand, as identified by Liu, there is the threat of "locking in" a regulatory framework too early, disrupting the development of a new or emerging technology.[529] Finding the right timing balance for regulation, as well as refraining from the impetus to over-regulate an industry, can be a difficult task for any regulator to approach. It is therefore unsurprising that its rulemaking in this area has generated some criticisms.[530]

4.3 Limitations

4.3.1 Ambiguous Authority

The Copyright Office is a unique federal agency in comparison with other administrative agencies with IP-related missions. The US Patent and Trademark Office (USPTO) is the federal agency for granting U.S. patents and registering trademarks, and is established as an executive agency under the Department of Commerce, subject to the policy direction of the Secretary of Commerce.[531] The Federal Communications Commission (FCC), bearing broad rulemaking authority in the regulation of most types of public broadcasting signals in the U.S., is established as an independent agency wherein its appointments are managed by the President, and its authority is subject to the statutory mandate of Congress, as well as the enforcement of Congress and the courts on its rulemaking.[532] By contrast, the position of the Copyright Office is an administrative agency within the legislative branch,

[527] U.S. Copyright Office, 'Eighth Triennial Section 1201 Proceeding (2021)' 2020) accessed 25 October 2020 <https://www.copyright.gov/1201/2021/>
[528] Gass, Considering Copyright Rulemaking: the Constitutional Question 1069
[529] Liu, Regulatory Copyright
[530] Meredith Rose, Ryan Clough and Raza Panjwani, Captured: Systemic Bias at the U.S. Copyright Office, 2016) 31 (citing the §1201 rulemaking procedures as an example of the Office's "mission creep."); Perzanowski, The Limits of the Copyright Office
[531] 35 U.S.C. §§1-13
[532] 47 U.S.C. § 154

with its appointments and approval of its rulemakings subject to the oversight of the Librarian of Congress.

The Office's position within the legislative branch has raised some issues specifically in relation to its rulemaking authority. First, its authority in some instances has been scrutinized for being "executive" in nature, despite its positioning within the legislative branch of government. Executive agencies in the U.S., created by an act of the President rather than Congress, "have the power to enact laws within the scope of their authority, conduct investigations, and enforce the laws that they promulgate accordingly."[533] To balance this significant responsibility, the President is in charge of appointing the heads of executive agencies, and may remove such an appointment with or without cause.[534] By contrast, the appointment of the Register of Copyrights is the sole responsibility of the Librarian of Congress, who is themselves appointed by the President with the advice and consent of the Senate.[535] The President may only remove an appointment of a legislative agency with cause.[536] Therefore, this arrangement can raise some "separation of powers" concerns when the Office acts within its capacities to promulgate automatically public-binding rules, which seems quite analogous to performing an "executive" function.[537]

A second issue, as identified in one of the sections above, regards the Office's unique position in relation to other federal agencies is that it has been critically viewed as an "aggrandizement" of Congressional authority. As put by Gass, "[b]ecause the Copyright Office sits as a division within the Library of Congress, which is part of the legislative branch, delegations from Congress to the Copyright Office may amount to unlawful delegations from Congress to a sub-unit of itself."[538] Though this issue has not been directly raised in relation to the Office's rulemaking authority, it seems that if the Office is considered an "agent" of Congress, the normally-proscribed measures for policymaking of Congress shall apply, meaning that any proposed regulation must go through both the House and Senate, as well as receive the approval of the President.[539]

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[533] JUSTIA, 'Executive Agencies' 2020) accessed 25 October 2020 <https://www.justia.com/administrative-law/executive-agencies/>
[534] Ibid
[535] 17 U.S.C. §701, 2 U.S.C. § 136–1.
[536] JUSTIA, 'Executive Agencies'
[537] Gass, Considering Copyright Rulemaking: the Constitutional Question
[538] Ibid 8
[539] Ibid (citing Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise 501 U.S. 252, 277 (1991)).

To illustrate this issue, as it was originally conceived in the DMCA (according to its legislative history), an executive agency (The Department of Commerce) would have originally been tasked with the §1201 rulemaking, but was instead located to an agency in the legislative branch – the Office. The separation-of-powers issue lies in the idea that Congress could be considered to be assigning rulemaking authority "to itself" by delegating one of its "own" agencies to undertake the rulemaking. Unlike executive authority which provides for exercises of authority which are directly binding, exercises of legislative authority is controlled by Article I of the Constitution, and must instead be undertaken with the input and approval of both the House and Senate.[540]

For a few reasons, the resolution of this delegation of powers issue has not been entirely clear. First, directly related to the passage of the DMCA, then-President Clinton signed a memo which anticipated the potential constitutional challenge to the Office's rulemaking authority by specifying that, "…the Copyright Office is, for constitutional purposes, an executive branch entity."[541] Second, according to an appellate court decision *Eltra Corp. v. Ringer*, the classification of the Office's status as either an executive or legislative agency was considered to hinge on its functions, "…rather than its formal location in the federal government."[542] In that case, since the operations in question were "executive or administrative" in nature, the appellate court held that, "'the Copyright Office is an executive office'"—adding that it was "'irrelevant that the Office of the Librarian of Congress is codified under the legislative branch or that it receives its appropriation as part of the legislative appropriation.'"[543] Yet, as put by Gass, both of these claims that support the idea that the Office is an executive agency rests on a legal fiction – "it is not an open question which branch the Copyright Office actually sits in."[544] Therefore, the question seems to remain unresolved, which can be especially troubling given the fact that many scholars – including a former Register of Copyrights – have strongly advocated for an expanded role of the Office.[545]

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[540] Ibid
[541] Ibid 1058 (citing William J. Clinton, Statement on Signing the Digital Millennium Copyright Act, 2 PUB. PAPERS 1902 (Oct. 28, 1998), http://1.usa.gov/KL9h4U)
[542] Ibid 1059 (citing Eltra Corp. v. Ringer, 579 F.2d 294, 298 (4th Cir. 1978))
[543] Ibid (citing Eltra Corp. v. Ringer, 579 F.2d 294, 298 (4th Cir. 1978))
[544] Ibid
[545] See, e.g., Sandra Aistars, 'The Next Great Copyright Act, or a New Great Copyright Agency? Responding to Register Maria Pallante's Manges Lecture' (2015) 38 Colum JL & Arts ; Simmons, The Next Great Copyright Office ; Pamela Samuelson, Jessica Litman and CPP Members, 'The Copyright Principles Project: Directions for Reform' (2010) 25 Berkeley Tech LJ 1175-245; Liu, Regulatory

4.3.2 Extent of "Expertise"

Perzanowski articulates an important question when it comes to measuring the extent of the Office's authority to regulate certain areas of copyright law: namely, what can be considered to be its "expertise"?[546] This can be an important question due to the fact that courts in the U.S. traditionally adopt a deferential standard towards federal agency and administrative rulemaking.[547] As discussed, the primary functioning of the Office in its registry and recordation functions provide a clear sense of its expertise in terms of deciding matters of substantive and formalistic significance: for instance, making determinations on which materials are registrable or not, and distinguishing copyrightable works from "useful articles".[548] Its further statutory mandate regarding the oversight of statutory licenses is also clearly defined, though less so in relation to its ability to distinguish classes of technologies subject to the statutory license scheme.[549] However, its supposed expertise in areas relating to the assessment of digital technologies (and the delicate "fair use" issues embedded within this assessment) is less than clear, and has been the subject of critique.[550]

Over time, in relation to the increasing regulatory burdens that have been imposed upon the Office due to the increasing detail and technicality of copyright laws, its administrative rulemaking capacities have been repeatedly tested. Particularly, some have doubted the "expertise" of the Office in particular relation to its ability to offer expert guidance or advice on highly technical legal questions, which often have significant policy

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Copyright .Former Register Maria Pallante advocated for restructuring the Office as an independent agency operating outside the authority of the Library of Congress, which would have, among other things, resolved the issue of potential constitutional (or LOC) challenges to Office rulemaking. Maria Pallante, 'Letter to Ranking Member of the Committee on the Judiciary John Conyers, Jr. Re: The U.S. Copyright Office: Its Functions and Resources' (Senate*,* 2015) <https://copyright.gov/laws/testimonies/022615-testimony-pallante.pdf>This view stirred up a fair bit of controversy in U.S. politics, as the Register was removed by the Librarian of Congress in what was speculated to be a reaction to the idea of an independent Copyright Office. See, e.g., Ralph Oman and Marybeth Peters, 'Letter to the Senate Subcommittee from Former Registers of Copyright Re: Removal of Maria Pallante as Register of Copyrights' (Senate*,* 2016) <https://artistrightswatchdotcom.files.wordpress.com/2016/11/copyright-office-letter-and-enclosure-2.pdf>

[546] Perzanowski, The Limits of the Copyright Office 744

[547] See, *inter alia*, Auer v. Robbins, 519 U.S. 452 (1997) (holding that an agency's interpretation of its own regulation is "controlling unless plainly erroneous or inconsistent with the regulation"); Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 468 U.S. 837 (1984) (holding that "when a legislative delegation to an administrative agency on a particular issue or question is not explicit but rather implicit, a court may not substitute its own interpretation of the statute for a reasonable interpretation made by the administrative agency.")

[548] Perzanowski, The Limits of the Copyright Office 746-50

[549] Ibid 752-3

[550] Ibid ; Rose, Clough and Panjwani, *Captured: Systemic Bias at the U.S. Copyright Office*,

consequences. The consumer group “Public Knowledge” offers an example of the nature of this challenge by criticizing the Office’s ability to carry out the §1201 rulemaking: “the latest round of hearings [in 2015] saw the Copyright Office opine on non-copyright policy questions related to the regulation of medical devices, aerospace component safety standards, agricultural equipment, emissions standards, and highway safety standards, among other far-flung topics.”[551] Furthermore, some of the Office’s determinations are extremely polarizing, and have been criticized for being in favour of one side over another, as opposed to serving as a balanced agency actor.[552] In a recent study, the Office came to the conclusion that Congress should review the § 512 safeharbours, as they are “unbalanced” and “no longer working for all concerned parties.”[553] This position was viewed as highly controversial, and could serve to effectively initiate the process of revising the current safeharbour laws in the U.S., which may in turn initiate a rather significant upheaval of the current status quo regarding the liability of internet intermediaries based in and operating in the U.S..

In acknowledgement of these shortcomings, many have advocated for expanding the expertise of the Office to be able to meet the regulatory challenges of a modern context. Some have advocated for further rulemaking and policymaking of the Office, while others have speculated on the potential of the Office to function as an executive or independent agency.[554] In practical terms, perhaps the former is closer to the realm of possibility than the latter.

4.3.3 Threat of Regulatory Capture

“Regulatory capture” is something that all institutions must confront and safeguard against to a certain degree, and has been raised in the past regarding both the Office’s staffing and its decisionmaking.[555] The basic idea is that the regulated industry has an undue influence

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[551] Rose, Clough and Panjwani, *Captured: Systemic Bias at the U.S. Copyright Office*, 32

[552] See, Pamela Samuelson, 'The US Copyright Office Section 512 Study: Why the Entertainment Industry Is Claiming Victory' 2020) accessed 2020 <http://copyrightblog.kluweriplaw.com/2020/05/25/the-us-copyright-office-section-512-study-why-the-entertainment-industry-is-claiming-victory/#:~:text=The%20biggest%20disappointment%20for%20me,Circuit's%20decision%20in%20Lenz%20v.>

[553] Maria Strong, 'Section 512 of Title 17: A report of the Register of Copyrights' (U.S. Copyright Office, 2020) <https://www.copyright.gov/policy/section512/section-512-full-report.pdf>

[554] Samuelson, Litman and Members, The Copyright Principles Project: Directions for Reform ; Aistars, The Next Great Copyright Act, or a New Great Copyright Agency? Responding to Register Maria Pallante’s Manges Lecture ; Liu, Regulatory Copyright 148-54; Perzanowski, The Limits of the Copyright Office 772-4

[555] Rose, Clough and Panjwani, *Captured: Systemic Bias at the U.S. Copyright Office*, ; Litman, 'Digital Copyright' (2017) 59 <http://hdl.handle.net/2027.42/56221>(“Unfortunately, the Copyright Office has tended to view copyright owners as its real constituency, and has spent the past ten years

on the regulator, whether directly through the institution's staffing, or indirectly through the (biased) positions supported by the institution in question. The Public Knowledge Group has raised the potential of bias of the Copyright Office in its report "Captured: Systemic Bias at the Copyright Office," claiming that, "the Office has a well-trodden revolving door between its leadership, in other legal and policy staff and major rightholders and their representatives."[556] In relation to this issue, the constitutional question of the Office's rulemaking authority is again relevant for determining whether, and to what extent, the Office's decisionmaking is influenced by outside motivators (e.g., campaign funding).[557] To confront the potential of regulatory capture, the standards regarding the hiring of staff and Office appointees is generally left to the Librarian of Congress, but in the future may be reconfigured as within the authority of the President.[558] Reducing the threat of regulatory capture, as with all administrative agencies, requires sufficient oversight mechanisms to ensure the impartiality of the decisionmaking carried out by the institutional actor, especially one which has a role in the development of national policy.

4.4 Transferability of Principles

4.4.1 Copyright Advisory

The recognition of the significant role of the Copyright Office as a specialized institution for the assessment of copyright laws has been supported most by the idea that it serves as a representative of the public interest.[559] Unlike large interest groups with the financial capabilities of lobbying legislatures, the public interest is often difficult to represent in the political arena, and thus relies heavily on the political actors themselves, as well as public institutions, to advocate effectively for their interests. The Copyright Office becomes involved in shaping policies relevant to the public interest through occasionally intervening in

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moving firmly into the content industry's pocket. The reasons are unexceptional: The office has a limited budget, and relies on the goodwill of its regular clients.")

[556] Rose, Clough and Panjwani, *Captured: Systemic Bias at the U.S. Copyright Office*, 4

[557] Gass, Considering Copyright Rulemaking: the Constitutional Question 1065 fn. 75("The term "self-dealing" is particularly appropriate in the substantive area of copyright law, where the available evidence suggests that Congress's delegating policymaking authority to the Copyright Office is occasionally motivated by an interest in expected campaign donations to the congressional committees that oversee it.")

[558] In 2017 the "Register of Copyrights Selection and Accountability Act" was passed by the House, which would change the ability of the Librarian of Congress to name the next Register, and instead place that responsibility with the President (on the condition that a list of potential candidates be generated by a congressional panel). U.S. House of Representatives, 'H.R.1695 - Register of Copyrights Selection and Accountability Act of 2017' 2017) <https://www.congress.gov/bill/115th-congress/house-bill/1695>

[559] Litman, 'Digital Copyright' (2017) 58-9 <http://hdl.handle.net/2027.42/56221>

litigation, whether in the service of the Department of Justice, on its own behalf (when sued), when intervening in copyright infringement suits related to the registration of rights, or when compelling the deposit of copies of copyrighted works.[560]

The Office's unique placement as an administrative agency capable of passing binding rules and advising Congress and courts, accompanied by its ever-increasing responsibilities in the copyright regulatory sphere, highlights the breadth of this institution's influence, especially in terms of its numerous avenues for intervening in favor of the public interest. Perhaps most importantly, as an institution which endures past the frequent turnovers of government, the Office retains a sense of "institutional memory," continuously building on a long history of expertise-building, expansion, and connection with Congress as its "copyright lawyer and copyright expert for almost a century."[561]

Thus, as far as understanding this institution in terms of what can be imagined for an EU equivalent, an advisory authority which is situated in close relation to the EU legislature can aid in conducting studies on technical and specific aspects of copyright, can offer comment on legal issues under consideration by EU courts, and can generally represent the public interest through advocating on its behalf. In terms of intervening in particularly challenging cases, an EU level authority can potentially help to resolve legal questions through delivering advisory opinions to the Court. Furthermore, an EU level authority may be effective in establishing "best practices" to be applied EU-wide, which can aid in the early development of harmonized practices among Member States when faced with novel legal challenges brought on by new technologies or business models.

4.4.2 Registry and Recordation

The Office's continued commitment towards modernization is centred on its primary functions since its inception, namely in registering titles and recording documents relevant to copyrighted works.[562] The recordation of transfers of title also remains a vital function of the Office, especially in the digital age. In an effort to both digitize and streamline the registration and recordation of documents relevant to copyright titles, the Office has committed to

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[560] Peters, 'Copyright Administrative Institutions: The United States Copyright Office', 551-2 (internal citations omitted)

[561] Litman, 'Digital Copyright' (2017) 58 <http://hdl.handle.net/2027.42/56221>

[562] Office, *United States Copyright Office Annual Report 2019*, ; U.S. Copyright Office, 'Copyright Office Modernization -- September 2020' 2020) accessed <https://www.copyright.gov/copyright-modernization/Quick%20Facts%20September%202020.pdf>

enhancing its IT capabilities, in conjunction with the modernization of the Library of Congress itself.[563]

Similarly, at the EU level, introducing (or reintroducing) a voluntary system of registration may prove useful in confronting the numerous informational challenges posed by digital rights management.[564] Centralizing this information into a searchable, publicly-available database would seem to be beneficial to all stakeholders.[565] Managing this process will require considerable investments in devising an appropriate system and popularizing such a service, but stakeholders may be more convinced to utilize such an option if the information can be validated by an institutional actor. A very similar effort has been recently undertaken by WIPO, to allow stakeholders to verify the status of copyrighted works through a metadata system.[566]

A useful alternative to establishing a new database could be to certify or authenticate the data of third-party commercial databases. This was proposed in the context of the Copyright Office's modernization by delegates of the "Copyright Principles Project," who raised the point that, "information about who is currently able to license the copyright in a particular photograph is much more accessible in commercial databases operated by Corbis and Getty than in the records of the Copyright Office. Similarly, Creative Commons has developed an efficient means for copyright owners to provide more information to users about what uses are permitted for their works, information that is valuable to users but that the Copyright Office registration system as it currently operates does not facilitate."[567] In recognizing this, perhaps an EU authority can do something similar, which could in turn

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[563] Office, 'Copyright Office Modernization -- September 2020'

[564] Many academics have considered the viability of reintroducing some form of registration of works in light of the informational challenges posed by digital works. See, *inter alia*, D. Gervais and Dashiell Renaud, *The Future of United States Copyright Formalities: Why We Should Prioritize Recordation, And How To Do It* (Vanderbilt University Law School Public Law and Legal Theory 2013); Stef van Gompel, 'Contextualizing the International Prohibition on Copyright Formalities', *Formalities in copyright law: an analysis of their history, rationales and possible future* (Kluwer Law International 2011); Dev S. Gangjee, 'Copyright formalities: A return to registration?' in Rebecca Giblin and Kimberlee Weatherall (eds), *What if we could reimagine copyright?* (ANU Press 2017)

[565] The recently passed Music Modernization Act (MMA) calls for the establishment of a publically-available works database, with the regulations regarding data standards, oversight of the new mechanical licensing collective, and other aspects of implementation assigned to the Office. See U.S. Copyright Office, 'Music Modernization Act Implementing Regulations for the Blanket License for Digital Uses and Mechanical Licensing Collective: Notice of Inquiry' (LIBRARY OF CONGRESS, 2019)

[566] WIPO, 'WIPO PROOF' 2020) accessed 25 October 2020 2020 <https://wipoproof.wipo.int/wdts/> ; van Gompel, 'Contextualizing the International Prohibition on Copyright Formalities',

[567] Samuelson, Litman and Members, The Copyright Principles Project: Directions for Reform 1203

encourage private firms to compete with each other and innovate in terms of registration design, as well as collaborate to form a wide-ranging network of reliable data sources.[568]

5. Canada: The Canadian Copyright Board

The distribution of copyrighted content sometimes relies on market-regulating mechanisms such as tariffs to ensure that content circulates efficiently and equitably between rightholders and users. When administered on a statutory basis, tariff rates are often based on complex and industry-specific determinations, and require a precise balancing of interests between stakeholders with varying levels of market power and divergent interests, and the cultural interests of making copyright content accessible enough for the public-at-large.[569] The process of setting these statutory tariffs must necessarily be a transparent one to maintain its legitimacy amongst stakeholders once a rate has been approved, and it must be efficient enough to function alongside a rapidly-evolving digital marketplace.

In recent years, copyright regulatory authorities throughout the world have been tested by a combination of external factors, such as the emergence of new online business models, and internal pressures, such as domestic firms' and industries' interests in expanding their international reach. Such is the regulatory challenge tackled by the Canadian Copyright Board (the "Board") in devising tariffs which adequately represent these diverging interests. Conceptualized as an independent federal administrative tribunal, it has the power to establish royalties and tariffs to be paid for use of copyrighted works where collective management organizations are entrusted with the administration of the right, and takes advantage of its position as an agency to utilize unique flexibilities in its rate-setting procedure.

This section will first provide a background of the Board as it functions within its respective legal framework (Canadian law). The Board's institutional structure, rate-setting process, and overall functioning will be outlined. Next, the Board's overall successes and continuing challenges will be analysed. Finally, the conclusions will turn towards specific observations which highlight the potential applicability of some of the Board's regulatory approaches to the EU.

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[568] Ibid

[569] D. Gervais, 'A Uniquely Canadian Institution: The Copyright Board of Canada' in Ysolde Gendreau (ed), *An Emerging Intellectual Property Paradigm: Perspectives from Canada* (Queen Mary Studies in Intellectual Property series, Edward Elgar 2008) 216

5.1 Historical Background and Legal Framework

Canada's domestic copyright law, embodied in the Canadian Copyright Act ("Copyright Act"), came into force in 1924.[570] The Copyright Act establishes protection for copyrighted works in c. C-42 section 3; for related rights of such works in sections 15, 18, and 21 (performances, sound recordings and communication signals, respectively); and technological measures and management information of such works in sections 41.1 to 41.21.[571] The regulatory mandate of the Board is linked to these provisions, and the bulk of its statutory authority is embodied in sections 66-78 of the Act. Generally, the Board deals with four distinct legal regimes: music performing rights (and certain neighbouring rights); general ("residual") rights; retransmissions and certain uses by educational institutions; and private coping levies.[572]

The first iteration of the Board was established in 1935 as the Copyright Appeal Board, which was originally organized as a tribunal responsible for reviewing and approving tariffs on public performances of music.[573] In 1989, the Copyright Board assumed the prior mandate of the Copyright Appeal Board, this time with an expanded jurisdiction into the collective administration of copyright and the licensing of uses of published works whose owners could not be located.[574] In 1997, its mandate was expanded further to oversee tariff-setting procedure for public performances and communications to the public by telecommunication of sound recordings of musical works ("neighbouring rights"), private copying of recorded musical works, and recorded performances with its sound recordings ("home-taping").[575] In 1997, the "second phase" of Copyright Act revisions also added a definition of the term "collecting society," placing all CMOs specifically within the supervisory authority of the Board.[576]

[570] Government of Canada, 'History of Copyright in Canada' 2017) accessed 2017 <https://www.canada.ca/en/canadian-heritage/services/history-copyright-canada.html>
[571] K. Hancock, '1997 Canadian Copyright Act Revisions' (1998) 13 Berkeley Tech LJ (citing provisions in 'Copyright
[572] *See* Gervais, 'A Uniquely Canadian Institution: The Copyright Board of Canada', 199
[573] Government of Canada, 'Copyright Board of Canada: Information about programs and informational holdings' 2018) accessed 2018 <https://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/access-information/information-about-programs-information-holdings/copyright-board-canada.html>
[574] J. Manley, Copyright Board Canada: 1997-1998 Estimates. Part III Expenditure Plan, 1997) 3
[575] This piece of legislation also calls for the mandatory review of Canadian Copyright Law every 5 years.
[576] This authority, however, is limited in practice. See Gervais, 'A Uniquely Canadian Institution: The Copyright Board of Canada', 199 (citing S.C. 1997, c. 24 (assented to 25 April 1997)).

As an administrative agency, the Board is technically situated as an arm of the federal government. It nevertheless undertakes a quasi-judicial role as well in determining royalties to be paid for the exploitation of copyrighted content in cases where rights are administered by a CMO.[577] The means by which the Board may fulfil its core responsibilities are not only bound by the text of the Canadian Copyright Act; its "agency" characteristics naturally fall within general principles of administrative law, while courts and the federal government can issue regulations to be placed upon the Board's activities, or establish general operational criteria for the Board, further placing checks on the Board's authority.[578] All this considered, the Board is still perceived to enjoy many flexibilities in the way it carries out tariff proceedings and in the independent conclusions it reaches, while its authority (especially when it acts in its 'agency' role) is treated deferentially by Canadian courts.[579]

5.2 Institutional Structure

5.2.1 Internalities

5.2.1.1 Membership

The constitution of the Board's members and staff are governed by provisions 66 to 66.5 of the Copyright Act. The Board itself consists of no more than five full-time or part-time members per its statutorily-imposed cap, and is assisted by a small staff.[580] Board members are appointed by the Governor in Council in an "open, transparent, and merit-based selection process."[581] Proceedings are chaired by either the Chairman or Vice Chairman. In comparison to other administrative agencies in Canada, the Chairman has historically been a sitting or retired judge of a superior court.[582] As a sitting judge, the Chairman would typically carry out Board activities part-time, dividing responsibilities between himself and a Vice-

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[577] Copyright Board of Canada, 'Fact Sheet: Re:Sound Tariff 6.B – Use of Recorded Music to Accompany Physical Activities, 2008-2012' 2012) accessed 29 May 2018 <www.cb-cda.gc.ca/tariffs-tarifs/certified-homologues/2012/06-07-2012_sheet.pdf>

[578] Gervais, 'A Uniquely Canadian Institution: The Copyright Board of Canada', 213

[579] Ibid 211fn. 82 (citing Canadian Ass'n of Broadcasters v. SOCAN (1994), 58 C.P.R. (3d) 190 at 196: "…the Board is in a better position than this Court to strike a proper balance between the interests of copyright owners and users and this Court will not interfere unless the result reached is patently unreasonable.").

[580] In practice, the Board may choose to expand its staff and may, at any time, temporarily engage with persons that have technical or specialized expertise. See Jeremy de Beer, 'Canada's Copyright Tariff-Setting Process: An Empirical Review' (2016) 63 J Copyright Soc'y USA 489

[581] Government of Canada, 'Governor in Council appointments: Government appointments' 2018) accessed 2018 <https://www.canada.ca/en/privy-council/topics/appointments/governor-council.html>

[582] Gervais, 'A Uniquely Canadian Institution: The Copyright Board of Canada', 210

Chairman, who acts as Chief Executive Officer.[583] In practice, all members of the Board except the Chairman serve full time.[584] Between 2003 and 2008 more tariff certification hearings were chaired by one of two appointed Vice Chairmen, one being a non-lawyer, than by one of the three judicial Chairmen.[585]

5.2.1.2 Functions

As mentioned, the Copyright Act identifies four tariff-setting regimes that fall within the Board's authority: "mandatory" tariffs, optional or general tariffs, retransmission tariffs, and private copying tariffs.[586] The Board also advises licensing and royalty setting, addressing the particular issues of fixing royalty payments in individual cases where parties cannot agree, and issuing licenses to would-be users in lieu of unlocatable copyright owners.[587] In each case, the Board must review an ever-increasing amount of evidence dealing with a mixture of legal, economic and technical issues.[588]

These pieces of evidence reviewed by the Board range from interrogatories to expert reports compiling empirical data.[589] In recent years, the Board has particularly increased its competency to handle economic evidence, employing an economist as the Director of Research and Analysis, and a devoted on-staff Economic Analyst.[590] Indeed, since the tariff setting process is in large part a price-setting exercise, economists have been perceived as particularly well-equipped to handle such issues.[591] Notwithstanding, the Board ultimately has the discretion to ignore such evidence, having asserted that market prices are "only one of

583 Ibid
584 Ibid
585 Ibid
586 As observed by de Beer, the Board's practice is not to refer to the statutory classification of groups of rights, but rather of according to the kind of work and/or the kind of activity involved. This would include, *e.g.*, Public Performance of the communication to the public by telecommunication of musical works and sound recordings; Retransmission of distant television and radio signals; Reproduction and public performance of radio or television news or news commentary programs and all other programs by educational institutions for educational or training purposes. de Beer, Copyright Tariff Setting Study ; Copyright Board of Canada, 'Raison d'être, mandate and role: who we are and what we do' 2018) accessed 28 May 2018 <http://www.cb-cda.gc.ca/about-apropos/role-role/raisons-etre-e.html>
587 de Beer, Copyright Tariff Setting Study 490 (citing Copyright Act, RSC 1985, c. C-42 § 70.2 (Royalties); § 77 (Unlocatable Owners)).
588 P. Daly, Best Practices in Administrative Decision-Making: Viewing the Copyright Board of Canada in a Comparative Light (Report Prepared for the Canadian Heritage and Innovation, Science and Economic Development Canada, 2016) 5 <https://ssrn.com/abstract=2782487>
589 de Beer, Copyright Tariff Setting Study 492. See also Copyright Board of Canada, 'Model Directive on Procedure' 2010) accessed 25 May 2018 <http://www.cb-cda.gc.ca/about-apropos/directive-e.html>
590 G. Wall, 'Remarks to the SERCI panel on Regulatory Copyright Tariff Setting' (2017) 14 Review of Economic Research on Copyright Issues 50
591 Ibid 49

several rational bases" for tariffs, and that "in certain circumstances public policy would lead it to ignore market considerations altogether."[592]

Though the Board performs a highly specialized and technical function in reviewing evidentiary submissions and presiding over tariff proceedings, it enjoys the administrative flexibilities of an agency which allow it to hire additional outside experts as necessary, and to permit parties who are not directly interested in the proceeding -- but are likely to possess useful insights – to intervene.[593] This drastically differs from the practice of a traditional tribunal, which is limited by the evidence and analysis expressly provided by the parties, and obliged to apply formal rules of evidence.[594] In fact, the Board can, "compel the production of evidence…the appearance of witnesses…[and] can formulate its own objections to proposed tariffs."[595] Importantly, these abilities reinforce the Board's overall capacity to acknowledge broader public policy considerations in its decisionmaking.

Significantly, the Board does not have to wait for conflict to arise before it intervenes.[596] This enables the Board to initiate tariff proceedings on its own as need arises, and further allows it to consider broader public policy interests such as the timeliness of new tariffs in response to changing technological and societal circumstances, as opposed to limiting its decisionmaking to instances of conflicting parties and individual disputes. Lastly, the Board is empowered to commission studies with respect to the exercise of its own powers or may be compelled to do so at the behest of the Minister of Industry.[597]

5.2.2 Externalities

5.2.2.1 CMO Interaction

The collective administration of copyright and related rights in Canada is, as mentioned, divided into four distinct regimes.[598] Though all Canadian CMOs will not be

[592] Gervais, 'A Uniquely Canadian Institution: The Copyright Board of Canada', 211(citing SOCAN Tariff 2.A, 1993, at 34, 39.)
[593] Ibid 210
[594] Ibid
[595] Ibid 212
[596] M Bouchard, 'Collective Management in Commonwealth Jurisdictions' in Daniel J. Gervais (ed), *Collective Management of Copyright and Related Rights* (Kluwer Law International 2010)
[597] Copyright Act (Canada), §66.8.
[598] Gervais, 'A Uniquely Canadian Institution: The Copyright Board of Canada', 199

discussed at length here, the CMO markets for the first two regimes handle some of the largest royalty revenue streams, and are of particular interest. [599]

In the first regime, CMOs grant licenses for the performance or telecommunication of musical works and sound recordings of musical works, pursuant to section 67 of the Act.[600] The Society of Composers, Authors and Music Publishers of Canada (SOCAN) is the only collective in Canada that manages these rights, having formed by merger in 1990, and impressively manages "virtually every musical work communicated or performed in Canada."[601] In 2016, SOCAN collected a total of $262.5 million in domestic royalty revenues for the performance right alone.[602] The other collective in this regime is a non-profit umbrella collective consisting of five member collectives, administering the rights to remuneration of performers and makers of sound recordings: The Neighbouring Rights Collective of Canada (NRCC).[603]

In the second regime concerning "general" or "residual" rights, "s. 70.1 CMOs" administer voluntary licenses where the rights involve reproduction, adaptation, rental, publication and public performance, performers' rights to the first fixation, reproduction and communication of their performances, and certain rights of sound recording producers and broadcasters (unless another regime applies).[604] As far as the administration of mechanical rights, the Society for Reproduction Rights of Authors, Composers and Publishers of Canada (SODRAC) and the Canadian Musical Reproduction Rights Agency (CMRRA), "collaborat[e] in certain areas, including online use of music through a joint agency known as CMRRA/SODRAC Inc. (CSI)," as well as in the tariff-setting process, as described below.[605]

The Board is directed to balance the relationship between CMOs and users, and it is able to do so by influencing the structure of CMO markets.[606] Yet a CMO's internal structures, *e.g.*, its corporate form, is not dictated by the Act. And, despite its centralized position, the Board does not have the authority to regulate all CMO activity.[607] Within its

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[599] A complete list of Canadian CMOs and descriptions can be found at Government of Canada, 'Copyright Collecting Societies' accessed <http://www.cb-cda.gc.ca/societies-societes/index-e.html>
[600] Gervais, 'A Uniquely Canadian Institution: The Copyright Board of Canada',
[601] Ibid
[602] *See* SOCAN, Financial Report 2016, 2016) 3 <http://socanannualreport.ca/wp-content/uploads/2017/06/8773_SOCAN_Annual_Report_Print_V2_ENG_Financial.pdf>
[603] Gervais, 'A Uniquely Canadian Institution: The Copyright Board of Canada', 201
[604] Ibid 202
[605] Ibid
[606] Ibid 211-13
[607] Ibid 212

direct authority, the Board may only limit the ability of a CMO to enter the market if that CMO is unable to, for example, make the payment of royalties for the performance or communication of sound recordings of musical works in a single payment, or if the CMO collects a private copying levy “twice” from users.[608] Of course, this limitation on the Board’s authority over all CMO activity allows CMOs to form “strategic alliances,” preventing the Board from interfering in certain transactions. For instance, the CMOs CMRRA and SODRAC filed a single tariff with the Board that, “appl[ied] to commercial radio stations *irrespective of their relative use* of the repertoires of [either CMO],” enabling both CMOs to apportion royalty payments between them “as they see fit”, pursuant to the certified tariff.[609] In other instances, however, the opposite has happened where the Board has “forced” CMOs together by issuing a single tariff for two collectives to manage, such as the case of SOCAN and NRCC.[610] But again, as far as regulating CMO conduct, “the manner in which [CMOs] secure[] the repertoire it administers or the nature of its relationship with rights holders or users or the way in which it surveys and distributes the income collected on behalf of rights holders,” the Board cannot intervene, and the activities mentioned are monitored instead by Canadian competition authorities.[611]

5.2.2.2 Other Administrative Agencies

The Board defines itself as an “economic regulatory body.”[612] Though the Board occasionally must address questions of law, its role as an administrative agency shifts the nature of its decisionmaking to, “…take into account economic and social factors to a larger extent than judicial tribunals that are concerned solely with the application of objective legal standards to established facts.”[613] This characteristic is similar to other administrative agencies in Canada, which similarly make decisions after an evidence-gathering process, and aim to strike a balance between many parties who have “varying levels of enthusiasm, expertise, and procedural protections.”[614]

Perhaps the most pertinent of other authorities to consider is the Competition Tribunal, which supersedes its primarily adjudicative role by ascertaining the “potential economic and

[608] Ibid
[609] Ibid 214
[610] Ibid
[611] Ibid 212
[612] Canada, 'Raison d'être, mandate and role: who we are and what we do'
[613] Daly, *Best Practices Administrative Decisionmaking*, 20
[614] These agencies include the Competition Tribunal, the National Energy Board, the Canadian Radio-television and Telecommunications Commission and the Patented Medicine Prices Review Board. Ibid

commercial impacts" of the conflicts it resolves, which recalls the public-policy oriented flexibilities that allow the Board to consider a broader range of evidence than presented by the parties when making a tariff determination. The Tribunal may also adopt its own rules of practice and procedure subject to the Governor in Council's approval, but unlike the Board has opted for a very detailed and formalistic set of rules for the discovery process and its hearing procedure.[615] Still, the Tribunal may deal with all proceedings "…as informally and expeditiously as the circumstances and considerations of fairness permit," reintroducing the idea of flexibility in spite of a highly formalized procedural backdrop.[616]

Taking these similarities into account it would seem that these authorities impart a similar regulatory influence in Canada, but the Competition Tribunal has special advantages that enhance its authority in this sphere. One important difference is that the Tribunal has the ability to award costs, which is an important feature considering the uniquely time-sensitive ruling requirements imposed on the Board: "…the inability of the Board to award costs has sometimes resulted in it having to deal with matters that could have been addressed more expeditiously."[617] Combined with a lack of formal rules and mandatory steps in the procedure, there is a real possibility of abuse of the process.[618] Furthermore, unlike the Competition Tribunal (or the practice of any other traditional tribunal), parties to a tariff proceeding file the statement of their case *after* the discovery period.[619] The consequence is that issues cannot be assessed and narrowed from the outset of the proceeding, causing uncertainties and costing time.[620]

These deficiencies considered, in comparison with other administrative authorities with a similar function, the Board is still able to carry out its mandate with an exceptional level of autonomy. Its overall market-regulating influence is not to be understated: "[t]he Board's role…greatly exceeds the function of a competition law safety valve, and its decisions exceed finding the right 'number' for a given tariff...An administrative body of this type with its own internal research and ability to contract out for additional expertise seems

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[615] *See generally*, Ibid at 22. (citing provisions of the Competition Tribunal Act, R.S.C. 1985, c. 19).
[616] Ibid at 23. (citing Competition Tribunal Act, § 9(2)).
[617] Bouchard, 'Collective Management in Commonwealth Jurisdictions', 335
[618] *See, e.g.,* CMRRA/SODRAC, Reproduction of Musical Works by Commercial Radio Stations, 2003) <http://www.cb-cda.gc.ca/decisions/2003/20030328-rm-b.pdf>("…many of the targeted stations engaged in what was from all appearances systematic obstruction coupled with inappropriate consultations amongst themselves in preparing answers…[i]t would be unwise to assume that the Board will display as much patience in the future.")
[619] Daly, *Best Practices Administrative Decisionmaking*, 27
[620] As suggested by Daly, issuing a non-binding preliminary statement of the case at its outset can be a potential solution. Ibid at 44 n. 224.

better suited to tackle questions of this nature than a traditional tribunal limited to the adversarial process."[621]

5.3 Tariff Setting

5.3.1 Process and Discretionary Procedures

Generally, the tariff certification process is initiated by the collecting society, which is required to file proposals for new tariffs on or before March 31st of the year preceding the year which the tariff will be in effect.[622] Next, the Board is required to publish the proposed tariff in the *Canada Gazette*, which it completes after a review of the tariff's accuracy. After publication, the deadline for objections to the proposal is fixed at 60 days post-publication. During this objection period the Board is tasked with notifying the proponent of the tariff of objections raised by itself of third parties, which the CMO is obliged to respond to.[623] After the Board's consideration of the proposed tariff, any objections raised, CMO responses, and "any factor it deems appropriate," the Board certifies the tariff by publication in the *Canada Gazette*.[624] Tariffs may be applied retroactively if they are not approved between March 31 and December 31 of the year in which they are proposed.[625] Though the preceding provides a basic idea of the sequence of events in the tariff certification process, the Board's authority allows it to change the order of steps, eliminate or add additional steps to the proceedings as it sees fit: for example, according to an empirical study on the issue, only 28% of tariff proceedings included a hearing.[626]

To further guide CMOs, users, and other interested parties in the tariff-setting process, the Board has voluntarily adopted a Model Directive on Procedure.[627] This set of informal rules, spanning just a few pages in length, provide a brief and simplified procedure with very open requirements on what types of information may be submitted and utilized during the

[621] Gervais, 'A Uniquely Canadian Institution: The Copyright Board of Canada', 212
[622] The following notes on procedure are closely based on the description found in de Beer, Copyright Tariff Setting Study 491-97. *See also*, G. M. Daigle and J. A. O'Neil, 'The Evidentiary Procedures of the Copyright Board of Canada' in Ysolde Gendreau (ed), *The Copyright Board of Canada: Bridging Law and Economics for Twenty Years* (Carswell 2009) 45-50
[623] de Beer, Copyright Tariff Setting Study
[624] Ibid
[625] Daly, *Best Practices Administrative Decisionmaking*, 10 (citing Canadian Broadcasting Corp. v. SODRAC 2003 Inc. [2015] 3 S.C.R. 615).
[626] de Beer, Copyright Tariff Setting Study 471
[627] Canada, 'Model Directive on Procedure'

proceedings. These procedures, of course, may be dispensed with or varied by the Board at any time.[628]

One final procedural element that assists the overall tariff-setting process is the Board's ability to combine tariffs and certain tariff proceedings, often where delays are caused due to the extraordinary number of parties that want to participate in the process, or split tariff proposals into different proceedings.[629]

5.3.2 Decisionmaking Ability

The Board's high amount of discretion to carry out proceedings as it sees fit is clearly an outgrowth of principles of administrative law.[630] But even more far-reaching than its ability to control procedure is its capability to make a completely "unrelated" ruling regarding tariff determinations. In reaching a decision, the Board, "may take into account any factor that it considers appropriate."[631] This allows it to, for example, "ignore market considerations altogether" in favor of public policy rationales.[632] Indeed, the Board, "is allowed to develop a tariff structure that is completely different from the one proposed by the collective or the users…" and in practice, has done so.[633]

The Board also has plenary power to issue interim decisions and to vary earlier decisions.[634] This is especially helpful in cases where the proposed tariffs are particularly complex or of special importance to the cultural sector, and where tariff proceedings are anticipated to last several years.[635] Its ability to vary earlier decisions follows from the Board's own admonition that, "it would illegally fetter its discretion if it considered itself bound by its previous decisions."[636] Rationally speaking, since there still the need for sense of consistency in the Board's decisionmaking, in reality this ability has its limitations.

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[628] The section containing this provision is simply titled "Flexibility." Ibid
[629] Gervais, 'A Uniquely Canadian Institution: The Copyright Board of Canada', 217
[630] de Beer, Copyright Tariff Setting Study 492
[631] Copyright Act (Canada), § 68(2)(b).
[632] Gervais, 'A Uniquely Canadian Institution: The Copyright Board of Canada', 211
[633] Ibid at 213; Bouchard, 'Collective Management in Commonwealth Jurisdictions', 330(citing Canadian Broadcasting Corp. v. Copyright Appeal Board (1986), 17 C.P.R. (3d) 460. (F.C.A.)).
[634] Copyright Act (Canada), § 66.51.
[635] D. Tkachuk and J. Day, Copyright Board: A Rationale for Urgent Review (Report of the Standing Senate Committee on Banking, Trade and Commerce, 2016) 3 <https://sencanada.ca/content/sen/committee/421/BANC/Reports/FINALVERSIONCopyright_e.pdf>
[636] S. Callary, Annual Report 2004-2005, 2005) 12 <http://publications.gc.ca/collections/Collection/RG81-1-2005E.pdf>

Lastly, concerning judicial review over decisions reached by the Board, this review is limited to questions of law, such as the scope of copyright protection, and review of procedures strictly in terms of fairness.[637] Generally, courts will be unwilling to make such judgements of procedural choices made by the Board in the absence of a complete deprivation of a right.[638]

5.3.3 Limitations

As with any institution, the Board and its procedures are not perfect. The Board's Directive on Procedure has been scrutinized by stakeholders in the past, some regarding the tariff-setting procedure too time-consuming overall, while others believe that the procedure contains inadequacies in regards to the Board's ability to hire outside experts for consultation.[639] The retroactive character of most certified tariffs may also be indicative of inefficiency. According to empirical findings, "…certified tariffs took an average of 3.5 years to certify after filing…[and] on average tariffs are certified 2.2 years after the beginning of the year in which they become applicable…in effect a period of retroactivity."[640] Other factors such as the scheduling of the parties, the judicial appeal process, and complexity of the tariff proposal at hand obviously indicate that the Board is not wholly to blame for hearing delays.

Another recent issue that the Board has had to face, but will not be discussed at length here, refers to the "stacking" of royalty payments, resulting in a "double-tariff" imposed on users. So called "royalty stacking" occurs by "…layering of multiple payments for permission – through a certified tariff, collective blanket license or individual contract – to use copyright-protected subject matter…. [it] may result not only from the fragmentation of copyrights, but also from the multiplication of rights holders, though new neighbouring rights or paracopyight protections for technological measures."[641] It is unclear how the Board will continue to deal with this problem in the future.

To address some of the problems described and to combat the increased workload resulting from the technological developments of the past few years, the government of

[637] Daly, *Best Practices Administrative Decisionmaking*, 14
[638] Ibid 15
[639] Access Copyright, Reforming the Copyright Board of Canada, 2017) <https://www.ic.gc.ca/eic/site/693.nsf/vwapj/CBconsulations_2017_Submission_Access_Copyright.pdf>
[640] de Beer, Copyright Tariff Setting Study 471
[641] J. de Beer, 'Copyright Royalty Stacking' in M. Geist (ed), *The Copyright Pentalogy: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law* (University of Ottawa Press 2013) 335

Canada released an IP strategy in 2018 committing $5 million over five years for the Board's operations, a hopeful investment that was praised by CMOs and practitioners alike.[642]

5.4 Transferability of Principles

5.4.1 Procedural Uniformity and Authoritativeness in Tariff-Setting

In the past ten years, the development of technology has increased the number of online platforms commercializing in digital copyrighted content. This increase of new business models – and new tariffs in response – has complicated the distribution of rights where those rights are subject to differing legal regimes.[643] In the EU this issue is especially magnified, as the regulation of tariff-setting systems is left to national legislatures, organized as national official authorities, councils, boards, or other similar bodies.[644] Despite the fact that the CJEU has issued a few rulings in this area in attempts to harmonize certain concepts in tariff-setting, specific questions regarding what amounts should be paid and how to properly calculate those amounts are not addressed at length and are left at the Member States' discretion.[645] Problematically, the approaches of national regulatory bodies vary widely in their consideration of different objective rate-setting criteria and different methodologies for rate determination. These multifarious approaches may likely affect the creative markets and creative behaviours of creators engaging in cross-border commerce in the EU, though there is limited current existing research on these effects.[646] Recognizing this issue, the EU has prioritized harmonization of certain aspects of the copyright across Member States to facilitate the growth of the Single Market, including the process of setting levies.[647] Respecting subsidiarity and proportionality principles, while it seems unlikely that the EU

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[642] *See* Government of Canada, 'Intellectual Property Strategy: Quotes' (Innovation, Science and Economic Development Canada, 2018) accessed 28 May 2018 <https://www.canada.ca/en/innovation-science-economic-development/news/2018/04/quotes-backgrounder-intellectual-property-strategy.html>

[643] de Beer, Copyright Tariff Setting Study 473

[644] Romana Matanovac Vučković, 'Remunerations for authors and other creators in collective management of copyright and related rights' (2016) 66 Zbornik Pravnog Fakulteta u Zagrebu 35-60 40

[645] For example, the Court in SENA held that, "The concept of equitable remuneration in Article 8(2) of 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 *must be interpreted uniformly in all the Member States*…" while in the same sentence, finding that, "each Member State to determine…the most appropriate criteria for assuring…adherence to that Community concept." Case C-245/00 SENA v NOS (2003). This suggests the limitations of CJEU rulings in this sphere, where the determination is limited to the ruling that a payment should be made, but the exact amount will always be an open question.

[646] Wall, Remarks to the SERCI panel on Regulatory Copyright Tariff Setting 53

[647] European Commission, 'Modernization of the EU copyright rules' 2003) accessed 28 May 2018 <https://ec.europa.eu/digital-single-market/en/modernisation-eu-copyright-rules>

would be able to directly intervene in respect to national tariff-setting processes, it may be useful for Member States to develop more coordinated approaches to tariff-setting which involve similar transparency obligations, procedural flexibilities and stakeholder participation, as represented by the practices of the CBC. Importantly, the CBC's broad discretion and authoritativeness in the tariff-setting process as an agency/administrative authority, combined with its unique relationship with CMOs, places it in a position to be able to effectively oversee the structure and functioning of the market. If such a regulator is to be considered at the EU level,[648] it must also possess a level of autonomy and authoritativeness to be able to participate effectively in regulating the market for creative content.

5.4.2 Influencing Policy

The Board has played an influential role in copyright policy in recent years – whether or not it has anticipated its own involvement. Canada's copyright history is one of ambitious legislative and judicial efforts, and one of its most sweeping changes occurred in 2012, when five landmark decisions were passed down in a single day by the Supreme Court of Canada ("SCC"), each involving decisions of the Board.[649] These rulings, "…included no fees for song previews on services such as iTunes, no additional payment for music included in downloaded video games, and [held] that copying materials for instructional purposes may qualify as fair dealing,"[650] all during a time when international authorities were also grappling at answers to the same questions. The fact that the Board was one of the first points of contact for addressing these problems evidences the institution's prime placement at the centre of policy change, especially in the digital era.[651] Referring to the decisions of the Canadian Copyright Board, as put by Kusy, "[copyright administrative institutions] are not only instruments to serve the law, but also assist in developing the law as they fulfil their role as quasi-courts. It can be said that these specialized institutions have greater knowledge and a better grasp on copyright issues than ordinary courts. As such, they have a substantial impact on the development of the law."[652]

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[648] The level and extent of tariff-setting activities that may be considered at the EU level/by an EU level regulator is discussed in greater detail, infra, Part III Section 6.1.
[649] For further analysis on the lasting impact of these decisions on Canadian IP, *see* M. Geist (ed), *The Copyright Pentalogy: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law* (University of Ottawa Press 2013)
[650] Ibid iii
[651] de Beer, Copyright Tariff Setting Study 483-4
[652] Claire Kusy, 'Comparative Study on Copyright Administrative Institutions' in Y. Gendreau (ed), *Copyright Administrative Institutions* (Éditions Y. Blais 2001) 655

On its own, as noted by Gervais, "[the Board]…has not hesitated to produce original decisions, such as its 1999 decision on the application of copyright to online transmissions of music, the first decision of its kind on the merits anywhere in the world, most findings of which were later upheld by the Supreme Court of Canada."[653] This builds upon the idea that the Board may even be capable of influencing policy at the international level. As Susan Bannerman writes, "Canada's periods of copyright rebellion and scepticism toward the model of international copyright…show that Canada has the potential to be enrolled in efforts to push for major structural change in the international copyright system." [654] Given that this may be a bit hyperbolic, the fact that the Board stands as a centralised body clarifying certain aspects of the law at an early stage is a function that works specifically in the interest of modern stakeholders who require a fast-adapting and fair market for creative content. Though the Board has intervened in a limited way thus far, it has still provided an unconventional avenue for the advancement of public policy in the field.

CONCLUSION PART II: OBSERVATIONS ON INTERNATIONAL INSTITUTIONS AND COPYRIGHT

In jurisdictions outside the EU, there exist institutions which contribute in many ways to ensuring the coherence of copyright. While operating in jurisdictions with different copyright conventions than those found in the EU, the foregoing analysis has provided some insights which are universal. The mere fact that these administrative actors continue to grow and accumulate new functions in the digital era indicates that the space for administrative actors in the field of copyright is one which continues to expand.

In the U.S., the role of the Copyright Office, which is clearly situated within the Library of Congress (legislature), has recently seemed to incorporate aspects of the executive in its decisionmaking. As an administrative body that was first solely charged with registering works, the current influence it commands through its rulemaking functions in particular shows that one of the most influential legislatures in the world (Congress) recognizes the need for highly specialized, technical rulemaking which can be revised without relying on the legislative process. To delegate this complex task from the legislature to an agency actor is indicative of the nature of the goals that ought to be achieved in a digital age – to refrain from adding more complexity to an already "bloated" copyright law, and instead to add more flexible (yet binding) regulations which complement the existing laws and respond to a fast-

[653] Gervais, 'A Uniquely Canadian Institution: The Copyright Board of Canada', 217
[654] S. Bannerman, 'Canadian Copyright: History, Change, and Potential' (2011) 36 Canadian Journal of Communication 31-49

changing digital context. Whether or not the Office in its current form is sufficiently equipped for fulfilling this immense task is another question.[655]

In Canada, the Board's interventions into the market situate it as an economic regulator, while its institutional structure is that of an administrative tribunal. According to Canada's copyright laws, the Board is granted considerable authority to regulate the practices of collecting societies, issue tariff opinions, and resolve tariff disputes. Its wide discretion in reaching tariff decisions, mainly in its ability to subsume economic arguments in favor of broader public policy rationales, shows that the CBC can have a far-reaching impact on the public policy aspects of the statutory licensing regime, as well as on the policies of the industries which rely on the regime.

Both the U.S. Copyright Office and the Copyright Board of Canada offer insights into the design for effective administrative bodies for regulating specific aspects of copyright law. In both examples, the respective national governments have explicitly recognized the continued importance of a regulatory authority for copyright-related legal issues, and as such have granted these bodies with a high level of autonomy, discretion and independence in their decisionmaking and rulemaking tasks. Legislatures in both jurisdictions seem amenable to the idea of a specialized authority setting rules as opposed to locking-in incremental changes to the law by way of the political process. In both examples, though these institutions began to undertake their regulatory functions in an analogue era, their responsibilities have only increased with the move towards digitization. It is therefore made even more striking the fact that no EU level authority for copyright related issues exists, nor is there any consistency to be found in the copyright regulators available at the Member State level. In all, there seems to be much room for reconsidering the role of institutions in the EU for confronting new copyright challenges brought on by digitization.

[655] Perzanowski, The Limits of the Copyright Office

PART III. RECONCEPTUALIZING EU COPYRIGHT AND ITS INSTITUTIONS: A FUNCTIONAL APPROACH

Copyright laws continue to face a battle of legitimacy in a digital age. With growing contingents of new industry players, copyright owners and amateur creators weighing-in on copyright issues, many different opinions of the continued role of copyright in the digital society have come into view. Endeavours towards "fixing" copyright have become a worldwide phenomenon, as governments prioritize revisions to their domestic IP laws as a way of ensuring their competitiveness on the international stage. But even so, copyright laws remain a challenge to address adequately and comprehensively. Why is this the case?

Perhaps the explanation can be found when examining the qualities of the regulators themselves. Despite a beneficent upheaval of the once linear system of creation and distribution of works into a more dynamic system of creation, recreation, remix and mashup, the ways in which copyright law can be regulated and adapted are still limited by the institutional realities of an analogue era. As put by Liu, "[o]nce we acknowledge that copyright has become more regulatory and that this aspect of copyright law is here to stay, then it behoves us to think more carefully about how to properly administer a complex statutory framework. In particular, more attention needs to be paid to the institutional structure administering the copyright laws."[656] It becomes apparent that, in order to produce a more flexible and dynamic body of law that is capable of functioning well in an evolving digital context, one must ensure that the regulator is capable of producing and enforcing such laws in the first place.

There is a growing need for developing more harmonized approaches to regulating copyright in the EU, but the mandates of the institutions, along with the predetermined limitations on their competencies, have also limited the possibilities of promoting a single, coherent copyright strategy in Europe. With the latest CDSM Directive serving to deepen some of the existing divergences in Member States' copyright laws, the limitations of what can be accomplished through the current institutional configuration quickly become apparent.

But there is room to challenge this arrangement. If the EU is to adopt more common EU regulatory actions in the field of copyright in the future, there must be some level of regulatory coordination in place. While existing political bodies, market regulators and courts can only go so far, an administrative body organized at the EU level, or a coordinated network of national-level regulators (or a combination of these options), can perhaps go a bit further in

[656] Liu, Regulatory Copyright 139-40

terms of promoting flexibilities in copyright law motivated by a genuine interest in promoting long-term goals as opposed to short-term, reactionary ones. It is perhaps only through such a fundamental change to the way copyright regulation is promulgated can a coherent concept of an "EU Copyright Law" finally begin to emerge.

As Part I focused on identifying the regulatory and enforcement gaps in the current institutional arrangement, Part III offers some insights into how these gaps may be bridged by reconsidering the issues from the perspective of institutional reform. The following sections present ideas for reforming the current institutional arrangement for copyright regulation by "working backwards" from the potential functions of an administrative body (or bodies) for copyright law in the EU. These functions range from the purely "administrative" (III.6), to the quasi-judicial (III.7), to the more passive observatory and advisory functions (III.8). Using specific examples of current copyright challenges, each section will demonstrate how each function can be used to specifically remedy the selected issues (summed up in *Conclusion Part III.*). Finally, these potential regulatory functions will be discussed in terms of the form of their potential implementations, divided into three distinct policy "options" with their own benefits and costs of implementation (*Policy Options* and *Final Recommendation*).

6. ADMINISTRATIVE FUNCTIONS

After comparing many different institutional actors as they operate within distinctive arenas of decisionmaking, it was observed in Part I. 1. that administrative actors seem to have a broader ability to engage with stakeholders. In Part II, the examples of the U.S. Copyright Office and the Canadian Copyright Board, as administrative authorities, were demonstrated to perform many specialized functions ranging from setting tariffs, advising legislative actors, courts, and the public, managing databases and a registry, and resolving disputes, among other functions. It is therefore worth considering how certain administrative functions performed at the EU level can address some existing issues in EU copyright law. The following subsections will investigate specific "purely" administrative functions, which include advising on certain aspects of copyright tariff-setting processes, and managing a public database for works information.

6.1 Copyright Tariff-Setting

In a traditional sense, the concept of a "copyright tariff" is linked to a statutory right of remuneration, typically set by a government or appointed body and enforced in that jurisdiction. Statutory rights of remuneration are generally understood to be "any statutory

entitlements providing holders of copyright and/or related rights with a claim to remuneration without any possibility to control the use of copyrighted works or subject matter."[657] Remunerations for private copying practices fall within this category (6.1.1), and are usually subject to mandatory collective management in the EU. Remuneration rights for the communication to the public of commercial phonograms, the resale right and rental and lending rights, as well as fair compensation of orphan works are often statutory in nature, but may also be subject to voluntary measures. In the EU, national laws provide for a range of mandatory and voluntary collective administration over certain rights. Accompanied with collective management measures, as described in Part I, CMOs may play an important role in setting tariffs at the national level, subject to the supervision of a national authority. National tariffs set by CMOs and other similar bodies are especially relevant for the discussion on online multi-territorial music licenses, which exposes some latent issues with the currently fragmented regulatory approach (6.1.2).

6.1.1 Private Copying Levies

An example of tariff-setting that is established as a statutory right of remuneration in most EU Member States is the private copying levy. At its most basic, according to current EU law, private copying is an exception to the copyright holder's exclusive right of reproduction where the creation of personal (*i.e.*, non-commercial) copies of lawfully-owned copyrighted material is deemed permissible.[658] In exchange, the rightholder is entitled to "fair compensation," which is collected in the form of a levy. The payment of the levy, as administered by most Member States of the EU,[659] is tied to the sale of physical media and/or equipment used for copying (such as CDs and USB drives), and collected from either manufacturers, importers or distributors of copying media or equipment, or collected from consumers themselves.[660]

The majority of Member States of the EU have implemented the levy and supported its role in the EU's creative economy. Particularly in the EU, in addition to remunerating creators, the levy plays a unique cultural and social role in funding initiatives aimed at,

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[657] Christophe Geiger and Oleksandr Bulayenko, 'General report: Scope and enforcement tools to ensure remuneration' in S. Von Lewinski (ed), *Remuneration for the Use of Works: Exclusivity vs Other Approaches* (De Gruyter 2015) 115

[658] 'InfoSoc Directive' (2001) Art. 5(2)(b)

[659] As of this writing, two jurisdictions that do not incorporate some form of the private copying levy into their national legislation are the UK and Ireland. WIPO and Stichting de Thuiskopie, International Survey on Private Copying: Law and Practice 2016 (WIPO Publication No 1037E/17, 2017)

[660] Kretschmer, *Private Copying Study*, 10

"…supporting the creation, the promotion and the dissemination of works as well as enabling the training of artists and writers, all in the interest of the public."[661]

However, the administration of the levy among EU Member States is not harmonized. Instead, each Member State is at liberty to determine "the form, detailed arrangements for financing and collection, and the level of…fair compensation."[662] In effect, this has led to 22 different national systems with "dramatic differences between countries in the methodology used for identifying leviable devices, setting tariffs, and allocating beneficiaries of the levy."[663] Hence, the levy has become an increased year-on-year administrative burden on national regulatory bodies tasked with updating levies and continuously ensuring that the amount of compensation remains "fair." The engrained levy system in the EU, accompanied by its significant social and cultural functions, make the issue of levy modernization a constant and politically-challenging one; one that is far from being resolved by itself over time.[664]

As a result of a large-scale consultation and mediation conducted on the functioning of the levy in 2013, it was pointed out by the mediator that, "…one of the issues paralyzing the normal operation of the market for devices and media in the EU is the lengthy and burdensome process on the basis of which the applicability of levies and the levy tariffs are decided."[665] As identified by Stichting de Thuiskopie (Dutch collecting society for private copying remunerations) and WIPO, four different tariff-setting models exist amongst EU member states implementing the levy: 1.) State-funded systems (no tariffs); 2.) Direct state intervention; 3.) Negotiation with industries and societies; and 4.) Tariffs set by law/government after proposals by rightholders or negotiation among stakeholders in special government-appointed bodies.[666] The determination of which products should be levied is also the responsibility of either the lawmaker/government, the court, or a special regulatory body appointed to either make the determination on its own or to advise the government.[667]

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[661] CISAC, *Private Copying Global Study*, 9
[662] Case C-467/08, Padawan ECLI:EU:C:2010:620 (2011) para. 7
[663] Kretschmer, *Private Copying Study*, 8
[664] On 17 April 2020, MEP Henna Virkkunen raised again the issue of "levy inaction" to the Commission. Henna Virkkunen, 'Question for written answer E-002342/2020 to the Commission: Subject: Inaction on private copying levies' (European Parliament, *European Parliament* 2020) <https://www.europarl.europa.eu/doceo/document/E-9-2020-002342_EN.html>
[665] Vitorino, *Recommendations from PCL Mediation*, 20
[666] WIPO and Thuiskopie, *International Survey on Private Copying: Law and Practice 2016*, 9
[667] Ibid

While the effectiveness of each style of tariff setting has not been empirically measured, it can be appreciated that the rapidly changing legal landscape over the past decade has challenged national governments to assess, reassess and adapt their systems. One such catalysing event was the Padawan decision in 2010, which triggered many Member States to change their national laws to differentiate between the costs of products used for private and professional copying purposes, the latter of which should not be levied at all.[668] In the wake of this decision, in 2011 the Spanish High Court favoured the annulment of the levy system in place, which had previously been indiscriminately applied to any equipment or media commercially distributed in Spain.[669] However, the replacement collection mechanism implemented in 2012, which allocated a portion of the General State Budget to fund the levy, was also found to be incompatible with EU law in that it, "…did not ensure that the cost of the private copy levy is borne by the actual users of the private copies."[670] As a result, zero revenues were collected for the private copying levy in 2015, as opposed to 5 million euros collected from the three years prior, and over 61.5 million euros collected in 2011 alone.[671]

In Germany, the *Padawan* decision affected ongoing negotiations of tariffs, where an already protracted legal dispute between German IT industry representatives (BITKOM) and the representative organization of the German collecting societies (ZP) came to an end only after the Padawan decision was rendered, concluding three years of legal dispute.[672] Over the last few years, "[b]y far the largest contributor to the volatility of total revenues [collected in the EU] is Germany," in that, "between 2013 and 2014…revenues almost tripled, but in 2015

[668] Christian Tinnefield, 'Copyright Levies in Germany – Settlement for Computers, Netbooks & Co.' 2014) accessed 2020 <https://www.hlmediacomms.com/2014/01/31/copyright-levies-in-germany-settlement-for-computers-notebooks-co/ > ("…the CJEU took the view that an indiscriminate application of the private copying levy, in particular with respect to digital reproduction equipment, devices and media, made available to business users (and clearly reserved for uses other than private copying) is incompatible with the Copyright Directive 2001/29/EC.")

[669] Legal, 'Private copy levy system: how do recent developments in Spain compare with other EU jurisdictions?' (2017)

[670] *See Case C-470/14, EGEDA and Others,* Spain has since reinstated its levy system. *Cf.* State-funded systems can potentially function adequately for private copying levies, as in the case of Norway. WIPO and Thuiskopie, *International Survey on Private Copying: Law and Practice 2016*, 124-7

[671] WIPO and Thuiskopie, *International Survey on Private Copying: Law and Practice 2016*, 16 Table 7: Total revenues (in current €).

[672] The resulting agreement failed to be comprehensive, as the leviability of Tablet PCs was ultimately not negotiated in the resulting settlement. Tinnefield, 'Copyright Levies in Germany – Settlement for Computers, Netbooks & Co.' (2014)

they were back at the 2013 level, leading to an overall decline of 32% in the 2007-2015 period."[673]

Although the unpredictability and volatility of the fluctuations in tariffs resulting from the current system has been the result of many factors, there are some identifiable gaps in the current regulatory practices of Member States that can potentially be bridged with the aid of EU level guidance. The potential of EU level intervention in regulating the private copying levy will be discussed in below in two specific respects: 1) in calculating tariff amounts and 2) in determining which devices or technologies should be subject to the levy.

6.1.1.1 Tariff Amounts

Notwithstanding the administrative difficulties that inure with setting different tariffs for each Member State, in theory there are some advantages in allowing Member States to tailor levy calculations to reflect national circumstances. Importantly, permitting each Member State to calculate levies and determine leviability on its own is a practice underpinned by the subsidiarity principle, giving preference to Member States' ability to manage its own national systems in accordance with its own legal traditions.[674] Furthermore, country-to-country variances in levies should ideally reflect the differing purchasing powers of EU citizens.[675] Lastly, this amount should be linked to the notion of actual "harm" to the rightholder, a criterion which each Member State is allowed to define using its own set of relevant factors.

Most commonly Member States will apply fixed tariffs in relation to the copying capacity or copying utility of manufactured goods.[676] Alternatively, some countries apply a variable tariff based on the percentage of the sales or import price.[677] Many other factors are also involved in determining the appropriate tariff amount which adds another wrinkle of complexity to rate setting. For example, adjusting tariff amounts to account for the revenues available to less-popular "marginal works" is one consideration that can serve to rebalance the

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[673] WIPO and Thuiskopie, *International Survey on Private Copying: Law and Practice 2016*, 26, 15
[674] Article 5(3) of the Treaty on European Union (TEU) and Protocol (No 2) on the application of the principles of subsidiarity and proportionality. This principle also ensures that powers are exercised "as close to the citizen as possible." Article 10(3) TEU.
[675] And this does seem to be the case in practice. WIPO and Thuiskopie, *International Survey on Private Copying: Law and Practice 2016*, 26 ("The higher the purchasing power per capita in a country, the higher the levy revenues per capita. This correlation is particularly strong within the EU. Hungary has by far the highest revenues from private copying levies relative to GNI; France comes second, followed by Lithuania, Italy and Belgium.")
[676] Ibid 9
[677] This includes Czech Republic, Latvia and Lithuania. Ibid

market where popular works disproportionately reap most financial benefits from the current copyright system. France seems to be the strongest example of this kind of active rebalancing, as 25% of total revenues collected from the private copying levy are distributed towards cultural programs and social funds, impacting a range of artists.[678]

This duly acknowledged, though the calculation of tariffs in Member States should be a reflection of different legal traditions and correlate with the purchasing power of consumers, in reality most of the time variances in levy amounts are difficult to rationalize. According to an empirical study on private copying levies conducted in 2011, the levy applicable to a 64 GB iPod Touch was nearly 20 euros per device in Sweden, but not levied at all in Germany, a difference that "cannot be explained by an underlying concept of economic harm to rightholders."[679] The system has been criticized in the past for being, "…deeply irrational, with levies for the same devices sold in different EU countries varying arbitrarily."[680] This is also in line with some of the findings of the Castex Report, a Parliamentary research inquiry conducted in 2017 on the functioning of the levy: "when the prices at which material sells in a country that charges the levy are compared with those in one that does not, it becomes clear that the private copying levy has no appreciable impact on product prices."[681] These observations indicate that some stakeholders are being affected disproportionately by the levy and are absorbing costs instead of passing them on to the consumers, contrary to the purpose of the levy.[682] It was further found that some manufacturers operating in the EU "…absorb the levy for some products where there is concentrated purchasing power of retailers."[683] For manufacturers of high value innovative products, "…[they] seem to ignore the levy. In a second phase, they may either decide to pass on, or absorb [the levy costs]."[684] Even when tariff amounts are published by a jurisdiction, the negotiation practices of collecting societies may also vary, at times offering significant tariff discounts to manufacturers/importers which

[678] La copie privee, 'What is Private Copying? Private Copying in France' accessed 2020 <http://www.copieprivee.org/en/la-copie-privee-cest-quoi/copie-privee-en-france/>
[679] Kretschmer, *Private Copying Study*, Table 5 and 8, respectively.
[680] Ibid 10
[681] Françoise Castex, Report on private copying levies (2013/2114(INI)), 2013) 6 Recital K ; Kretschmer, *Private Copying Study*, 57.
[682] Kretschmer, *Private Copying Study*, 8, 57
[683] Ibid 57
[684] Ibid

remain unpublished.[685] As a consequence, it is difficult to form a complete picture of the true state of Member State tariff differences and reliably measure its effects.

In addition to these difficulties, the biggest challenge in reducing differences in national tariff amounts and tariff setting processes requires overcoming the strong subsidiarity and proportionality counterbalance that limits EU competencies. For the private copying levy in particular, Member States are empowered to, "…determin[e] the form, detailed arrangements and possible level of such fair compensation, [taking] account…of the particular circumstances of each case."[686] Yet in response to the strong argument for protecting the ability of Member States to adapt their levy systems to match their particular cultural and economic situations,[687] according to an empirical study conducted by Kretschmer in 2011, "[t]here appears to be a pan-European retail price point for many consumer devices *regardless of levy schemes* (with the exception of Scandinavia where consumers are willing to pay a premium.)"[688] In 2012, the Spanish government had completely abolished its levy system, but interestingly this "had no impact on media and material prices."[689] These examples, while demonstrating on the one hand the arbitrariness of the levy amounts set against devices, on the other hand seems to indicate that if an attempt is made to more closely align tariff amounts across Member States, the market would still be able to function.

All this considered, remedying disparities in tariff amounts would translate into concrete benefits for manufacturers and importers of technological goods operating in the EU. Indeed, manufacturers and importers have already been identified as the group most likely to benefit from a more harmonized administration of the levy.[690] It is suggested here that, by way of EU level regulation, setting reasonable lower and upper caps on tariff amounts at the EU level may potentially remedy some of the negative externalities resulting from the more volatile fluctuations in national tariff setting, helping to stabilize the market for levied

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685 Copyright Levies Reform Alliance, Analysis of National Levy Schemes and the EU Copyright Directive, 2006) <http://eurimag.eu/index.php?id=12&cid=31&fid=15&task=download&option=com_flexicontent&Itemid=11> ("…certain collecting societies offer discounts, which can be significant. These discounts do not appear to be clearly set forth in official publications, however; instead they are agreed separately and diverge from published tariffs.")
686 InfoSoc Directive, Recital 35.
687 Vitorino, *Recommendations from PCL Mediation*, 10
688 Emphasis added. Kretschmer, *Private Copying Study*, 57
689 Castex, *Report on private copying levies (2013/2114(INI))*, Recital O
690 Vitorino, *Recommendations from PCL Mediation*, 17

goods.[691] Setting these "caps" would also grant Member States enough legislative "breathing space" to adjust their levy schemes in accordance with national circumstances, in accordance with the principles of subsidiarity and proportionality.

As for *who* should be making such determinations, it is important to review the process in other Member States. The French and German examples are particularly interesting to consider. The French regulatory body in charge of the administration of the private copying levy, the Copie Privée Commission, consists of representatives from each stakeholder group: rightholders (50%); manufacturers/importers of recording media (25%); and persons selected by consumer organizations (25%).[692] In theory, this representation split should enhance transparency in rate-setting and ensure that all relevant stakeholders have a say in the levy. In practice, however, negotiations have been tricky – the representative of UFC Que Choisir (Federal Union of Consumers) left the Commission in the 2000's, and five of six manufacturer/importer representatives resigned from the Commission by the end of 2012.[693] Despite this, the levy system in France has shown a remarkable ability to keep pace with technological advancement, as it has recently applied levies to digital tablets and has introduced levy obligations on nPvR,[694] making France *de facto* one of the first jurisdictions in the EU levying cloud technology.[695]

The other relevant example of incorporating stakeholder input in tariff setting has been the German organization ZPÜ, which applies German law mandating that levies are set collectively.[696] The agreements reached collectively between ZPÜ and the industry representatives are the result of open negotiations between all stakeholders related to the levy – this bolsters the transparency of the levy calculation, as well as the reasonableness of the

[691] The approach of setting revenue caps for the levy can be observed with the administration of the artist resale royalty right. *See* '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' (2001) OJ L 272 32–36
[692] Marie-Andree Weiss, 'What is in the Future for Private Copy Levies in the EU?' 2014) accessed 2020 <http://ipkitten.blogspot.com/2014/12/what-is-in-future-for-private-copy.html>
[693] Ibid
[694] NPvR, or "Network personal video recorder," allows users to save a program in a dematerialized space (on the cloud), and make that program available somewhere in the network. Antoine Germain, 'Qu'est-ce que le NPVR ?' 2018) accessed 2020 <https://www.programme-tv.net/news/evenement/la-tele-et-vous/208167-quest-ce-que-le-npvr/>
[695] WIPO and Thuiskopie, *International Survey on Private Copying: Law and Practice 2016*, 7
[696] § 53 (1) - (3) '(Urheberrechtsgesetz – UrhG) Copyright Act of 9 September 1965 (Federal Law Gazette I, p. 1273), as last amended by Article 1 of the Act of 28 November 2018 (Federal Law Gazette I, p. 2014)'

resulting amount.[697] Importantly, manufacturers/importers are not forced to become parties to these agreements once concluded. If they do choose to become a party to the agreement, however, their fees are slightly reduced. In turn, the parties are obligated to disclose the relevant figures (related to number of devices imported, amount of levy paid, etc.), implementing a detailed system to prove that the appropriate amount has been paid. In cases where negotiations are unsuccessful, tariffs are set by ZPÜ based on market research data, "regularly lead[ing] to judicial proceedings, such that a new and valid tariff is suggested/set by the arbitration board or by the courts."[698] Interestingly, it has been found that this model of rate setting involving stakeholder negotiation tends to yield higher levy revenues per capita.[699]

Taking these examples into account, and recognizing that most practical modalities should still be left within the Member States' discretion,[700] setting some general minimum procedural standards at the EU level may serve as a workable solution to bridge existing gaps in tariff-setting practices. Mediator Vitorino was, "…convinced that it is necessary to apply some general minimum standards," suggesting that "…in light of the principles of subsidiarity and proportionality…more coherence with regard to the process of setting levies…[including] some basic procedural requirements applicable to the process of levy setting [should be implemented]."[701] In this regard, a rate-setting procedure ensuring equal stakeholder participation, as demonstrated by the French and German models, should be encouraged. Moreover, setting uniform baselines for the calculation of harm at the EU level, such as developing a list of generally-accepted factors of calculation, can potentially diminish some of the more radical tariff discrepancies among Member States. This suggestion most directly relates to Mediator Vitorino's conclusion to defining the "harm" criterion at the EU level,[702] though here creating a baseline list of relevant factors would not foreclose on the ability of Member States to use additional criteria in their calculations. Finally, as already mentioned, setting upper and lower thresholds of tariff rates for certain devices at the EU level can eliminate outliers to the tariff rates in Europe and further stabilize the rates across Member States while, again, allowing for sufficient regulatory "breathing room" at the national level.

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[697] The following observations were compiled via interview between the author and a representative of ZPÜ.

[698] WIPO and Thuiskopie, *International Survey on Private Copying: Law and Practice 2016*, 80

[699] Ibid 25("…the model in which the government sets the tariffs after negotiation between rightholders and the industry generally yields higher outcomes, while the model in which tariffs are set directly by the State seems to yield the lowest revenues per capita.")

[700] Vitorino, *Recommendations from PCL Mediation*, 21

[701] Ibid 10

[702] "…a common definition of 'harm' would certainly contribute towards increased legal certainty, since the starting point of the process of setting the levies would be the same across the EU." Ibid 18

Alternatively, if tariff amounts themselves remain at the Member States' discretion, but instead a list of leviable devices/technology is developed at the EU level, differences between Member State implementations can also be limited without overly encroaching on MS' authority to make a final levy determination.[703] The following section presents this solution in more detail along with some challenges.

6.1.1.2 Leviable Devices and Technologies

National governments have sometimes been slow or reluctant to adapt their levy systems in response to technological change. One obvious reason could be that adding a levy a newly released technology poses a competitive disadvantage to some jurisdictions who want to incentivize device manufacturing domestically.[704] Another issue is that some jurisdictions simply lack the administrative capacity to keep pace with technological change. In the case of cloud storage, only a few Member States have considered establishing a levy, while others have outwardly claimed that it is not a priority.[705]

To use a recent example, "foldable smartphone" technology, which stretches definitions of a tablet PC and smartphone, poses a new challenge to some national levy systems.[706] But this challenge will be more burdensome for some jurisdictions than others – for countries with levy systems which do not differentiate on the basis of storage capacity alone, (*i.e.*, countries that levy smartphones and tablets differently despite the same storage capacity), determining the leviability of "foldable smartphones" might potentially prove to be

[703] "The mediator recommended that products (or classes of products) to be levied should continue to be identified at national level...an individualized approach would seem to be justified by the fact that choosing which products are subject to levies would allow member states to quantify the concept of 'harm' in a way that reflects the different purchasing power of consumers residing in different member states. That policy goal could still be achieved, however, by letting only tariffs be set at national level." Giuseppe Mazziotti, Copyright in the EU Digital Single Market: Report of the CEPS Digital Forum, 2013) 20

[704] "If some member states impose substantial levies on IT hardware and media and others do not do so, it is clear that many end users located in the member states which have a levy will purchase the products directly from a dealer located in a member state which has no copyright levy. Obviously, this is a material disadvantage of the importers and dealers in the member states that have a levy and, thus, will seriously affect trade between the member states." Duisberg, Alexander, Niemann, Fabian (2006). "Guide copyright levies Europe." Bird & Bird. April 2006. : https://www.twobirds.com/en/news/articles/2006/guide-copyright-levies-europe.

[705] In 2016, France passed legislation bringing cloud storage (particularly "NPVR services offering cloud storage") within the scope of remuneration for private copying. This is in contrast to jurisdictions such as Hungary which left cloud storage off its reform agenda. *See* WIPO and Stichting de Thuiskopie (2017), International Survey on Private Copying: Law and Practice 2016, WIPO Publication No. 1037E/17.

[706] *See* Boxall, Andy (2019). "Foldable phone wars: Huawei's Mate X takes on Samsung's Galaxy Fold." Digital Trends, 24 February 2019. : https://www.digitaltrends.com/mobile/huawei-folding-smartphone-news/.

a more challenging task because those jurisdictions will also need to define a new category of technology into its existing framework.[707] In theory, the same task might be "easier" for Member States that place the same levy on smartphones and tablets, adjusting the rate solely in relation to storage capacity. Ideally, private copying jurisdictions should be able to set a provisional tariff within one month of the release of new technology, but given that each Member State has its own particular definitions of the levy and unique criteria for tariff setting, it is uncertain to what extent EU jurisdictions would actually be able to meet this goal.[708]

Here again, making a determination of leviable devices or technologies at the EU level can be a more efficient approach. This can eliminate issues when Member States put themselves at a competitive disadvantage by levying a product which is unlevied in another jurisdiction. As suggested by AGECOP, the Portuguese association for the management of private copying, "[l]evies should…increasingly tend to apply to the same devices across Europe."[709] If an EU authority is able to assess new technology quickly and issue a leviability notice to Member States, it will encourage efficiency and uniformity in levying devices, and will eliminate the competition rationale that currently spurs regulatory "sandbagging."

On this EU level approach, it is worth mentioning that mediator Vitorino was sceptical, believing that it would be an overly burdensome task for an EU regulator to continuously monitor new technology and maintain a list of leviable devices.[710] However, as suggested here, if the appropriate EU level authority were in place, *i.e.,* in the form of an agency or similar regulatory mechanism, this would certainly address the concerns raised. As Mazziotti supports, "[s]uch risk [of being too burdensome] could be easily avoided by giving

[707] *See, e.g.,* WIPO and Stichting de Thuiskopie (2017), International Survey on Private Copying: Law and Practice 2016, WIPO Publication No. 1037E/17 Table 4 pg. 11

[708] Vitorino Recommendations, 21. ("In the case of a new product being introduced on the market, the decision as to the applicability of levies should be taken within 1 month following its introduction. The provisional level of tariffs applicable should be determined not later than within 3 months following its introduction…The final tariff applicable to a given product should be agreed or set within 6 months period from its introduction on the market.").

[709] "Private Copy Compensation: AGECOP's Report on the Portuguese Legal Framework and Collection." : https://circabc.europa.eu/sd/a/23654f9f-15a8-4325-927e-231ac260adfb/AGECOP.pdf. Pg. 13

[710] Vitorino Recommendations, 10. ("[a]pproaches involving EU intervention would bear the risk of being burdensome and not flexible enough, as they would require drawing up a list of products subject to a levy that would have to be updated constantly. It is difficult to imagine how, at the EU level, such a list could be reviewed and/or corrected (including the question of having an appropriate system of judicial review).")

an EU institution or agency the task of making such EU-wide determinations and ensuring a periodic and technology-wise update of the list of levied products."[711]

Determining leviable devices or technologies at the EU level may be a viable harmonizing step that can facilitate the administration of private copying across Member States without undermining the authority of Member States in setting appropriate tariff amounts. Perhaps an EU level authority, with the input of Member States, can aid in the management of tariffs EU-wide by providing manufacturers or importers with the opportunity to go to a single authority and pay the tariff to a single authority which is reflective of each different Member States' rate. Along the same lines, provisional tariffs can be set by an EU level authority while Member States continue to engage in their rate-setting processes, avoiding the issue of manufacturers or importers needing to back-pay tariffs. As far as encouraging the growth of innovative products in the EU, this arrangement could translate into concrete benefits for device manufacturers, importers, or new technology market entrants with the intention of marketing on an EU-wide scale. The goal of simplifying the levy process can be achieved with the same rationale that supports collective management of rights: this is a suitable economy of scale that can benefit from some level of centralization to reduce overall transaction costs and, therefore, contribute to a better-functioning "single" market.

6.1.2 Multi-Territorial Licenses

Setting tariffs for certain rights in the EU requires CMOs to engage in the tariff-setting process, often under the supervision of a national authority. CMOs may negotiate with users (or representative user organizations), as is the case for "…tariffs for specific uses of musical works and for the equitable remuneration for secondary uses of commercial sound recordings." [712] Tariff calculations are based on criteria such as actual use, user market share, and shares of advertising revenue.[713] As a further note, the CJEU has ruled on several aspects of tariff setting in the sphere of copyright, most of which has been transposed into national law.[714] As with the case in Germany, CMOs may use hundreds of criteria (known as "Tariff

[711] Mazziotti, "Report of the CEPS", 20.
[712] *See* Europe Economics, Lucie Guibault, Olivia Salamanca, Stef van Gompel. "Remuneration of authors and performers for the use of their works and the fixations of their performances." Study Commissioned by the European Commission. 2015. http://publications.europa.eu/resource/cellar/c022cd3c-9a52-11e5-b3b7-01aa75ed71a1.0001.01/DOC_1
[713] Ibid 47.
[714] *See,* C-395/87 (*Tournier*), [1989] ECR 02521 ; C-110/88, 241/88 and 242/88 (*Lucazeau*), [1989] ECR 02811; C-192/04 (*Lagardère*), [2005] ECR I-07199; C-245/00 (*SENA*), [2003] ECR I-01251; C-52/07 (*Kanal 5 Ltd.*), [2008] ECR I-09275 and C-351/12 (*OSA*), ECLI:EU:C:2014:110.

IDs") for calculating a single tariff. In some countries, CMOs also require approval and certification by a special authority before a proposed tariff can be applied.[715]

Though EU CMOs generally operate with a large measure of autonomy in setting tariffs, they are often not at complete liberty to determine tariffs rates. Governmental or quasi-governmental regulatory bodies such as national IP offices, boards or arbitration panels, play a supervisory role in determining the adequacy of the tariffs set.[716] Assessments are made on the basis of national law, which may include the application of specific criteria that must be demonstrated by CMOs in its tariff setting processes. According to Vučković, though a precursory examination of relevant Member State laws reveals a sense of "conceptual consistency" in tariff setting criteria, it is still the case that the application of such criteria to national circumstances can be very different between jurisdictions.[717] Finally, governmental or quasi-governmental regulators may act as a point of resolution for tariff disputes.

This has all been the case for assessing the tariff setting practices in reference to traditional CMO licensing practices. However, this national-based regulatory structure for copyright tariffs, and the application of national laws in tariff setting practices, have a direct and consequential effect on the issuance of multi-territorial licenses, as there is no separate form of regulation over multi-territorial licensing tariffs.[718] Previous national regulatory structures that were justified on the basis of regulating territorial licensing practices and deterring abuses of monopoly power are now to be recontextualized in terms of setting tariffs that will be applied multi-territorially. To put it differently, the non-discriminatory conditions applicable to licensing and the distribution of royalties were previously a guarantee for national rights holders according to most national laws in Europe, but the multi-territorial licensing scenario raises the question of how to apply these same principles to a "new" licensing circumstance that has eliminated the *de jure* or *de facto* monopoly status of national CMOs.[719] This is an issue yet to be specifically addressed by national law.

Another new form of licensor, Independent Management Entities (IMEs), is also contemplated by the CRM Directive. As defined by the Directive, IMEs are "commercial [for-

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[715] This is the case in, e.g., Poland, Bulgaria and Hungary. Vučković, "Implementation" 33.
[716] Vučković, "Role of Collective Management Organizations" 412.
[717] For an in-depth analysis of Central and Eastern European jurisdictions regarding the comparison of national tariff-setting law, *see* Vučković, "Implementation".
[718] Vučković, "Role of Collective Management Organizations", 414. *See also* Vučković, "Implementation" 32-33.
[719] Giuseppe Mazziotti, 'New Licensing Models for Online Music Services in the European Union: From Collective to Customized Management' (*Florence, IT,* 2011) 23

profit] entities which differ from collective management organisations, inter alia, because they are not owned or controlled by rightholders."[720] As opposed to publishers, broadcasters, or other rightholders who may manage their rights and license on an individual basis, IMEs, "manage rights in the sense of setting tariffs, granting licences or collecting money from users."[721]

The regulation of the tariff-setting practices of IMEs under the Directive itself is somewhat vague. By way of example, since only Article 16(1) is applicable to IMEs,[722] Member States (national authorities) need only ensure that tariff negotiations are conducted in "good faith," whereas tariffs set by CMOs must reflect "objective and non-discriminatory criteria" (Art. 16(2)). While the Directive acknowledges that "…to the extent that such independent management entities carry out the same activities as collective management organisations, they should be obliged to provide certain information to the rightholders they represent, collective management organisations, users and the public," it does not mention the obligation of providing the same information to national authorities. This could be problematic from both an administrative and enforcement standpoint, as it is unclear to what extent national authorities may, on the one hand, monitor IME activities, and on the other hand, exert their authority on and/or sanction the conduct of IMEs operating in Europe. It is still up to national authorities to impose obligations of transparency on these entities, but as of now there does not seem to be much in the way of national-level regulation for monitoring their tariff-setting practices in a separate regime, or even ensuring that tariff rates are published.[723]

As far as settling tariff disputes, there is a similar issue. The Directive contains an obligation for Member States to create appropriate complaint mechanisms and procedures, as well administrative sanctions, if they do not currently exist within each jurisdiction. Specifically, the Directive mandates that "disputes regarding licensing conditions and tariffs related to cross-border licensing can be subjected to an independent and impartial alternative

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[720] Recital 15, Art. 3, CRM Directive
[721] Ibid, Recital 16
[722] Ibid, Art. 2(4) ("Scope:" "Article 16(1), Articles 18 and 20, points (a), (b), (c), (e), (f) and (g) of Article 21(1) and Articles 36 and 42 apply to all independent management entities established in the Union.")
[723] Romana Matanovac Vučković, 'The Role of Collective Management Organizations in New Business Models – Challenges for the Legislature and Courts' in S. Von Lewinski (ed), *Remuneration for the Use of Works: Exclusivity vs Other Approaches* (International Congress June 18-20 2015, ALAI Conference, De Gruyter 2015) 414-15

dispute-resolution procedure of the country of establishment of the CMO."[724] As Vučković points out, however, "…this provision determines the law of the country of establishment as the applicable law for the resolution of disputes, but the question remains whether this provision implicitly also regulates the applicable law for the tariff-setting procedure."[725]

To examine the effect of this, the example of ICE may be useful. ICE is a "multi-territorial copyright hub" established in 2010, representing the repertoires of European CMOs (PRS, GEMA, STIM), and is able to grant online multi-territorial licenses pursuant to the Directive. According to its statement included in the public merger documents submitted to the Commission, it attests that,

> "… CMOs are subject to strict regulatory pricing constraints and duties to license on fair and non-discriminatory terms. Licensing tariffs are either set by law, subject to approval by a public authority, or subject to control by an independent court or a dispute resolution body.…[S]ince the [joint venture] will be based in London and Berlin, *at least the UK Copyright Tribunal and the German Patent and Trademark Office will exercise price control over the JV*…The Notifying Parties also submit that a finding of "unreasonable" rates in court or arbitration procedures would constrain CMOs' negotiation behaviour vis-à-vis DSPs because the rates considered reasonable by a court or by an arbitration body would have to be applied retroactively to all similar DSPs."[726]

It seems unclear whether the DPMA and/or the UK Tribunal are particularly specialized to oversee the calculation of suitable levies and assess the proceedings for setting rates that apply on a cross-border basis. Though it could be foreseeable that the DPMA and/or the UK Tribunal might be able to appoint a certain sub-department or division within the organization specifically for assessing these kinds of tariffs, they will nevertheless be burdened with the complex task of assessing the viability of the tariff not just as applied in the regulator's home jurisdiction, but assessing to what extent the tariff is reasonable as it relates to the laws of foreign MS jurisdictions.[727] Unless the laws on tariff setting themselves were harmonized

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[724] Art. 34(2)(a) and Recital 49, CRM Directive.
[725] Matanovac Vučković, Remuneration for authors and other creators in collective management
[726] European Commission, DG Competition, case M.6800-PRSfM/ STIM/ GEMA/ JV, Merger Procedure Regulation (EC) 139/2004 16 June 2015, para. 237. emphasis added.
[727] As mentioned in Part I (fn. 319), this has already been the subject of conflict in the context of a broadcasting license and the UK Copyright Tribunal's jurisdiction to rule on aspects of the license falling under foreign copyright law. See, *BBC Worldwide Ltd v. Mechanical-Copyright Protection Society Ltd and PRS; Sky Ltd and ITV Networks Ltd intervening* [2018] EWHC 2931 (Ch) 6 November 2018 J. Arnold. http://www.bailii.org/ew/cases/EWHC/Ch/2018/2931.html.

(including calculation rates, relevant factors, etc.), this would be a complex task for any regulator, let alone a regulator that is unspecialized for making such decisions.

Finally, if tariff claims are raised, it is also important that such disputes are resolved quickly. In the US and Canada, for example, specialized regulatory bodies are specifically tasked with assessing tariffs and setting a suitable baseline calculation based on party submissions for calculating rates. These regulatory bodies are also tasked with resolving tariff disputes (US Rate Court, Canadian Copyright Board Adjudication). In these jurisdictions, appointed judges, often with specific backgrounds suited to the subject matter of the adjudication, are tasked with the resolution of such conflicts in a timely manner. The transparency and efficiencies promoted through these practices in other jurisdictions may be informative in considering a potential solution for overseeing tariff disputes with cross-border elements at the EU level.

6.1.3 Cultural Dimensions of Tariff Setting

Considering the interest in promoting cultural policy, new licensing models enabled by the Directive are unclear in establishing how cross-subsidization of less popular repertoires might work, as they had with the issuance of blanket licenses under the previous system.[728] Prior to the 2014 Directive, CMOs that had representation agreements offered "blanket licenses" for content which allowed all works, regardless of popularity or commercial value, to reach a broader audience and market. The existence of this type of license further relies on repertoires of rights that are mostly in-tact. However, the Directive encourages rightholders to be able to customize their rights representation by allowing the withdrawal of certain rights, which may predictably lead to further repertoire fragmentation. There is a danger that, unless users are obliged to license an entire repertoire offerings, less-popular "niche" works or works in non-mainstream languages will be underrepresented and may lose their value.[729]

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[728] Graber, 11. ("CRM systems that are based on reciprocal cooperation between national monopoly CMOs contribute to [a policy of cultural diversity] since those CMOs are obliged to represent all repertoires [and thus secure an income also to less-popular creators] rather than cherry-pick popular works.")

[729] Vučković (2016), "Implementation" 50. ("…the new licensing system…will inevitably lead to a race to the bottom because most of the users will seek out the lowest price for the precise repertoire in which they are most interested. In this situation, small and niche repertoires will lose their licensees… the question remains whether the user is obliged to buy and the CMO to sell the whole repertoire represented or is entitled to sell only part of it if the market demands such a licensing model. Directive 2014/26/EU did not provide a clear answer because an obligation to offer does not mean that there is an obligation to accept the offer. Also, there is no obligation to sell if there is no request for purchase.")

The regime laid out by the new Directive will likely lead to a further distillation of European CMOs, enabling only a select few technologically capable CMO joint ventures to engage in multi-territorial licensing, while smaller and mid-sized CMOs of other Member States would not be able to provide a similar offer.[730] This might lead to a migration of rightholders towards services which are merely able to provide the most competitive price without factoring in cultural or social interests. This disadvantages those artists who use local CMOs who are "excluded from the remit of multi-territorial licensing."[731]

Lastly, CMOs in some Member States are obliged to withhold certain percentages of revenues for the promotion of cultural and social initiatives. However, the Directive is restrictive in its allowance of such practices to continue, "…providing that deductions for cultural and social purposes are to be applied only if the members of the CMO agree and, in addition, if the partner organisation in a representation agreement expressly consents to them."[732] According to Vučković, this will have the effect of:

> "…encourag[ing] the race to the bottom between CMOs… In an environment where economic values are at the fore, to the detriment of cultural and artistic values, the organisations that deduct for cultural purposes will certainly be less attractive, both to the right holders and to the users, because their tariffs would reflect the fact that those deductions exist. And finally, a system of norms whereby competition between the CMOs is introduced without the protection of their cultural and social role will inevitably induce competition in tariffs."[733]

This final point cements the many lasting uncertainties as to the fulfilment of the CMOs' roles in promoting their traditional cultural and social roles under the new Directive. It is even less clear how they will prove that economic factors are not the only consideration when setting tariffs in the context of issuing multi-territorial licenses.

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[730] This is anticipated by the CMOs themselves in the merger documents re: the formation of ICE. European Commission, DG Competition, case M.6800-PRSfM/ STIM/ GEMA/ JV, Merger Procedure Regulation (EC) 139/2004 16 June 2015, para. 172. ("The internal documents submitted by the Notifying Parties show that the Notifying Parties themselves envisage that ultimately there will only be at most two hubs providing copyright administration services, the JV [ICE] and Armonia, to which all other CMOs, including those that are currently part of competing initiatives, will gravitate").

[731] Mendis, Dinusha (2017). "Chapter 10: Directive 2014/26/EU on Collective Management of Copyright and Related Rights and Multi-Territorial Licensing of Rights in Musical Works for Online Use in the Internal Market." in: "EU Regulation of E-Commerce: A Commentary." Arno R. Lodder and Andrew D. Murray (Eds.). Edward Elgar Commentaries series. p. 290-312, 311. http://eprints.bournemouth.ac.uk/30489/1/Lodder%2C%20Murray-Regulation_of_E-commerce_15_Chapter10%20Mendis.pdf.

[732] Matanovac Vučković, Implementation of CRM Directive, Tariff Setting Systems 51

[733] Ibid

Ultimately, tariff-setting is a balancing act, and requires clear regulatory guidelines and adequate enforcement opportunities. Additionally, a purely market-based or economics-based regulation of tariff setting will ultimately fail to address the externalities of such transactions which have an impact on culture and, in turn, society-at-large.

Though in many licensing agreements today there is nothing that prevents parties from negotiating outside of the regulatory process and agreeing to a set of rates individually via contract, tariffs set and assessed by measure of law still affect the overall ability of cultural goods to pass through the market in an effective way – a way that both properly rewards creators for their efforts and promotes public access to a variety of cultural content. The presence of a regulatory authority helps to ensure that rates relevant to cultural goods are set in congruence with existing law and are set in a timely manner, which in turn allows markets for creative content to function smoothly and predictably.

As we have seen from the discussions in Part I regarding the regulation of CMOs, particularly the effects of the 2005 Recommendation and the competition-based impetus behind the 2014 Directive, reliance on competition-based regulation alone may be inadequate. As some have pointed out, the business practices of the few major international music publishers chiefly benefitted from revised rules on multi-territorial licensing, enabling them to "to minimize the economic impact of the royalty collecting services of [national] European collecting societies on the turnover of their recording businesses."[734] And, though there were provisions in the Directive that referred to supporting culture in the EU, it remains questionable whether this will be enough to protect such a mission given the strong economic underpinnings of the CRM Directive.[735]

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[734] Mazziotti, 'New Licensing Models for Online Music Services in the European Union: From Collective to Customized Management' (2011) 26; *See also*, Matanovac Vučković, Implementation of CRM Directive, Tariff Setting Systems 29; Hviid, Schroff and Street, Regulating CMOs by Competition 267 (citing Arezzo, "Competition and Intellectual Property Protection in The Market for the Provision of Multi-Territorial Licensing of Online Rights in Musical Works – Lights and Shadows of The New European Directive 2014/26/EU," International Review Of Intellectual Property And Competition Law 2015, pgs. 534-64).

[735] Matanovac Vučković, Implementation of CRM Directive, Tariff Setting Systems 30-31 ("The final version of the Directive does indeed include some safeguards for small and medium-sized CMOs and cultural diversity [in Articles 30 and 31], but time will show whether these quite reticent elements of the unfinished mosaic of rules, which is supposed to represent the legal framework for the completely new relationships on the scene of collective management of musical rights on the internet, are effective or will just postpone the final decay of small and medium-sized CMOs, gradually leading to a diminution of cultural diversity in Europe's musical sector and a diminution in the value of music in general.")

6.2 Works Registry and Public Database

In an information age, obtaining information relating to the ownership and control of creative works still poses a challenge. A lack of reliable and centralized means of obtaining rights information has created high transaction costs for stakeholders to complete relatively simple licensing tasks. Disparities in the availability of rights information generates costs for rights management organizations and rightholders themselves, who may not be able to receive accurate royalty payments for the use and exploitation of their creative works. Outdated or unverified rights information further creates an environment of exchange with a high degree of legal uncertainty, which in turn translates to high investment risks on behalf of innovators wishing to properly license creative works. As such, a renewed focus on resolving latent issues with rights management of digital creative goods, as well as an(other) investigation of the potential of a comprehensive database for rights information, may prove useful.

Registration, recordation and access to information can all improve the current situation of informational exchange on the creative market. Therefore, the following section elaborates on the introduction (and reintroduction) of these concepts, also explaining what is necessary to fulfil these functions in a digital age.

6.2.1 Registration and Formalities in the Digital Environment

As identified by the Commission, "concerns have been raised…about the accuracy of rights ownership information. There seems therefore to be merit in examining the options for developing data management systems for the ownership of rights in audiovisual works… in light of the need for rights clearance for pre-existing works and subject matters incorporated in the audiovisual work there seems to be merit in exploring the ways in which sources of rights ownership information could be shared across sectors."[736] Though this remark was very closely associated with the idea of forming a European copyright registry, the idea was not followed up on since its proposal in 2011. [737]

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[736] European Commission, Green paper on the online distribution of audiovisual works in the European Union: opportunities and challenges towards a digital single market, 2011) 13
[737] Ficsor, 'The hurried idea of a "European Copyright Code" in the light of the EU's (desirable) cultural and copyright policy ', 9 (Drawing an important distinction, Ficsor maintains that "there is no need for registration for copyright protection; that is, for obtaining a copyright "title," and the international treaties forbid its application as a condition of copyright protection. The usefulness of registration may rather be that it could serve as a basis for a rebuttable presumption of the facts registered.")

Lack of information can become a barrier to the functioning of the creative market, generating costs in locating, accessing and using content, as well as impeding follow-on creativity. In the digital age, though the technologies exist for simplifying the management of the types of ownership and usage information necessary for a well-functioning marketplace, i.e., in the form of metadata, the solutions have been multifarious and dispersed over many different industries. Furthermore, those parties that have invested in creating infrastructure around the management of such data, collective management organizations for example, often have a proprietary interest in the management and maintenance of the data, and as such do not make such information publicly-available.[738] This can have negative consequences for stakeholders, as a lack of reliable and unified rights ownership information can reinforce informational asymmetries in the marketplace, and can contribute to an inefficient system of creation, distribution, and reuse of creative content.

Though a full discussion of the (re)introduction of some form of copyright "formality," – in this case, limited to the concept of voluntarily registering works and ownership information with an authority – is outside the scope of this thesis, it has been acknowledged by many scholars that the potential of reintroducing some form of voluntary system of registration and/or recordation of the transfer of rights would improve the current situation regarding the legal certainty of copyrighted works on the digital creative market, and would not contravene the general prohibition against formalities embodied in the Berne Convention.[739] At the EU level, such a function can be sufficiently carried out, given adequate investments in the infrastructure of the system, and especially in managing such a large potential database. This is further discussed in the next section.

6.2.2 Public EU-Database for Rights Information

Outside the US and particularly in Europe, it is common for creators (specifically in the music industry) to entrust the administration of rights to CMOs, which have traditionally

[738] CIS-Net is a network of databases shared between collecting societies compiling musical works information. Use of the database is subject to certain conditions as defined in the terms of CISAC membership of a society, which obliges members to contribute their data. See CISAC, 'Information Services: CIS-Net' 2020) accessed 1 October 2020 2020 <https://www.cisac.org/What-We-Do/Information-Services/CIS-Net>

[739] See, inter alia, Gangjee, 'Copyright formalities: A return to registration?', ; van Gompel, 'Contextualizing the International Prohibition on Copyright Formalities', ; Séverine Dusollier, '(Re)introducing Formalities in Copyright as a Strategy for the Public Domain' in Lucie Guibault and Christina Angelopoulos (eds), *Open Content Licensing: From Theory to Practice* (Amsterdam University Press 2011); van Gompel, 'Contextualizing the International Prohibition on Copyright Formalities',

been tasked with processing ownership information for works. Many independent "third-party" data aggregators also exist which manage proprietary databases of rightholder information on a variety of creative works, including images, music, audiovisual works, and works designated as "creative commons." These third-party data aggregators tend to operate in competition with one another, and are therefore incentivized to promote the use of their own data standards and services. These practices have generally led to further dilution of authoritative and accurate information on creative works on the market, and have created some uncertainties for content users wishing to obtain and use works without the threat of infringement.

While several rights information databases already exist, most of the time these remain far from comprehensive and are generally inaccessible to the public. One of the largest current databases for musical rights information is managed by CISAC, through the services it offers to its member societies CIS-net and the Works Information Database (WID).[740] CISAC maintains one of the most comprehensive databases for music rights information currently in existence (CIS-net), wherein collecting societies pool rights information and are able to access such data. However, not all of this data is publicly available, and subject to privately negotiated agreements between CMOs (reciprocal representation agreements). For EU collecting societies, most abide by rules established by CISAC.

In the past there have been many efforts to create a comprehensive, publicly-available database, but those efforts collapsed under the pressures of financing such a large project, and in deciding who would ultimately own the data. The ambition of the Global Repertoire Database (GRD), for example, was to provide, for the first time, a single, comprehensive and authoritative representation of the global ownership and control of musical works. Once deployed the GRD would save extensive costs currently lost to duplication in data processing.[741] The project was launched in 2009 following the "Online Commerce Roundtable" by the European Commissioner for Digital Agenda at the time. The Working Group for the project was composed not only of representatives of the major CMOs but only of the major publishers and OSPs (e.g., Google, iTunes). The project was however

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[740] According to its website, CIS-Net hosts the information for 81.1 million musical works, 35.4 million ISWCs and 39.8 million international works. These services are not public and only made available to CISAC member societies. See https://www.cisac.org/What-We-Do/Information-Services/CIS-Net.
[741] GRD: https://web.archive.org/web/20140801000000*/http://www.globalrepertoiredatabase.com/

abandoned, due to the large costs inherent in building and maintaining the database, as well as disputes relating to who could claim ownership over the data.

The IMJV, or the International Music Joint Venture, was a similar project that was started in 1998 which involved the collaborative efforts of several CMOs (PRS for Music, ASCAP, BUMA-STEMRA). Other than "CIS" (CISAC's Common Information System) which was being developed simultaneously, the IMJV effort marked one of the first large-scale collaborative efforts between CMOs to unify national data systems into a single, authoritative database. However, many of Europe's large societies were reluctant to join the effort for "local" reasons – the financial commitments required in upgrading existing computer systems, for example, would prove too great for some societies.[742] Therefore, the task of uniting the CMO repertoires of music rights information proved to be more technically and financially difficult than first anticipated, and by 2001 the project was dissolved.

One interesting recent effort to compile an authoritative, publicly-available database for musical works information is currently underway in the U.S.. Under legislation passed in 2018, "The Music Modernization Act," part of the new system for compulsory blanket licensing of mechanical rights will involve the creation of a comprehensive and publicly-accessible musical works database.[743] According to 17 U.S.C. 115(d)(3)(E), the Mechanical Licensing Collective (MLC) will be tasked with building and maintaining "end-to-end databases and systems for ownership identification, matching and claiming, and royalty collection and distribution." This database will be managed by the MLC, and populated with the rights information and usage data from relevant stakeholders (primarily the digital licensees, such as Spotify and Apple Music). Following a public consultation period regarding the regulations that the U.S. Copyright Office should adopt to facilitate the implementation of the Act,[744] there are still numerous open questions regarding the legitimacy of data sources, implementation of metadata standards, and authoritativeness of the resulting database.

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[742] P. Hardy (2009), 'National versus Regional, Many versus Few: The Dilemma Facing the Collection Societies', *World Music: Roots and Routes*, Tuulikki Pietilä (ed.) https://helda.helsinki.fi/bitstream/handle/10138/25806/006_04_Hardy.pdf?sequence=1

[743] U.S. Copyright Office, 'Music Modernization Act' 2020) accessed 25 October 2020 <https://www.copyright.gov/music-modernization/>

[744] U.S. Federal Register (2019), "Music Modernization Act Implementing Regulations for the Blanket License for Digital Uses and Mechanical Licensing Collective." https://www.federalregister.gov/documents/2019/09/24/2019-20318/music-modernization-act-implementing-regulations-for-the-blanket-license-for-digital-uses-and

In taking a brief look at the past and present of database efforts related to copyrighted works, it becomes clear that there is a need for a centralized, authoritative and publicly-available database to ensure that the market for creative works remains efficient. On a related note, the Copyright Principles Project (CPP) participants reached an interesting conclusion regarding the relationship between third party database information providers and copyright authorities. In their proposal, they suggest that the U.S. Copyright Office – which is currently lacking in the technology and infrastructure to create a fully comprehensive database for creative works – set data standards and "certify" the data contained in private third-party databases as accurate.[745] This would be a cost-efficient and competition-friendly alternative to building a new database from the ground-up, and would contribute usefully to increasing the overall reliability and transparency in obtaining rights information.

7. Dispute Resolution

The fragmentation of copyright laws among EU Member States is also reflected in its enforcement. On a fundamental level, the immaterial quality of intellectual property as it exists on digital mediums poses a challenge for enforcing rights online. The governing principles of private international law – the rules on jurisdiction and choice of law – have been traditionally rooted in physical connecting factors which are difficult to translate into online contexts.[746] Both the ubiquitous, borderless nature of online infringements and the many disparities between laws as they exist in different Member States create complexities which still cannot easily be resolved by the current rules guiding enforcement.[747]

Jurisdictional rules and differences in national copyright laws are not the only obstacles in enforcing rights online. Differing national laws in other relevant fields of law – laws on contract, for example – can present country-specific issues which can only be resolved by a national court or similar judicial body. According to von Lewinski, "…in the field of copyright contract law…the diversity and, in most Member States, also the level of detail of regulation is enormously high. A glance at the provisions of the Member States on

[745] Samuelson, Litman and Members, The Copyright Principles Project: Directions for Reform 1203 (The basic idea … would be to shift the Copyright Office away from day-to-day operation of the copyright registry and toward a role of setting standards for and superintending a system of separate but networked and interoperable private registries.")
[746] A. Kur and U. Maunsbach, 'Choice of law and Intellectual Property Rights' (2019) 6 Oslo Law Review 43-61
[747] For detailed discussion, see, P. Torremans, 'Jurisdiction in intellectual property cases' in P. Torremans (ed), *Research Handbook on Cross-border Enforcement of Intellectual Property* (Edward Elgar 2014); Kur and Maunsbach, Choice of law and Intellectual Property Rights

copyright contract law shows a picture full of contrasts."[748] Aspects of "copyright contract law" is defined in both general and specific terms by some jurisdictions (e.g., France and Spain), while at the same time the very concept of a body of "copyright contract law" can be viewed as antithetical to the principles of freedom of contract in others.[749] This issue of unharmonized copyright contract practices among Member States cannot be easily remedied at the EU level either (if at all), as the Commission's previous efforts to legislate comprehensively in this area, and in the general area of contract law, was met with little to no support.[750]

These reflections on the diverging states of copyright law, contract law, and principles of enforcement among EU Member States duly acknowledged, digitization and online exploitations of works have exposed the tensions between enforcing exclusive rights online and protecting public interests in access. Though the exercise of the exclusive rights enjoyed by rightholders does not extend to preventing mere access to a work, copyright provisions are increasingly being used on digital mediums to impose such limitations.[751] Furthermore, the bulk of the design of proper enforcement schemes is left to private actors, and can skew the overall accessibility and utility of creative works to the disadvantage of the consuming public. Broad protections over rightholder applications of technological protection measures (TPMs) in the InfoSoc Directive have led to such imbalances.[752] On the other end of the spectrum, leaving the design of appropriate enforcement mechanisms to intermediaries can be just as ineffective considering that, as commercial actors, they are ill-suited for making the types of decisions which require the review of legal conflicts between two of its users, and therefore only provide bare minimums for claim inspection. In the long term, such inefficient mechanisms can have a chilling effect on initial and follow-on creativity, and can weaken the overall efficacy of fundamental rights protections.

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[748] S. von Lewinski, 'Copyright Contracts' in Tatiana-Eleni Synodinou (ed), *Codification of European Copyright Law: Challenges and Perspectives* (Information Law Series, Wolters Kluwer 2012) 242-43

[749] Ibid 243

[750] Ibid 242 (referencing Commission, 'Communication from the Commission to the Council and the European Parliament on European Contract Law' (COM (2001) 398 final, Brussels 11 July 2001))

[751] Séverine Dusollier, 'Sharing Access to Intellectual Property through Private Ordering' (2007) 82 Chicago-Kent Law Review 1392; Litman, The Exclusive Right to Read

[752] See generally, Art. 6(4) InfoSoc Directive [2001]. For a comment on the effects of these measures and the use of alternative dispute resolution measures, see Brigitte Lindner, 'Alternative dispute resolution -- a remedy for soothing tensions between technological measures and exceptions?' in P. Torremans (ed), *Copyright Law: A Handbook of Contemporary Research* (Research Handbooks in Intellectual Property series, Edward Elgar 2007)

Providing means of Alternative Dispute Resolution (hereinafter “ADR”) has been advised by the new CDSM Directive, raising some interesting new possibilities in relation to devising new, accessible means of resolving conflicts in a digital age.[753] In the following sections, different forms of dispute resolution relating to copyright will be broadly considered in the context of the current study.

7.1 Copyright Small Claims Courts and Tribunals

For many independent creators, artists, and small businesses, the idea of litigating over an infringement of a copyrighted work automatically triggers apprehension. In the first place, initiating litigation is often costly and time-consuming. Secondly, the idea of finding and hiring an attorney, pursuing an infringer, and potentially hauling them into a court can be a daunting prospect, even if the infringement is clear. Thirdly, litigating over a single or a few small-scale infringements may not feel justified in light of the attendant costs; the potentially low returns and the mere satisfaction of winning suit are often not big enough incentives for creators to enforce their rights. This situation has contributed to the overall situation of mass infringement of “low value” works without many straightforward, affordable avenues for creators to enforce the copyright in their work. Without a viable option for enforcement, the value of the right in the first place is incredibly low. Therefore, the idea of a “small claims procedure” for copyright disputes – an administrative proceeding involving very minimal costs and quicker resolutions – has been considered a very attractive alternative to copyright litigation by lawmakers worldwide.

In the UK, the small-claims track of the IP Enterprise Court (IPEC-SCT), established in 2012, has been particularly successful as regards the adjudication of low economic value copyright disputes.[754] As demonstrated by the IPEC-SCT example, the mere availability of this option changed the likelihood itself of a rightholder litigating against an infringer.[755]

In the U.S., since 2005 many legislative efforts have been launched by Congress to create a small claims track for copyright disputes.[756] More recently, in 2020, a bill was introduced in Congress which revitalizes the idea of a small claims track for copyright disputes. In this iteration of the bill, titled, “Online Content Policy Modernization Act,” the

[753] 'CDSM Directive' (2019) [CDSM Directive]
[754] Christian Helmers and others, 'Who needs a copyright small claims court? Evidence from the UK’s IP Enterprise Court ' (*BCLT-Hastings Workshop, Berkeley, CA* 2018)
[755] Ibid 5-6
[756] Sandra Aistars, 'Ensuring Only Good Claims Come in Small Packages: A Response to Scholarly Concerns about a Proposed Small Copyright Claims Tribunal' (2018) 26 George Mason L Rev 65-69

suggestion is to create a new administrative sub-body within the U.S. Copyright Office (and, therefore, within the Library of Congress) called the “Copyright Claims Board,” which would serve as an alternative dispute resolution forum “in which parties may voluntarily seek to resolve certain copyright claims regarding any category of copyrighted work, as provided in [Chapter 15 U.S.C.].”[757] Like the CASE Act(s) that preceded it,[758] the new Act suggests that a panel of 3 “Copyright Claims Officers” be appointed by the Librarian of Congress (with consultation of the Register of Copyrights), having experience as an attorney of seven years “representing or presiding over a diversity of copyright interests, including those of both owners and users of copyrighted works.”[759] Hence, this version of a copyright small claims procedure and board is essentially a re-vamping of the previous CASE Act with few modifications.[760]

Though the availability of a small claims procedure for copyright related legal issues has received some broad support, scepticism has been raised in relation to Congress’s constitutional authority to establish such a new venue for litigating copyright disputes – copyright being characterized at times as “private” in nature. Specifically, the ability of Congress to establish a venue for litigating disputes related to private vs. public rights was raised in *Oil States Energy*, a Supreme Court case involving a review of the legitimacy of inter partes review conducted by USPTO Board.[761] In that case, the Court maintained that only courts litigating *public* rights may be established by Congress to be able to fall within its permissible authority under Article III.[762] This conclusion rested on the fact that the Court considered patents to convey rights to “public franchise.”[763] It is therefore an open question how the Court would rule on the introduction of a new adjudicative proceeding for copyright disputes, with copyright often straddling the line between being characterized as a right that is both private and public in nature.

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[757] Sen. Lindsey Graham, 'S. 4632 "Online Content Policy Modernization Act" '*Senate* 2020) § 1502
[758] Copyright Alternatives in Small-Claims Enforcement (CASE) Act of 2016, 2017 H.R. 3945
[759] Graham, 'S. 4632 "Online Content Policy Modernization Act" '*Senate* 2020) § 1502
[760] The proposed small claims procedure has been rolled into a bill with some highly questionable legislative proposals geared towards rolling back “Section 230” civil liability protections for online services. For criticism, see E. Goldman, 'Senator Graham Cares More About Trolls Than Section 230 (Comments on Online Content Policy Modernization Act)' 2020) accessed 2020 <https://blog.ericgoldman.org/archives/2020/09/sen-graham-cares-more-about-trolls-than-section-230-comments-on-online-content-policy-modernization-act.htm>
[761] Oil States Energy Services v. Greene’s Energy Group 584 U S (2018)
[762] Ibid
[763] Ibid 6

Additionally, a group of academics have identified some issues related to, inter alia, the amount of default judgements that would be entered as a result of such a procedure, the eligibility criteria of claims, and the sufficiency of remedies.[764] Critically, like in the patent system, and in the case of fraudulent YouTube DMCA takedown requests, the introduction of a small claims procedure can become open to abuse from "copyright trolls," who may exploit the procedure to litigate hundreds of small claims at once.[765] It is therefore imperative that this issue be anticipated in any proposed legislation suggesting such a venue for copyright disputes.

Taking these relative benefits and drawbacks into consideration, overall it would seem useful to establish an EU level administrative, quasi-judicial procedure for small copyright claims, similar to that undertaken by the U.K. small claims tribunal and that proposed by the U.S. legislation.[766] This type of procedure, limited to the assessment of "low economic value" copyright disputes, could feasibly assist in the adjudication of online conflicts that may otherwise pose a difficult jurisdictional issue, and depending on its capacities can likely process claims much faster than a national court. Likewise, diverting these types of issues to a specialized adjudicator can lighten the burden of a national court (and generalist judges). Of course, this procedure would be limited to being an intermediary step before the claim can be elevated to the national court (or CJEU) by appeal. Ultimately, it may even have the same effect observed in the introduction of the U.K. procedure, which saw an increase in the amount of claims filed by rightholders that likely would not otherwise have been filed in the courts.[767] If the legislation is carefully drafted to limit the likelihood of copyright claims "trolling" on behalf of large and/or powerful rightholders, and if national courts and the CJEU are still recognized as venues for appeal of these types of decisions, a small claims track for copyright disputes at the EU level can have a positive impact on creators wishing to enforce their rights more effectively in the face of a more daunting and costly alternative.

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[764] Pamela Samuelson and Kathryn Hashimoto, 'Scholarly Concerns About a Proposed Small Copyright Claims Tribunal' (BCLT-Hastings Workshop) But see, Aistars, Ensuring Only Good Claims Come in Small Packages: A Response to Scholarly Concerns about a Proposed Small Copyright Claims Tribunal

[765] Brian L. Frye, 'The CASE Act Is for Trolls' 2020) accessed 2020 <https://www.jurist.org/commentary/2020/04/brian-frye-case-act/>

[766] As far as the EU legislator's competency to suggest this, the treaty basis for this type of specialized copyright adjudicator in the EU can potentially fall under Art. 257 TFEU regarding the establishment of specialized courts, in accordance with the ordinary legislative procedure.

[767] Helmers and others, 'Who needs a copyright small claims court? Evidence from the UK's IP Enterprise Court ' (*BCLT-Hastings Workshop, Berkeley, CA* 2018) 5-6

Finally, the availability of a centralized EU authority for resolving of the more "borderline" legal determinations of permissible uses of creative content would be an attractive alternative arrangement for certain categories of online platforms, considering that the current arrangement of Art. 17 CDSM Directive anticipates that platforms will be primarily responsible for the design of an appropriate user complaint and redress mechanism administered through the platform, while Member States are responsible for the availability of out-of-court redress mechanisms. According to the Directive, platforms will be obliged to not only process user complaints without undue delay, but that its decisions to disable access to or remove uploaded content shall also be subject to human review.[768] This requirement of ex-post human review in the complaint and redress process is confirmed in the recent Art. 17 implementation Guidance issued by the Commission.[769] However, it can be anticipated that in order for such human review to take place, the platform in question should invest in new specialized personnel who are able to make such determinations – to be sure, determining the application of exceptions or limitations to copyright in borderline scenarios, especially given the differing national standards on their application, can be a daunting task even for a judge. It therefore may become unduly burdensome on a platform to fulfil such a requirement and administer it on an EU scale, consequentially in violation of the platform's fundamental rights interests in freely conducting a business.[770] Recognizing this, it may be more efficient to install a specialized EU body with a quasi-judicial function which is able to process such requests as a neutral "third party". Instead of relying on the differing standards of human reviewers employed by platform operators, expert reviewers can be cleared at the EU level. Furthermore, following the model of ICANN in establishing an international dispute resolution policy for domain name disputes, similarly here, the procedures for resolving online content disputes can be designed to be administered completely online.[771] While this arrangement may obviously involve some costs at the EU level in developing and administering a platform for resolving such disputes, there are clear benefits to such an

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[768] CDSM Directive, Art. 17(9).
[769] European Commission, 'Communication from the Commission to the European Parliament and the Council: Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market' 2021)
[770] Art. 16 CFR.
[771] For example, the procedures established for resolving domain name disputes (UDRP) has been particularly successful in establishing a workable, fully online option for dispute resolution regarding domain names on an international level. See ICANN, 'Uniform Domain-Name Dispute Resolution Policy ' accessed 2020 <https://www.icann.org/resources/pages/dndr-2012-02-25-en#udrp> ; WIPO, 'WIPO Guide to the Uniform Domain Name Dispute Resolution Policy (UDRP)' accessed 2020 <https://www.wipo.int/amc/en/domains/guide/>

arrangement for all stakeholders that may justify such costs in the long term. This is particularly so given that there seems to be a higher likelihood that the fundamental interests at stake for all parties (rightholders, intermediaries and users) can be adequately balanced and safeguarded in an open and transparent way if a public regulator, rather than the platform, is responsible for the outcome.

7.2 Mediation

Mediation is defined in the EU Mediation Directive as "a structured process whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator."[772] It is offered as a means of ADR, but is distinctive in terms of the neutrality of the mediator. Unlike arbitration or dispute boards, mediators are not concerned with judging on the substantive issue of the case, but will instead focus on aligning the interests of the parties to reach a mutually-acceptable resolution.

In general, mediation offers an alternative to litigation which can provide numerous benefits to IP holders.[773] In multijurisdictional contexts, the creativity and flexibility of proposed mediation awards are particularly useful because parties are able to consider resolutions that go beyond monetary damages or injunctive relief, often with a comprehensive international effect. Mediation is also generally more likely to be a faster and more cost-efficient option for parties than the litigation process.[774] Appointed mediators act as facilitators to the negotiation process, while the parties themselves (and their legal counsel) are primarily tasked with the creating an agreement. Parties have the opportunity to reconcile negotiation deadlocks and reach a state of compromise with the help of an impartial mediator, and the process can help the parties find novel and innovative solutions that are not limited to legal remedies. The collaborative aspect of mediation enables the parties to work together instead of enforcing a "winner-loser" dynamic which is more often to occur in litigation.[775]

One of the benefits of mediation is the confidentiality offered by the process itself and the resulting solutions, allowing parties to maintain sensitive business relationships during

[772] Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters.
[773] For detailed analysis on the relationship between mediation and IP in Europe (and other select jurisdictions), see Asako Wechs Hatanaka, 'Mediation and intellectual property law: A European and comparative perspective', University of Strasboug 2016)
[774] James Scott Sledge, 'Mediating Copyright and Intellectual Property Disputes' (2013) 6 Landslide
[775] Ibid 49

conflicts. However, this may also be counted as a drawback, as there is no ability for mediators to build upon previous decisions. This ultimately makes the results of mediation difficult to predict from a legal certainty perspective. Furthermore, the voluntary nature of the process can lead particularly vindictive parties to reject the idea of finding a compromise and leave without a deal. This opportunity for withdrawal is in contrast to arbitration proceedings, which require both parties to reach a resolution.

These benefits and drawbacks duly accounted for, in relation to the resolution of copyright disputes, ADR measures such as mediation can offer another strong alternative to adjudicative or administrative processes. The control of parties over the outcome of the proceeding, as well as the relatively low costs and high degree of control over the nature of remedies give considerable flexibility to the resolution of conflicts. As put by Sledge, Copyrights…fall into the category of 'public goods' rather than 'private goods'…'Public goods' may be shared and licensed and are thus better addressed by more flexible and collaborative processes, such as mediation, so the parties can find solutions that fit their own needs, and those of the public as well."[776] The potential of mediation in resolving copyright-related legal disputes is still in a rather fledgling stage, but can be promoted and built upon given the right opportunities for implementation.

8. Observatory and Advisory Functions

8.1 Observatory

8.1.1 Towards "Evidence-Based" Policy in Copyright

"Innovation" is the buzz word in many reports on the economic performance of IP assets in global economies. The economic impact of the innovative output of any given country is a metric that almost cannot be avoided, mainly because it is so heavily associated with a well-functioning and competitive economy. Many countries around the world use these metrics comparatively against the figures of other countries, forwarding the debate around IP policy objectives almost exclusively on "big" numbers; yet these same figures have a history of being derived through some vastly inconsistent means.[777]

The importance of choosing the appropriate indicators to substantiate claims in IPR studies is already stressed to some degree by policymakers and academics, particularly in

[776] Ibid 51
[777] Magnifying the economic impact of IPR-driven industries is a commonly used rhetorical device of "grey literature" in this area. Mitra-Kahn, Copyright, Evidence And Lobbynomics: The World After The UK's Hargreaves Review 77

terms of measuring the innovative activity generated by the copyright regime. Yet placing copyright within a very patent-dominated "innovation" discourse is difficult because of how differently innovation is perceived in this field.[778] Innovative "input" in patent statistics is often measured by the size of R&D departments; innovative "output" in the same tends to measure the total amount of patents produced.[779] Innovation in copyright, however, is more often generated by smaller firms, and not within formally-defined departments.[780] From the output perspective, important values such as adding a more varied, diverse and more culturally-valuable supply of works to the market, and increasing social benefits such as public accessibility to such works, are difficult to assess and involve more than the mere use of an aggregate measure of copyrighted works produced.[781] From the infringement perspective, figures such as the economic impact of piracy on various industries are an especially illusive number to ascertain, despite the volume of these studies that have been conducted.[782]

Innovation in copyright, given these complexities, has long been assessed on an international scale. In 2003, WIPO first published a set of guidelines (Guide on Surveying the Economic Contribution of the Copyright-Based Industries) aimed at creating a uniform methodological basis for future surveys. In the 2015 revised version of these guidelines, WIPO implements country-by-country comparison with the justification that, "...there is a statistically significant positive relationship between the performance of copyright industries and such indicators and indices as per capita GDP, global innovation, global competitiveness, intellectual property rights, and economic freedom."[783] Likewise, the Global Innovation Index, Global Intellectual Property Index, and the Global Competitiveness Index are examples of international ranking systems that have become "most relevant to IP policymaking."[784] Yet

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[778] de Beer, Evidence-Based Intellectual Property Policymaking: An Integrated Review of Methods and Conclusions 162

[779] Christian Handke, Economic Effects of Copyright: The Empirical Evidence So Far (Report for the National Academies of the Sciences, 2011) 15

[780] Ibid

[781] Ibid

[782] One telling example is the aggregation of copyright studies collected in the Copyright Evidence Wiki, which includes 295 studies regarding the "relationship between protection and economic performance," while half as many studies (123) on the "relationship between the creative process, incentives and legal rules." *See* Copyright Evidence Wiki, http://www.copyrightevidence.org/evidence-wiki/index.php/Copyright_Evidence (last accessed 16 February 18).

[783] WIPO, Guide on Surveying the Economic Contribution of the Copyright Industries, 2015)

[784] de Beer, Evidence-Based Intellectual Property Policymaking: An Integrated Review of Methods and Conclusions 157

in hopes of reaching more credible and more accurate results with each year, changes in methodology and updates in relevant indicators yield (sometimes significant) year-to-year statistical variances that ultimately dampen their comparative potential.[785]

Furthermore, it is problematic to assimilate "cost" analyses onto copyright policy debate, at least in a strict sense, as it leads to a myopic view of any potential solutions.[786] Properly measuring the costs of creative expression, for example, presents a challenge of quantification, and the omission of a normative element to the analysis (law) conflicts with the factual bases upon which most economic modelling depends.[787] While there are many advocates of the use of economic research to help quantify some of the effects of copyright policy on creative markets – research which is undoubtedly well-placed – it is apparent that this view may not always respect the distinctive qualities of works as "creative goods" on a "creative market." As stated before, it is dangerous to limit the discourse to a consideration of a copyrighted good purely as "property" or an "investment" (though it is not incorrect to consider these definitions). Instead, a balanced *interpretation* of the evidence that *can* be gathered on copyright is needed; considering all potential approaches towards evidence-gathering for copyright policy, assessments should not strictly be tied to economic considerations, as they might have a tendency to do in the political discourse, but should also factor in social and cultural considerations by design.

In recognizing the many complexities inherent in gathering and interpreting evidence for copyright policy, thus far there have been some initiatives launched by academics, national and EU level actors aimed at devising appropriate standards of evidence-gathering in this area. In 2011, on the initiative of the UK Government, a report was published (the "Hargreaves Report").[788] In 2012, a symposium titled "What Constitutes Evidence for Copyright Policy?" was held in CIPPM, Bournemouth University as a follow-up on the initiative set in motion by the Hargreaves Report, assembling an array of economists, legal academics, social scientists and representatives of national governments to present their

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[785] In the field of patent, de Beer gives an effective example of the importance selecting the right indicators for assessing innovation through a case study of Canadian innovation performance from 2010-2015, begging the question, "Did Canada actually become more innovative? Or did new metrics yield new results?" Ibid

[786] For a critique on the use of economic metrics in regulating IPRs, see Andreas Rahmatian, 'A Fundamental Critique of the Law-and-Economics Analysis of Intellectual Property Rights' (2013) 17 Marquette Intellectual Property Law Review 211-28

[787] Ibid 212, 14

[788] Hargreaves, *Digital Opportunity A Review of Intellectual Property and Growth*,

perspectives on what makes evidence "reliable" in the field of copyright.[789] As made apparent from the discussions, lawyers and economists seemed to view evidence relevant to copyright issues from diverging perspectives, with lawyers favouring normative analyses based on the interpretation of laws and cases, and economists favouring hypotheses drawn from the interpretation of statistical data.[790] Nevertheless, all participants seemed to agree that the recognition of qualitative data – i.e., anecdotal evidence of the functioning of the law drawn from ethnographic studies or interviews – was crucial in developing accurate conclusions on the functioning of current copyright laws in society.

Building on these conclusions, evidence gathering for copyright law should occur on a more continuous basis, should be conducted by an independent, disinterested, and authoritative body, and should actively consider solutions to copyright-related issues that are properly balanced between achieving socially and culturally-optimal outcomes and economically-optimal outcomes. Data gathered independently – and not produced by interested parties – may be a useful first step towards reaching a more objective assessment of current copyright-related issues, and in developing more comprehensive legislation and/or regulations going forward.

As a corollary to this point, such assessments can also reveal the absence of an issue. It can be the case that new or emerging technologies may benefit from developing freely in the marketplace, at least at the outset, without risking rightholders' interests in the process.[791] Rushing into implementing a poorly-developed regulatory framework may be just as detrimental to the growth of the creative market as underregulation; catering to the regulatory requests of incumbent industry players may conversely limit opportunities for new disruptive technologies to emerge. Critically, these kinds of determinations require sound data, expertise, and consistent monitoring for governments to begin to form an accurate picture of the potential effects of regulating (or not regulating) certain aspects of the creative market for the public benefit. Perhaps a permanent body situated at the EU level may help to advance such a mission.[792]

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[789] , 'What Constitutes Evidence for Copyright Policy?' (*What Constitutes Evidence for Copyright Policy?, Bournemouth University, UK* 2012) <https://www.copyrightevidence.org/create/esrc-evidence-symposium/publication/>
[790] Ibid
[791] Liu, Regulatory Copyright 140
[792] It is worth noting here that the mandate of the EUIPO's Observatory on Infringement already prioritizes gathering objective evidence for online infringements, as a response to the widely-varying studies conducted by interested stakeholders. What is suggested here is an expansion of these

8.1.2 Observatory on Online Licensing Practices and the Public Domain

The creation and dissemination of online content is subjected to overlapping schemes of public and private regulation. Copyright law provides a baseline, establishing exclusive rights and limitations and exceptions to those rights. Layering on top of these basic provisions are agreements negotiated between private actors, which serve to either compliment or contradict these baseline arrangements. The enforceability of these agreements is then subject to the interpretation of the law in courts, providing a closed loop in the interpretation, application, and enforcement of laws. The law can provide other safeguards which respond to broader public policy objectives, such as consumer protection laws. As far as maintaining protections for rightholders, (in contrast to the EU where some rights are considered unwaivable), there is a consensus in common law jurisdictions to value a high degree of contractual autonomy. This tends to give rightholders more leeway in their contractual negotiations, allowing negotiating parties to reach agreements that are highly specialized and detailed. On the other hand, these agreements can become overly-restrictive, and begin to erode the ability of the consumer (and public) to fully benefit from the availability of creative works.

In the digital sphere, transactions are more likely to take on the form of licensing agreements. Often, license negotiations are not concluded directly with the end user, but are undertaken by the platforms providing services to users. End users instead access these works under a set of terms and conditions of use, which place limitations on how content can be accessed, used, and even reused. Technological protection measures, which received broad protections under the InfoSoc Directive, can be used as a tool of "automatic" enforcement in favour of rightholders, but often cannot be used adequately; these measures cannot make case-by-case exceptions, constraining the exercise of exceptions and limitations to copyright, as well as having an effect on follow-on creativity.[793] On the other end of the spectrum, rightholders can license some of their exclusive rights, including their economic rights, by way of making their works available through an Open Content License (OCL) such as the

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functions, as well as specialization towards assessing copyright-related legal issues. The potential for expanding the Observatory's current functions is considered in greater detail, *infra*.

[793] Christophe Geiger, 'The Answer to the Machine should not be the Machine: Safeguarding the Private Copy Exception in the Digital Environment' (2008) European Intellectual Property Review 121-29; Dan L. Burk, 'Algorithmic Fair Use' (2019) 86 University of Chicago Law Review

Creative Commons License.[794] The legitimacy and enforceability of these licenses are, again, based upon the existing body of law.

Some have considered the effects of private ordering on public access of works, but this phenomenon is difficult to observe on a large scale. Licensing agreements, taking the form of end-user licensing agreements (EULAs), are prone to change quite often, and layperson-users are often not aware of how these agreements affect their enjoyment of creative works. But just because it is difficult to measure the effects of these kinds of arrangements on a long-term scale does not imply that it is impossible. In fact, observing trends in EULAs and user expectations can help policymakers better understand the relationship between the two, and determine whether and to what extent online licensing practices should be regulated in light of safeguarding user liberties to the access, use, and reuse of creative content. Especially in the EU, where Member States have implemented a closed set of exceptions and limitations to the exercise of exclusive rights, it is important to make sure that any additional undue restrictions or limitations (as might be implemented in the form of a license) are swiftly determined against the public interest. Until a distinct body of "user rights" is developed in the EU, safeguarding those rights needs to be ensured by other means.

Hence, the idea of an EU level authority for monitoring the effects of online licensing practices on user rights – especially in relation to safeguarding the public domain and securing free uses of content – can at its very best serve as an early means of recognizing the existence of such rights as on par with other fundamental rights in the absence of legislation, and pending potential challenges in court (which may never occur if the right stakeholders or interest groups are unable to raise suit). Early recognition of issues at the EU level from a policy perspective can give a more solid grounding to any layperson's assessment of the situation, and at the same time does not diminish the Court's ability to deliver a more definitive ruling on the subject should it require higher authority to intervene. The evolution of a judicial recognition of a right into a general recognition of law was demonstrated in the development of the body of user rights in Canada, which stemmed from the Supreme Court upholding user rights as a distinctive regime of legal protection.[795]

[794] Dusollier, Sharing Access to Intellectual Property through Private Ordering

[795] See, e.g., Carys J. Craig, 'Globalizing User Rights-Talk: On Copyright Limits and Rhetorical Risks' (2017) 33 Osgoode Legal Studies Research Paper 1-71

It is further worth considering that multi-territorial licensing of creative works, not just in the music sector, will become the new norm. To ensure that the system of administering these types of licenses is transparent and sufficiently public, a single institutional actor at the EU level can simplify access to authoritative information on the state of the European market as a whole. Like the administrative bodies mentioned in Part I, monitoring rate-setting among EU Member States can indicate certain outliers, and over time can potentially lessen the impact of more radical variations in rates from Member State to Member State. As a final observation, enhancing monitoring activities in the sectors described above would actually align quite reasonably with the current mandate of the Observatory on Infringement that operates within the EUIPO.

8.2 Advisory

There are several areas of copyright in the EU which could benefit from some additional legal certainty. Assuring legal certainty is a challenging task due to the complexities of applying and enforcing differing sets of national laws in a quickly-changing digital context. There are also significant costs associated with assessing a legal issue in an "EU" context because, depending on the nature of the legal question, very often an assessment of 27 national copyright legislations on a single issue would be difficult to accomplish without a highly skilled research team and oftentimes months of effort. At an even more fundamental level, it can be difficult for a common citizen to obtain practical information about the main characteristics of a particular country's copyright laws, let alone the nuances of copyright laws existing in one's own country. The current state of copyright law and its modern complexities, being compared at times to tax code, certainly has a bearing on the nature of this issue and any potential solutions.

Recognizing this challenge, there have already been some modest initiatives supported at the EU level, particularly geared towards aiding IP enforcers, the public, and other interested stakeholders in understanding, assessing, and resolving copyright issues. To give just a few examples, the mandate of the EUIPO's Observatory on Infringement obliges it to periodically publish reports, host seminars, and compile authoritative research data on the infringement of IPRs broadly, with issues mostly centring on online infringements.[796] Two of its initiatives in particular which are public-outreach oriented include "Ideas Powered," an IP

[796] EUIPO Observatory, 'Online copyright infringement in the European Union' 2019) accessed October 2020 2020 <https://euipo.europa.eu/ohimportal/en/web/observatory/online-copyright-infringement-in-eu>

education program designed to “raise awareness of the value of intellectual property and the importance of respecting it,”[797] and AGORATEKA, a website tool that enables the EU public to perform content searches to find lawful websites in their jurisdiction to consume that content.[798] Additionally, the European IP Helpdesk is a European Commission-funded service (H2020 contract), managed by the Executive Agency for Small and Medium-sized Enterprises (EASME), which “provides free-of-charge, first-line advice and information on Intellectual Property (IP).”[799] By registering as a user on the website, access is granted to some materials and (non-binding) legal advice on the basis of the questions asked.[800]

Granted that such initiatives already exist for resolving some basic copyright questions that might be encountered, there are still some problems that may arise which deserve closer analysis. Hence, performing the functions of issuing advisory opinions, reports or recommendations at the EU level would help to add even more legal certainty, and could also serve as an indicator for Member States to follow when addressing new regulatory issues in their domestic laws. In the sections that follow, some specific areas of existing uncertainty in copyright will be examined to determine how an EU level actor or new regulatory arrangement may potentially intervene to deliver sound guidance to national level regulators and national courts.

8.2.1 Technological Standards Affecting Copyright

When technological standards are applied by rightholders in contravention of copyright principles, even the protections offered from the enforcement of fundamental freedoms may not be enough. It is anticipated that adapting rules on access to content, rather than rules on ownership, will become a far more pressing priority in the future given the current trajectory of online content consumption. Already, business models are prioritizing the use of licensing (e.g., subscription-based consumption models) over the ownership-based system of content access and consumption. An anecdotal example of the consequences of this shift can be found in the realm of digital book purchases, where in 2009 Amazon erased thousands of titles from user libraries without their knowledge.[801] Examples abound of digital

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[797] Ideas Powered, 'Ideas Powered: About Us' 2020) accessed 9 October 2020 2020 <https://www.ideaspowered.eu/en/about-us>
[798] EUIPO, 'AGORATEKA: The European Online Content Portal'
[799] EASME, 'European IP Helpdesk' 2020) accessed 9 October 2020 <http://www.iprhelpdesk.eu/>
[800] Ibid
[801] Aaron Perzanowski and Chris Jay Hoofnagle, 'What We Buy When We 'Buy Now'' (2017) 165 U Penn L Rev 317

services in other content sectors similarly warping user expectations of ownership over the works they purchase online.

Monitoring the development of technological standards relevant to these services is therefore necessary because of the amount of embedded copyright issues at stake. The ability of creators to receive "fair remuneration" for their works online is directly linked to the effectiveness of the technological safeguards in place to ensure this. It is clearly in the interest of rightholders that IT solutions implemented are as accurate as possible. Conversely, it is in the public interest that measures implemented by rightholders do not unnecessarily impinge upon uses which are already provided for through the exercise of limitations or exceptions to copyright and fundamental rights protections. Ensuring transparency in the process of achieving the quintessential "copyright balance" of private and public interests in technological standard-setting should not solely be an industry burden, yet regulators in the EU have rarely interfered with this arrangement. The following discussion identifies some specific technological standards which should be carefully considered and observed from a copyright and fundamental rights perspective, and proposes some ideas for ensuring that these standards remain within the acceptable bounds of private interests and user expectations.

8.2.1.1 Metadata Standards

Metadata is the information embedded into the coding of digital files, analogous to a "fingerprint," which can be used to identify the origin of the work, dates of creation and access, the original creator, and other similar pieces of information. This information can be changed manually, or can be embedded into a file automatically (i.e., by the software used to create the file). Metadata can also be readable or unreadable by humans without the right software, and can be either digitally "locked" or modified by anyone depending on the file. Accurate metadata is critical for identifying ownership, lawfully exchanging the work online, and many other tasks which are crucial to the proper functioning of the creative market. Yet there are few, if any, legal standards that exist which specifically regulate the use or modification of metadata in digital files.

Thus far, the overall development of metadata standards has been primarily industry-driven, with limited governmental intervention in the means by which such standards are adopted. In the EU, there have been few legal challenges to the use of metadata standards relevant to forms of digital rights management (DRM), due to the strong protections over the implementation of technological protection measures (TPMs) embedded in the InfoSoc

Directive.[802] With the exception of the recently passed U.S. Music Modernization Act, which codifies the use of ISWC/ISRC for musical works, metadata standards are agreed upon by different sets of stakeholders for different purposes, without much government involvement.[803] On a related note, the MMA also establishes a new administrative agency, the Mechanical Licensing Collective (MLC), to assist in the task of identifying musical works embodied in sound recordings (to perform metadata "matching" between musical works and sound recordings) and maintain a publicly-available musical works database.[804] This highlights the fact that metadata management often requires considerable investments in administration and technical expertise to be able to ensure that data is accurate and reliable.

One of the remaining questions still to be answered is whether consolidating copyright-relevant metadata standards at the governmental level – and adopting a "one-size-fits-all" mandatory approach to metadata management – would improve or reduce the functioning of the current system. While centralization and harmonization of existing metadata standards may seem to solve issues relating to high transaction costs in theory, there is a still lack of sufficient evidence to support this. It will be important to properly consider and test different approaches and solutions to metadata management to be able to achieve an optimal regulatory environment for creative content. In this regard, at a minimum, continuous monitoring of the situation in terms of copyright industry use and acceptance of certain metadata standards would seem like a suitable task for a governmental actor at the EU level. This could help to indicate whether convergence is already occurring absent regulatory intervention, and can likewise better inform the inquiry regarding the benefits and drawbacks of greater levels of metadata standard convergence on the content market. In the future, if these assessments indicate that there is great value in setting uniform metadata standards at the EU level, the same institutional actor can start to actively engage stakeholders – national and international – to develop a globally-acceptable, coherent standard for metadata in digital creative works.

8.2.1.2 Digital Rights Management (DRM)

Moving into a more specific discussion on the interface of technological standards and copyrighted works, DRM schemes lie at the centre of the debate. DRM schemes (which can involve the coordination of a technological measure, contractual agreement, software design,

[802] 'InfoSoc Directive' (2001)
[803] Office, 'Music Modernization Act'
[804] Ibid

etc.) have the capability of regulating several aspects of copyrighted content at once, from the amount of copies that can be made to the interoperability of the copyrighted content and end technology (controlling the user's ability to read a file using only certain devices or software). Some examples of DRM implementations include DVD region-locks and the use of proprietary file types such as .AAC and .WMA.

DRM standards over copyrighted content have been treated quite liberally at the EU level. Articles 6 and 7 of the InfoSoc Directive provides the primary part of the legislation relating to rightholders' use of technological protection measures (TPMs), including only a few specific exceptions against their application in light of countervailing user interests. Member States are also obliged to ensure that TPMs do not prevent users from benefitting from copyright exceptions.[805] In this regard, only some Member States have introduced specific legal mechanisms which can be used to override the ability of rightholders to use TPMs when they conflict with fundamental rights (e.g., France, Spain, Germany). Notably, the user protections embodied in the Directive also do not apply with respect to on-demand services.[806]

As pointed out by Dinwoodie, the ability of rightholders to implement DRM – to be able to choose which implementation best suits their interests (and, perhaps, the interests of publishers and other figures at the 'seller' end of the market) – may be a dangerous thing when considering that the motivations of rightholders may not always be aligned with maintaining a balance of interests:

> "[D]ecisions made in the construction of DRMs by content owners may determine whether norms of access to works are set nationally or internationally. [Content owners] have the capacity to set norms without reference to the balance of rights established in copyright law (whether national or international)."[807]

In fact, "…the ability of DRM systems to create copyright-inconsistent norms is ensured by legislation that, in response to the onset of DRMs, immunized private acts of the content owner from being overridden by public values enshrined in the copyright law."[808] With regard to the situation in the EU, this may have been an unanticipated outcome for the drafters of the Infosoc Directive when ensuring broad protections over the use of TPMs in the articles

[805] 'InfoSoc Directive' (2001) Art. 6(4)
[806] Ibid Art. 6(4), para. 4
[807] Graeme B. Dinwoodie, 'Private Ordering and the Creation of International Copyright Norms: The Role of Public Structuring' (2004) 1 Journal of Institutional and Theoretical Economics 14-15
[808] Ibid 3 fn. 3

mentioned above. Indeed, abuse of technological protections can have far reaching consequences for the health of the copyright content market if left alone.

Notably, the use of DRM technology, for all its influence in the copyrighted content market, is still generally unregulated. As of this writing, while some DRM systems have been paired with certain media types in the past, no single DRM technology nor encoding format has become the accepted standard.[809] The practical effect is that rightholders (or any party at the "seller" end of the value chain, such as publishers) may freely incorporate these measures into their agreements in any form they wish, with little to no legal barriers in doing so.[810] If this practice is continues over time across different channels of distribution and technology sectors, it is uncertain whether a single industry standard will emerge – especially one that ensures a balanced outcome from a copyright perspective for all stakeholders.

When considering exactly how a DRM standard might develop in the EU, one key question that remains is whether and to what extent the EU regulator should intervene in the standardization process. There are benefits and consequences that flow from establishing acceptable levels of protections or enforcing a standard at the governmental level. Helberger characterizes this tension by observing that the choice of policymakers to intervene legislatively in the standardization process relies on two probable outcomes. On the one hand, if policymakers want to promote more stable conditions for competition, diversity and a multi-platform content market by adopting a single standard, they must accept the risk that the technically best standard may not be adopted if negotiated at the governmental level. On the other hand, if policymakers want to promote a dynamic innovation and competition environment by choosing not to intervene, there may be a chance that market pressure will eventually induce parties to agree on a standard voluntarily.[811] Along these lines, it is acknowledged that "[s]tandardisation processes that are pushed too fast might suppress innovative ideas from being tested on the market."[812] The question remains whether the "wait and see" approach can continue to be effective in an environment where incumbent actors continue to be incentivized to develop more proprietary standards and implement more restrictive and complex DRM schemes, as opposed to reducing them.

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[809] Natali Helberger, Nicole Dufft and Stef van Gompel, Digital Rights Management and Consumer Acceptability: A Multi-Disciplinary Discussion of Consumer Concerns and Expectations, State-of-the-Art Report, 2004) 102

[810] For an in-depth look at the status of DRM standard setting, including a list of industry-led standardization initiatives, see ibid

[811] Ibid 121-22

[812] Ibid 104

According to Hugenholtz et. al., it is within the public interest to place the majority of the decisionmaking process on the administration and regulation of the use of DRM systems in the hands of a public authority as opposed to a market player such as a collecting society or manufacturer.[813] This can be especially important considering the delicate interplay of DRM and user interests, not least of which including the types of creative uses specifically enabled by private copying practices.[814]

With this in mind, one approach towards overseeing the standardization, regulation and monitoring processes of DRM in the EU may take the form of introducing an EU level regulator.[815] As highlighted in a 2007 report on the implementation of the InfoSoc Directive, Member States' diverging approaches towards fulfilling the obligations of Art. 6(4) (namely, to ensure "the availability of redress mechanisms to users in cases where beneficiaries were prevented by a TPM to exercise a limitation on copyright or related rights"), has resulted in a "disharmonized" situation.[816] The varying structural and functional differences between national authorities can create complications given that TPM resolutions reached by national authorities should ideally be coordinated with other national authorities, particularly when dealing with the delivery of cross-border content services.[817] It has therefore already been observed that there would be "…clear advantages to centralizing the monitoring and regulatory functions now performed by a plethora of national authorities" through "…institut[ing] a monitoring body at the European level."[818]

It also bears reiteration that the regulation of DRM technology should factor in counterbalancing the benefits of using technological standards against safeguarding existing copyright norms, simultaneously factoring in the effects of regulation (or not) at the national and international level. Ideally, then, an EU level regulator would be structurally placed to centrally organize stakeholder dialogues to reach the necessary balance of protection and user

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[813] Bernt Hugenholtz, L. Guibault and Sjoerd van Geffen, The Future of Levies in a Digital Environment, 2003) 46
[814] *See* Geiger, The Answer to the Machine should not be the Machine: Safeguarding the Private Copy Exception in the Digital Environment 121-29
[815] The "pan-European Observatory" option has specifically been contemplated in the context of regulating and monitoring the use of TPMs under the InfoSoc Directive. Guibault, Westkamp and Rieber-Mohn, *Study on the Implementation and Effect of Directive 2001/29/EC*, 130-33
[816] Ibid
[817] Ibid 130
[818] Ibid

freedoms, giving interested parties a neutral EU-level platform to suggest solutions and provide reliable evidence on the current state of DRM and its effect on user practices.[819]

Finally, by monitoring technological changes at the EU level, Member States need not incur the considerable burden of assessing how to deal with new technology or business models using novel forms of DRM as it emerges on the EU market. This advisory role can ultimately facilitate faster national legislative responses to new technologies by suggesting some vital aspects of effective regulation in this technical area. In this same regard, in the long-term, standards on the application and enforcement of DRM can be set at the EU level to promote the continued use of these types of measures in a more predictable and equitable way.

8.2.1.3 Algorithmic Enforcement Measures

It has been acknowledged that the use of automated filtering technologies to regulate uploads of creative content has become a widespread and commonplace practice in the online environment.[820] With the passage of the CDSM Directive, and the Member State transposition process currently underway, the Art. 17 regime of the Directive acts to “institutionalize” the use of algorithmic filtering tools and enforcement practices, transitioning a largely self-regulatory regime based on the application of voluntary measures into a set of mandatory requirements imposed on certain categories of online content-sharing service providers (OCSSPs) in order to avoid direct liability for the infringing activities of its users.[821] While this “new” liability regime raises a number of interesting issues, it is worth focusing on a few specific implementation challenges which can be discussed from the perspective of institutional reform.

First, from a fundamental rights perspective, the ambiguities of the Art. 17 legal regime casts serious doubts on the ability of platforms to implement a system of enforcement that sufficiently guarantees the fundamental freedom of expression and the freedom to receive and impart information.[822] Specifically, Art. 17(4)(b) and (c) of the Directive in particular was subjected to a legal challenge raised by Poland, on the grounds that the obligations imposed on platforms to prevent future infringing uploads (which likely *requires* the use of

[819] Hugenholtz, Guibault and van Geffen, *The Future of Levies in a Digital Environment*, 46
[820] Commission, 'Communication from the Commission to the European Parliament and the Council: Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market' 2021)
[821] Senftleben, M. (2020), “Institutionalized Algorithmic Enforcement—The Pros and Cons of the EU Approach to UGC Platform Liability”, 14 FIU L. Rev.
[822] Art. 11 CFR

preventative measures (i.e., automated filtering))[823], may have the consequence of overblocking legitimate uses of content, preventing permissible uses under an established exception or limitation to copyright, and ultimately violating users' fundamental rights interests.[824] To the extent that these provisions have survived CJEU scrutiny, there will still be many uncertainties left for Member States as the implementation process cautiously continues. In its awareness of the challenge ahead, the Court concludes in its judgement that Member States must "take care to act on the basis of an interpretation of that provision which allows a fair balance to be struck between the various fundamental rights protected by the Charter….[W]hen implementing the measures transposing [Art. 17], the authorities and courts of the Member States must not only interpret their national law in a manner consistent with that provision but also make sure that they do not act on the basis of an interpretation of the provision which would be in conflict with those fundamental rights or with the other general principles of EU law, such as the principle of proportionality."[825] As further supported by the Opinion of AG Øe in the same case, in order to ensure a fundamental rights-compliant implementation of Art. 17, designing automatic content recognition tools is a task that,

> "… can neither be left to those [content] providers nor…be left entirely to rightholders. In view of the importance of those solutions for users' freedom of expression, they must not be defined by those private parties alone in a way which lacks transparency, rather *the process should be transparent and under the supervision of public authorities*."[826]

After Case C-401/19, the regulatory onus on the Member States is therefore significant. Member States will have to make many determinations, e.g., articulating standards of "best efforts" on OCSSPs that can effectively ensure that users' fundamental rights interests are preserved. Member State authorities and courts must also consider the approach they will use for establishing thresholds for OCSSPs using algorithmic enforcement mechanisms that do not adversely affect the fundamental rights interests of users. Member States have already come up with different systems, as German legislators have "relie[d] on the concept of 'uses presumably authorised by law' (a concept which includes a "*de minimis*"

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[823] Senftleben, M. (2020), "Institutionalized Algorithmic Enforcement—The Pros and Cons of the EU Approach to UGC Platform Liability", 14 FIU L. Rev. 299 (connecting the language of Art. 17(4)(b) with platforms' use of "automated filtering tools" (a.k.a. algorithmic enforcement)).
[824] Case C-401/19, Republic of Poland v European Parliament and Council of the European Union, ECLI:EU:C:2022:297.
[825] Case C-401/19 Poland v Parliament and Council, para. 99.
[826] Advocate General's Opinion in Case C-401/19 Poland v Parliament and Council, ECLI:EU:C:2021:613, para. 212 (emphasis added).

exemption), which must not be blocked automatically,"[827] whereas French authorities have directly opposed the German approach[828] in rejecting the application of *ex-ante* criteria or measures to approximate exceptions and limitations to copyrighted content which should not be subjected to algorithmic filtering measures.[829] Hence, it does not seem that Member States are necessarily prioritising harmonisation as a goal in their Art. 17 legislative efforts. There will be significant room for interpretation with respect to permissible and impermissible uses of automated filtering tools to block the upload of content, which the Commission already attempts to clarify in its recent Guidance, but has been either ignored or expressly rejected by most Member States.[830]

In short, there are numerous issues to be confronted by the national legislator (and national court), which might predictably lead to 27 different standards of what constitutes a fundamental rights-compliant standards to be applied to OCSSPs, especially regarding what standard should be applied to balance the scope of the use of algorithmic enforcement measures. To address these issues, some academics have already suggested that introducing an independent, institutional intermediary situated at the EU level may be able to assist in the task of articulating guidelines and best practices for OCSSPs under the Art. 17 regime.[831] An

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[827] Communia Association, "German Article 17 implementation law sets the standard for protecting user rights against overblocking", 20 May 2021. https://www.communia-association.org/2021/05/20/german-article-17-implementation-law-sets-the-standard-for-protecting-user-rights-against-overblocking/.

[828] CSPLA/Hadopi/CNC, "Les Outils De Reconnaissance Des Contenus Sur Les Plateformes Numériques De Partage. Propositions Pour La Mise En Œuvre De L'article 17 De La Directive Européenne Sur Le Droit D'auteur" (Report #2), 19 January 2021, p. 57: https://www.hadopi.fr/sites/default/files/sites/default/files/ckeditor_files/2021_01_19_Rapport_CSPLA_Hadopi_CNC_Outils_de_reconnaissance.pdf (Translated from French: "As pointed out above, no quantitative rule set ex ante can be a satisfactory approximation of exceptions, as short content may not be covered by them, while long content may be. The introduction of rules exempting from the application of copyright on platforms all short or low-volume content would not so much reflect the implementation of the exceptions as the introduction of a new "de minimis" exception, which neither Directive 2001/29 nor Directive 2019/790 provide for.")

[829] Importantly, after Case C-401/19 the French legislators may have to reconsider this approach, as the Court maintains that, "[service providers and Member State authorities] must take into account, ex ante, respect for users' rights." Case C-401/19, Republic of Poland v. EU Parliament and Council, ECLI:EU:C:2022:297, para. 85 (referencing Opinion of Advocate General Saugmandsgaard Øe in Case C-401/19, ECLI:EU:C:2021:613, 15 July 2021, para. 193).

[830] The Guidance mentions a "manifestly infringing" standard for the application of content recognition tools, though Member States are not obliged to adhere to this standard or to the criteria mentioned. Commission, 'Communication from the Commission to the European Parliament and the Council: Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market' 2021)

[831] Christophe Geiger and Bernd Justin Jütte, 'Platform liability under Article 17 of the Copyright in the Digital Single Market Directive, Automated Filtering and Fundamental Rights: An Impossible Match' (2021)

independent institutional actor may be able to take into account the exercise of user rights, and can approach the difficult task of articulating unified standards which are compliant with the other competing fundamental rights interests at stake.[832] At a minimum, there are some clear instances of infringing conduct that would be equally recognized by Member States, regardless of their national implementations of copyright law, exceptions and limitations; for example, complete and unmodified uploads of content would be considered infringing in most cases. Introducing an EU level institutional actor may provide an important new platform for reaching consensuses among Member States and copyright stakeholders on standards to be applied on a pan-European basis, which can be revised periodically to reflect changing technologies and business models. Overall, this could improve legal certainty surrounding the implementation of this Directive across Member States, and reduce fragmentation in Member States' regulatory practices.

Another related dimension of the implementation of the Art. 17 regime involves the task of properly monitoring platforms' development and application of algorithmic enforcement measures after they are applied. It is almost intuitive to recognize that the task of monitoring the development and application of such technologies cannot be easily undertaken without significant technical expertise and resources.[833] Furthermore, the platforms developing such algorithms must not merely be transparent in the disclosure of data related to the effectiveness of the algorithm, but must be held accountable for misapplications and errors. This is especially so given that (at least in the copyright context) the application of algorithmic filtering technologies to correctly identify infringing uses of content involves nuanced and sometimes subtle determinations of infringement and permissible use that are not easily ascertained, even by a sophisticated algorithm. At their worst, algorithmic enforcement mechanisms may "afford insufficient opportunities to challenge the decisions they make while failing to adequately secure due process; and…curtail the possibility of correcting errors in individual determinations of copyright infringement by impeding the opportunity for public oversight."[834]

Following these observations, according to some academics, ensuring an appropriate level of accountability over platforms may require some level of institutional oversight. This task would seem to require specialized and technical knowledge on the side of the public

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[832] Ibid.
[833] B. Rieder and J. Hofmann, 'Towards platform observability' (2020) 9 Internet Policy Review
[834] Maayan Perel and Niva Elkin-Koren, 'Accountability in Algorithmic Copyright Enforcement' (2016) 19 Stan Tech L Rev 473 478

regulator, as well as access to adequate resources to perform such analyses, and procedural mechanisms which allow evaluations to take place in a consistent and timely manner. Though the CDSM Directive does identify the necessity for oversight in this area, it does not go as far as to broach the bigger question of how institutions (either at the national or EU level) should be developed in order to carry out such a task.[835]

As argued by Rieder and Hoffman, merely imposing transparency obligations on platforms in their development of algorithms may not be sufficient to ensure that these measures are applied in an effective manner. Instead, they argue for a broader standard of platform "observability," wherein understanding the inner workings of algorithms is only part of the task: platform observability rather, "seeks to address the conditions, means, and processes of knowledge production about large-scale socio-technical systems."[836] To accomplish this, Rieder and Hoffman specifically advocate for the presence of independent regulatory institution (in the form of a European Platform Observatory)[837] driven by a public interest mandate, equipped with highly specialized technical and logistical capabilities, imbued with some level of authoritativeness, and capable of performing continuous assessments on the development of platforms and algorithmic technology.[838] A similar conclusion is reached by Perel and Elkin-Koren, who, in addition to mentioning the characteristics of a public regulator above, also identify that such a regulator can play a collaborative role in assisting intermediaries with developing systems of enforcement which acknowledges the limitations of technological measures, yet carves out a specific space for the development of better-functioning algorithms in the long-term.[839] Put another way, collaborative efforts between public regulators and intermediaries may help to reduce intermediaries' current incentives to "overblock" content, and may provide the levels of legal

[835] Relatedly, the "Digital Services Act" partly addresses this "institutional question" by proposing an EU level regulator in the form of a European Board for Digital Services, consisting of national Digital Services Coordinators, intended to function as a coordinator between Member States with respect to cross-border issues. Arts. 47-9. Additionally, according to the current proposal text, the Commission shall play a significant role in monitoring platform use of algorithms. Art. 57: "The Commission may also order that platform to provide access to, and explanations relating to, its databases and algorithms". 'Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC' (2020) COM/2020/825 final

[836] Rieder and Hofmann, Towards platform observability 4

[837] They use the example of the Observatory on the Online Platform Economy, yet cite its limited institutional mandate and its lack of regulatory authority. Ibid 23 fn. 35

[838] Ibid

[839] Perel and Elkin-Koren, Accountability in Algorithmic Copyright Enforcement

certainty necessary to encourage intermediaries in developing more effective algorithmic enforcement measures in this still-experimental field.

Hence, returning to the discussion of Art. 17 implementation, the option of an independent EU regulator may help to clarify standards at a pan-European scale, as well as enhance OCSSP accountability in the design of their enforcement schemes. Installing an EU-level institutional actor would also provide an important avenue for assessing the overall effects of OCSSP practices on EU rightholders and users in the creative economy, and can help to coordinate and enhance the monitoring, enforcement and information-gathering tasks that would otherwise be left to Member State authorities alone.

As an alternative arrangement, adding onto the current DSA proposal by expanding the mandate of the European Board for Digital Services to "observe" online platforms in light of public interest objectives, and extending the Board's competences and technical capabilities to perform the types of assessments required over algorithms, may also be useful steps towards monitoring platforms more effectively. In all, ensuring that platforms are held accountable for the design and implementation of algorithmic enforcement measures which do not adversely affect the dissemination and access to knowledge requires some level of institutional support, and it would seem most efficient to consider such support at the EU as opposed to national level.

8.2.2 Judicial Guidance

To facilitate the search of additional flexibilities in the European system, interpretive guidance on the law can help to clarify complex issues, and can support a more legally-certain environment for stakeholders. While not necessarily going beyond the CJEU in terms of setting new precedents or establishing very detailed lists of permissible or non-permissible conduct, providing some conceptual clarifications can help to bridge the gap between laypersons' understandings of the law and judicial precedent.

In the Copyright Principles Project (CPP), some members of the project had recommended that the U.S. Copyright Office be vested in "developing some mechanism(s) through which users can receive guidance on 'fair use.'"[840] Recognizing that the jurisprudence in this area has been difficult to apply straightforwardly, by establishing some guidelines on the fair use doctrine, stakeholders can benefit from a greater degree of legal

[840] Samuelson, Litman and Members, The Copyright Principles Project: Directions for Reform

certainty in their activities. New or emerging intermediary actors can innovate within the space, and individual creators can understand the extent of their rights.

Along similar lines, Jütte proposes the use of guidelines in ensuring legal certainty when judiciaries are faced with interpreting copyright law in the EU consistently and effectively. As he points out,

> In order to safeguard legal certainty, foreseeability, and to stabilize the balance of interests courts should receive guidance on how to interpret all elements of the future copyright *acquis.* The interests of the interested groups must be defined in abstract terms, and collision rules between these interests must also be defined. One could imagine rules that give certain interests which are an expression of fundamental rights priority over purely economic interests, and which protect reasonable economic interests against unreasonable free uses.[841]

In this respect, not only can copyright stakeholders benefit from guidance issued at the EU level, but judiciaries themselves can improve their ability to strike a fair balance in their copyright jurisprudence and, in the long term, develop consistent precedents that can be followed at both the national and EU levels.

The CJEU itself can also benefit from such an arrangement, in that it could avail itself of an important regulatory "escape route" which might be more satisfactory than simply remitting issues back to the EU legislator: if the CJEU could refer at least part of its decisionmaking which necessitates the articulation of a policy direction to a specialized and independent regulatory body at the EU level, this could help the Court to maintain its legitimacy and still have the authority to rule on the cases without running the risk of acting as a *de facto* political actor. Furthermore, in cases in other disciplines such as in the financial realm, the Court has already exhibited its deference towards the judgements of agency actors and EU level regulators.

Another option could take the form of judicial guidance after a judgement is rendered by the CJEU. On return to the national court, further guidance can be sought from an EU level agency actor, where appropriate, to ensure consistency between the CJEU ruling and the ruling of the national court. Offering national courts the possibility of addressing a specialized, independent EU level regulator to weigh-in on disputes could promote judicial outcomes which properly advance the objective of delivering a balanced and coherent body of copyright law in the EU.

[841] Jütte, *Reconstructing European Copyright Law for the Digital Single Market* 498

Conclusion Part III: Expanding the Regulatory Functions of EU Institutions

Above, several potential functions of an administrative body (or regulatory arrangement) have been described, with specific reference to some currently problematic challenges of administering copyright in the EU. These functions, which largely build upon the inferences drawn from the practices of copyright administrative bodies in the U.S. and Canada, connect the inherent strengths of specialized and independent regulatory authorities for copyright, with the aim of resolving some of the most pressing issues currently faced by EU and national regulators.

First, in considering purely administrative functions, there is a space for an EU institution in terms of harmonizing some aspects of Member State tariff-setting practices, as well as monitoring the fairness of tariffs calculated on the basis of an "EU-wide" market. Ensuring that tariff-setting practices remain transparent, fair, and balanced can help to guarantee that the objectives set out by the Directives in these specific areas can be fulfilled. There is also great potential to be realized in revitalizing the idea of some form of voluntary "formalities" system in managing digital copyright works information, through either the standardization of some forms of metadata, or through closely monitoring the implementation of standards as used by the industry. Looking at another purely "administrative" function, there are several implementation options available for an EU regulator to choose from in administering a public database for rights information. Ideally, a centralized database can be built and maintained by an EU level authority, providing a streamlined EU-wide point of access for rights information, and providing a reliable, up-to-date and authoritative source of information for the public. As an alternative approach, an EU regulator can act as a certifier of existing third-party private databases, which can ensure that these parties are obliged to provide accurate and up-to-date information, as well as compete with each other to innovate in terms of developing better and more efficient means of rights management as time progresses. In considering either of these approaches, there is a clear role to be fulfilled by an EU authority which requires a level of specialized, technical expertise.

In terms of dispute resolution, more opportunities present themselves for quasi-judicial intervention coordinated at the EU level. New forms of dispute resolution which do not involve the high financial and informational costs associated with classic litigation can be tested at the EU level. There is great unrealized potential in launching a small-claims styled dispute resolution mechanism for low economic value copyright disputes, as well as the mediation option for stakeholders to reach interesting and mutually beneficial resolutions of

their conflicts. Furthermore, territorial enforcement of copyright infringements occurring in the online environment may not be an effective system in the long-run. Perhaps some harmonization in terms of introducing an EU dispute resolution procedure, or EU administered dispute resolution body for specific types of infringements, may provide a simpler and more efficient means of enforcing rights than the current default of litigating on a Member State by Member State basis. In general, the public-facing and dynamic characteristics of copyrighted works calls for flexibilities in the types of remedies that can be offered in times of dispute, and these underutilized avenues of dispute resolution can help move the resolution of copyright conflicts in the EU into the 21st century.

Lastly, the role of an EU level regulator or regulatory arrangement can clearly be carried out in terms of performing observatory and advisory functions. An advisory authority may be well-placed to anticipate and address issues that may arise when regulating new market players or business models, as well as provide judicial guidance to national courts to ensure more consistency in the enforcement of rights in the long term. Particularly, safeguarding fundamental rights through a more precise regulatory approach adopted EU-wide can create a much more interesting environment for the entry of new market players wishing to distribute in an EU-wide market. Such assessments can add legal certainty, and may well be effective in stymying the ever-growing stream of litigation directed towards the CJEU testing the boundaries of EU copyright law. Such a result would be more expeditious, more certain, less costly, and therefore more attractive for potential businesses.

In the final sections of this thesis, all of these potential functions will be discussed in terms of potential “options” for the reform of the institutional framework for copyright regulation in the EU. These options will be balanced against one another at the end of the section to determine which are better or worse at dealing with specific issues, and which options are ultimately the most feasible for the EU legislator to move forward with.

POLICY OPTIONS

Modernization has impacted the ways in which everyday citizens must confront today's issues, but political thinking tends to remain trapped in the dogma of previous regulatory systems. The classic analogy of the circulation of content, for instance, should no longer be discussed as distribution on a value "chain," but rather as distribution on a "network," reflecting a more fluid and dynamic process of creation, access, dissemination, and re-creation. Yet the recent legislation is passed with the "value chain" in mind, unchallenged, failing to reflect a modern reality which requires a more holistic view on regulating online conduct. In the same sense, the benefits of localized enforcement and regulation are becoming much harder to justify in a data-driven age, yet remains a central aspect of proposed solutions at the EU level due in part to strict interpretations of the principle of subsidiarity. Taking the specific example of music licensing, uses occurring online not only take place in a borderless virtual environment, but the nature of the data collected from the uses can readily connect the use with the location. Unlike the previous era which consisted of a localized CMO monitoring a local business's uses under its license, such localized usage monitoring is no longer justified on a country-by-country basis in the online sphere. Altogether, newer solutions to modern issues are warranted – solutions which can adequately take into consideration the ubiquitous nature of digital copyright issues, and does not fight too much to fit into an outdated regulatory paradigm. Viewed another way, there is still room to consider the development of new approaches to regulating copyright law in the EU which interprets constitutionally-imposed limits in light of the unique characteristics of the online environment. The first step towards reaching a solution is in identifying which new arrangements may satisfy existing Treaty rules on the one hand, and sufficiently advance the state of play in the EU on the other.

To investigate the potential for reconfiguring the existing institutional structure in light of addressing the new regulatory challenges posed by copyright, this task foremost requires an analysis of EU competences to suggest change. To briefly recount EU competencies, referencing Art. 5 TEU, the outer limits of Union competencies are governed by the principle of conferral, and the exercise of Union competencies is governed by the principles of subsidiarity and proportionality. By default, these principles generally favour decentralized regulatory solutions, and require the Commission and the EU to intervene only where Member States cannot act effectively. Accordingly, EU lawmakers can move forward with a proposed solution by justifying any proposed actions as "best achieved at the Community

level." Furthermore, "the intensity of the action must not go beyond what is necessary to achieve the objective pursued."[842]

With these guiding principles in mind once again, the following Options will specifically reference the ability of the EU lawmaker to propose the Option in light of Treaty principles ("feasibility"). Comparison will be made to other similar actions taken at the EU level, where appropriate, to colour the argument by analogy. Of course, other immeasurable factors such as the political climate, particularities of Member State preferences, specificities of the regulatory issue at stake, and the positions of lawmakers themselves will contribute to overall feasibility of the solutions proposed, but at this stage such factors could not be fully measured. Thus, the following section only aims to deliver a balanced overview of available options drawn from inferences of the research.

OPTION 0: STATUS QUO

This option contemplates the current trajectory of the EU institutions in regulating copyright. Within this option, the development of individual institutions progress as usual, and the EU level actors remain bound to their conventions and institutional mandates.

Obviously, of the options presented, this is the least costly. However, in the long term, not considering alternatives may accrue high costs across the board, as institutional approaches begin to contradict one another. If the court, for example, begins to engage in more "judicial activism" in terms of adapting copyright, it could both draw external criticisms against its own legitimacy within the institutional order, and internal criticisms from political actors who are chiefly responsible for steering the policy direction of the law. Yet it seems that, if the status quo is to remain, the court is the best chance for adapting copyright law EU-wide in the face of novel issues.[843]

These costs can also, crucially, include costs with respect to innovation. Under a regulatory regime that only considers single, discrete issues or industries at a time, the overall policy direction among the EU institutions, and likewise the Member States, will remain unclear. Legislation will continue to "lock in" ineffective rules that cannot easily be changed, and courts will be compelled to bend backwards to both fairly interpret the laws and not

[842] Guibault and van Gompel, 'Collective Management in the European Union', 142

[843] This mirrors the conclusion of Rai re: institutional design and the patent system: "Despite the well-theorized institutional shortcomings of courts when it comes to policymaking, in the specific area of patent law, policy development though the court system is probably the best of the available options." Rai, Engaging Facts and Policy: A Multi-Institutional Approach to Patent System Reform 1135

engage in “rewriting” legislation. There is very little room for manoeuvre under such an institutional arrangement, and there is also very little opportunity for Member States to collaborate effectively and engage with one another to face new regulatory challenges.

OPTION 1: ESTABLISHING A NETWORK OF NATIONAL-LEVEL REGULATORS FOR COPYRIGHT

Increasingly, the task of designing new regulations targeted at the online content market necessitates a holistic view of the “European Market” or the European Economic Area (EEA). As companies operate on the virtue of the existence of a “single” European market, their actions (i.e., investments, corporate strategies) tend to encompass the entire region. However, differing copyright traditions have hampered the ability of companies to fully commit to a single commercial approach to establishing and maintaining their business practices in Europe, and have instead been obliged to consider individual solutions for each country.

This of course contravenes the principle of having a “single market.” At the creator/rightholder level, it is most desirable to commercialize in the widest market possible. At the intermediary (online platform) level, it is also desirable to cover the largest regions possible to fully popularize and integrate the service in many societies. And, at the consumer level, access to content is expected to occur not only within one’s domicile, but also in other regions of the EEA. This much was ascertained in the legislative efforts surrounding data portability regulation, for example, which responded to the typical European consumer expectation of access which is not impeded by national or territorial boundaries. These are uncontroversial, generally-accepted and long-held ideas, and yet the current situation still reflects an onerous process of negotiation for all parties concerned.

Furthermore, it is still the case that there are significant differences between Member States as regards, inter alia, the enforcement of copyright, contract, and consumer laws. There does not seem to be an easy way to converge these practices at the EU level, as previous efforts have not gone very far. However, a regulatory avenue exists which puts the onus on Member States to coordinate their regulatory schemes with one another and, therefore, start to reduce some of the larger discrepancies between their domestic regulatory practices and enforcement schemes.

Member States have typically charged some form of administrative or public body at the national level with responsibilities relating to copyright. In some EU countries, the general IPO or PTO will primarily oversee the registration activities of the industrial properties

(patents and trademarks), and have a separate department or sub-department devoted to the supervision of copyright-related issues. Since registration is not required for the recognition of a copyright, these copyright sub-departments serve a somewhat superficial role as a stand-in for addressing copyright issues, should they arise. In other countries, the authority for overseeing copyright-related issues is in the Ministry of Culture. Since there is a traditional view of cultural matters being within the exclusive competence of Member States, these types of authorities enjoy some autonomy.

This option would similarly follow the establishment of "national competent authorities" in the CRM Directive, but in the interest of tackling more copyright-related issues, would be expanded. In Part I, there were several networks of national-level actors discussed, which indicates that this type of arrangement of national authorities can already function in practice. Most pertinently, the network of national competent authorities envisioned by the CRM Directive presents the idea of national authorities which are able to effectively coordinate with one another in obtaining information related to multi-territorial licensing practices. Exchanges between these national regulatory actors is complemented by the Commission, which plays a facilitative role in the coordination of periodic meetings during which the authorities can share information. Another regulatory network mentioned previously is the European Competition Network (ECN). According to its establishing Regulation, the network functions by virtue of "a system of parallel competencies in which the Commission and the Member States' competition authorities…can apply Article 81 and Article 82 of the EC Treaty."[844] An additional benefit of this approach is that subsidiarity and proportionality principles may be more easily satisfied. Networks have been recognized within the EU regulatory sphere as a "natural by-product of subsidiarity," which in turn fuels, "…a considerable expansion of bilateral and multilateral cooperation and coordination among national regulatory bodies, leading to the emergence of more or less formalised network structures."[845] The approach advocated for here reinforces this concept.

This considered, as previously identified, national-level actors can be quite diverse both in terms of their institutional mandates and authority to regulate in the sphere of copyright law. This is perhaps one of the largest hurdles to overcome in suggesting a network of national regulators, because some of these actors may be completely competent to carry out

[844] European Council, 'Council Regulation No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty' (Council Regulation, 2002)
[845] Littoz-Monnet, 'European Cultural Networks',

the functions described above, while others may lack the finances, authority, or requisite expertise to carry out the same. It further bears reiteration that, in the long term, it is uncertain how effective national governments can continue to be at regulating conduct occurring in the online sphere, which usually involves some cross-border elements. As described below, an EU level authority can help serve as a centralizing "hub" for exchanges between national-level actors, as well as provide a platform for the resolution of issues that require a level of coordination among multiple actors (i.e., cross-border issues). Nevertheless, in recognizing the successes of national regulatory networks in the EU in other disciplines, perhaps with some careful consideration each Member State can appoint an authority that is fit-for-task, and able to effectively communicate with other national-level actors.

OPTION 2: ESTABLISHING AN EU- LEVEL REGULATORY AUTHORITY FOR COPYRIGHT

Taking the increasingly regulatory direction of copyright into consideration, perhaps there is still some room to challenge the current institutional arrangement in the EU. As discussed by Benjamin and Rai in relation to promoting IP innovation policy in the U.S., they also analyse this key question of institutional choice, and scrutinize the current institutional logic in the U.S.[846] In their analysis, they find that no one institution deals with IP innovation policy *per se*. In the case of patent policy, for example, the constitutional goal of promoting the progress of the useful arts is undermined by the fact that institutions such as the PTO and Court of Appeals for the Federal Circuit are unable to consider patents specifically in relation to their potential to promote innovation. These same institutions, though equipped with regulatory authority in this area, may either lack the competency, or willingness, to intervene in matters of social policy.[847] Similarly, in relation to copyright policy, the institutions that primarily deal with copyright related issues such as Congress, the courts, and the Copyright Office, are also limited, this time in specifically dealing with policy objectives which specifically promote the creation of "culture."[848]

In response to these limitations, Benjamin and Rai suggest that a new executive entity, independent of other regulatory agencies, would be a suitable means of ensuring that IP innovation policy remain consistent among U.S. institutions. The executive entity that they propose would have more than mere hortatory, or persuasive, influence and would instead

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[846] Stuart Benjamin and Arti Rai, 'Fixing Innovation Policy: A Structural Perspective' (2009) 77 Faculty Scholarship
[847] Ibid 3
[848] Ibid

have the “authority to push agencies to act in a manner that either affirmatively promoted innovation or achieved a particular regulatory objective in a manner ‘least damaging’ to innovation.”[849] They advocate for a greater degree of centralization through the introduction of centrally-placed, independent, regulatory agency to ensure that overall policy objectives – particularly those that promote innovation – can be more effectively coordinated among other institutions and governmental agencies.

In the spirit of this idea, perhaps something similar can be envisioned for the EU. At the EU level, no institution currently exists for copyright law. An authority specifically charged with balancing the economic, social and cultural dimensions of copyright through regulation can serve as a new touchstone for policymaking throughout the EU. As an agency-like institution with an innovation-cantered mission, it can consider and provide guidance for the interactions of copyright with new technological issues in a more contemporaneous way than the legislature or courts. In general, an EU level institutional actor may be a promising way of reconceiving of the process of reviewing important aspects of copyright regulatory practices so that it continues to function in a rapidly-evolving digital environment.

This Option, divided into two sub-options of implementation, involves the creation of a new, specialized EU level regulator for copyright-related legal issues. This institution can take the form of an agency or similar, and would ideally serve as an independent authority. The strengths of this Option are in the fact that the range of functions of this type of regulatory body can be broad, and its institutional mandate can more effectively promote of “innovation” in copyright as a goal. This has the potential of extending the nature of regulatory solutions past the idea of ensuring economic efficiency to respond to important social and cultural issues as well. An EU level regulator has the clearest potential to forward a more unified policy message on copyright, and articulate uniform copyright principles for the EU.

As for the legal basis for suggesting such a centralized solution, Art. 118 TFEU may be the most relevant in this case, and can potentially be complimented by other legal bases depending on the measure proposed (e.g., the introduction of specialized adjudication under Art. 257 TFEU, which refers to the establishment of specialized courts). With respect to the principle of subsidiarity, the cross-border nature of the issues presented by the online regulation of copyright pose a challenge for any single Member State to address effectively,

[849] Ibid

on a territorial basis. Any justifications for maintaining a territorial view of internet and copyright-related legal issues provides a weak basis for any counterargument suggesting that Member States can deal with these types of issues more effectively than a pan-European regulatory body.

Taking these brief remarks on the EU legislator's competencies into consideration, the main obstacle in forwarding the idea of a new EU level regulator is in limiting the potential perception of a new EU authority in this sphere as a "self-aggrandizement" of the EU's current regulatory authority. To the extent that the new EU agency will engage in the promulgation of new rules, the normal legislative procedure (ratification by the Member States via the EU political/legislative process) shall prevail. Therefore, it seems from the outset that it would be difficult for EU level regulator to, *sua sponte*, issue EU-binding copyright rules. If the nature of the rulemaking is such that allows for optional compliance, this issue can well be avoided. In the future, however, were such a regulator to exist, it may be difficult to tread the narrow path between rulemaking which has a superficial, "hortatory" influence on Member State conduct, and more authoritative measures which might better ensure unified regulation of copyright throughout the EU. Resolution of this issue is indeed crucial in order to promote or suggest the presence of a new EU level regulator in both the short and long term.

Suboption 1: Extension of the EUIPO mandate

The potential of expanding agency competencies with the EU institutional framework has already been considered at length in Part I.[850] It is on this basis that the current sub-option is presented, namely to expand the current mandate of the EUIPO to encompass several new functions which may facilitate the regulation of copyright in the EU. In its history, the EUIPO has added functionalities to respond to the needs of a digital era, and as such can reasonably be expected to do so again given the proper political backing. As previously remarked, the issue of whether the EUIPO *can*, in fact, expand has less to do with the EU's competencies to adopt such action, and more to do with the politics surrounding the decision.

Expanding the EUIPO's functions – or, put another way, simply extending the Observatory's current copyright-related mandate – can potentially be more easily accomplished due to the mere fact that it already exists as an institution in the EU framework. Extending its mandate would not require as much political will as might be needed in the

[850] 1.1.2.1 §4. Enhancing the Role of EU Agencies within the EU Framework, *supra*.

proposal of an entirely new regulator in this sphere, and would make efficient use of an already established infrastructure. Furthermore, with regards to the Observatory's role in relation to other existing institutions in the EU framework, the Observatory defines itself as a coordinator of many different stakeholder groups, and is therefore already a well-integrated part of an existing network: "The Observatory network is composed of public- and private-sector representatives, who collaborate in active working groups. Although the Observatory has no direct enforcement powers, it brings together a wide range of stakeholders who use their technical skills, experience and knowledge to protect and promote IP rights and support those directly engaged in enforcement."[851] Given some additional responsibilities and functions, the Observatory can become an essential institution for guiding the resolution of increasingly complex and specialized copyright-related legal issues taking place in the online environment.

Suboption 2: Independent EU level Regulatory Authority

Currently, no independent EU level regulatory authority exists for copyright. Given the previous regulatory paradigm and historical institutional arrangements, there has not been much (if any) discussion on whether a new regulator could take on some of the regulatory responsibilities currently allocated to other copyright-related institutions. As demonstrated in the analysis of Part I, these existing institutions are bound by their mandates, and as such can do very little to advance copyright in fulfilment of broader cultural and social goals in their current form. In a digital age where the regulatory challenge has only increased, the resolution of many different types of online issues can be handled more easily through more, rather than less, centralization of regulatory functions and solutions.

The primary difficulty in proposing this Option lies in generating the necessary political will to advance a new independent agency. A secondary challenge will be in deciding what form this authority should take, how it should be funded, and how "regulatory capture" can effectively be prevented. There are some risks associated with installing a new institution into the current framework, but these are the same risks that are always inherent in introducing a new agency, council, board, or similar.

Otherwise, this Option provides a key missing piece in the puzzle of institutional competencies and the regulation of copyright. By building a regulator "from the ground up," its mission of fulfilling the functions described can become an engrained part of its founding

[851] EUIPO. "Observatory: About." https://euipo.europa.eu/ohimportal/en/web/observatory/about-us.

principles, and its institutional mandate can likewise be tailored to achieving "innovation" in copyright as opposed to attaining purely economic-efficient outcomes. Importantly, an EU level regulator of this nature can be a solid step towards attaining a truly coherent body of copyright law in the EU.

OPTION 3: HYBRID APPROACH [OPTIONS 1 AND 2]

This Option combines qualities of both a network of national regulators and an EU level regulatory authority for the advising, monitoring and enforcement of copyright-related legal issues. It is interesting to mention that, in the context of the then-pending ACTA, Peukert advocated for a similar arrangement, proposing an independent authority within the EU institutions in the form of a "European Public Domain Supervisor," accompanied by parallel authorities situated at the national level.[852] His proposal, while confined to functions relating to safeguarding the public domain – and, therefore, ensuring the exercise of fundamental rights and freedoms related to the access, use and exchange of creative content – in many ways mirrors the proposed functions of an EU regulator for copyright law as presented in this thesis.[853]

Another similar arrangement, combining an EU level authority with national-level actors, has been created with respect to the implementation the General Data Protection Regulation (GDPR).[854] One key "pillar" of the EU's data protection reform package recognized that a new degree of centralization and coordination was required to administer data protection laws more effectively EU-wide.[855] Through a challenging and lengthy

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[852] Alexander Peukert, 'A European Public Domain Supervisor' (2011) International Review of Intellectual Property and Competition Law (IIC) 125-29 (Peukert also draws attention to the role of the European Data Protection Supervisor, on which he bases his proposal.)

[853] Ibid 5("…a special institution representing general and individual interests in a lively public domain would only counterbalance structural and institutional asymmetries inherent to current IP politics and practices. *Public Domain Supervisory Authorities* would thereby contribute to an IP system that achieves its objectives: fostering and not hindering creativeness and innovation.")

[854] 'Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) ' (2016) OJ L 119 1-88

[855] European Commission, 'Commission Staff Working Paper: Impact Assessment Accompanying the document 'Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation)' and 'Directive of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data. SEC(2012) 72 final ' 2012) <https://ec.europa.eu/transparency/regdoc/rep/2/2012/EN/SEC-2012-72-F1-EN-MAIN-PART-1.PDF>

negotiation process spanning a few years, the Regulation eventually gave rise to the construction of a new EU level body in the form of the European Data Protection Board (EDPB).[856] Structurally, the EDPB is a regulatory body falling short of a "full" EU agency, yet is instilled with more authority than the previous arrangement (WP29) which consisted of a group of national data protection authorities with no binding regulatory powers of its own.[857] Like WP29, the Board maintains its national membership requirements and therefore its fundamentally "intergovernmental" character.[858] Unlike its predecessor, however, the EDPB is granted legal personality, as well as some legally-binding powers, albeit strictly limited ones that may only apply in situations where national DPAs could not come to an agreement in the handling of a cross-border case.[859] Predictably, even in cases which have involved multiple jurisdictions, the role of the EDPB has been minimal thus far, with national DPAs still maintaining a significant degree of autonomy in its enforcement practices against multinational companies.[860]

These examples considered, the main advantage of this institutional arrangement is mostly structural. An EU level body can provide a central, independent and neutral platform for exchanges to occur between national level regulators. Additionally, monitoring and observatory tasks can usefully be carried out at the EU level as opposed to the national level, providing a more comprehensive picture of the successes and challenges of current laws in dealing with issues affecting multiple Member States.

One of the main disadvantages of this type of institutional arrangement lies in the costs inherent in adopting this type of solution. This would not only require Member States to set up a national regulator with the specific competences required, but it would involve certain "informational" costs in coordinating a system of national authorities, as well as corresponding with a central EU level authority. Such an arrangement has certainly been possible in the past, as described above with the EDPB, but it is still unclear how (especially in the contentious field of copyright) national-level regulators will react to the interventions of

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[856] Arts. 68-76, GDPR.
[857] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, O.J. L 281, p. 31-50.
[858] Laima Jančiūtė, 'European Data Protection Board: A Nascent EU Agency or an 'Intergovernmental Club'?' (2019) 10 International Data Privacy Law 57–75 9
[859] Art. 65, GDPR.
[860] See, e.g., European Data Protection Board, 'The CNIL's restricted committee imposes a financial penalty of 50 Million euros against GOOGLE LLC' 2019) accessed 2021 <https://edpb.europa.eu/news/national-news/2019/cnils-restricted-committeeimposes-financial-penalty-50-million-euros_en>

an EU authority, given that Treaty principles and the reality of diverging national substantive laws seem to automatically imbue the national-level authority with the "final say" in any case. It might also be anticipated that this arrangement can result in clashes between national authorities and the EU level authority, in cases where the national authority disagrees in principle with measures suggested by the EU authority that may undermine or contradict its domestic policies on the one hand, yet effectively promote the goal of harmonizing Member State practices in the interest of the Single Market on the other. In a worst-case scenario, the Member State and EU regulators would contradict each other, leading to a loss of credibility on one side or the other, certainly worsening the situation in the EU. To be sure, there are examples of EU level actors and a network of national authorities collaborating effectively.[861] However, given the highly polarizing character of copyright debates, it is quite uncertain (on a practical level) how much this type of arrangement can contribute towards reaching consensuses on the regulation of copyright EU-wide.

Comparative Analysis of Options

The chart below synthesizes the characteristics of the Options above to reflect on the potential feasibility of each proposed Option against one another. "Feasibility" in this instance refers to the author's estimates of potential costs associated with implementing the option, taking into account financial costs, as well as informational costs and "political" costs involved in performing the functions identified in the left column. In the chart, positive (+) is the most feasible/likely to effectively carry out the function identified, whereas (-) indicates low feasibility/limited ability to carry out the function identified, and +/- is neutral. Since *Option O: Status Quo* would not incur any of these costs (nor respond to any of the identified potential new functions advanced by the current study), it has been omitted from the chart for clarity.

[861] E.g., the European Competition Network, the European Trademark and Design Network (now EUIPN, European Intellectual Property Network), the aforementioned European Data Protection Supervisor and nationally-established federal data protection commissioners/officers.

Fig 3. Feasibility Chart

Function: Issue	**Option 1 [National Authority Network]**	**Option 2 [EU level Regulator]**	**Option 3 [Hybrid]**
Administrative: Tariff-Setting; PCL	+	+/-	+/-
Administrative: Tariff-Setting; MTL	+/-	+	+
Administrative: Public Database	-	+	+
Dispute Resolution: Copyright Small Claims/ADR (Mediation)	-	+	+
Observatory/Advisory: Enhancing Evidence-Based Policymaking in Copyright	+	+	+
Advisory: Issuing Advisory Opinions	-	+	+/-
Observatory: Online Licensing Practices and Effect on Creativity	+	+	+

As illustrated, ***the strengths of Option 1 are in its coordination of national actors***. This type of coordination is useful when trying to achieve more consistent tariff rates among Member States, as it provides an opportunity for national authorities to converge and exchange on their tariff-setting practices. Though the final tariff determinations would still be left to the national authority, this option could begin to reduce the outliers. Gathering evidence on the implementation of tariffs on a continuous basis from specific Member State representatives which are actively exchanging with each other within a network can help to feed information on the actual situation of Member States back into the political process at opportune moments, ensuring that policies are a more accurate reflection of real data. The same logic can be applied to the idea of tracking "innovations" in copyright law, i.e., by studying the effects of national policies on creativity, among Member States through exchanges on a network. If this option is adopted, there is also a very low chance that there would be subsidiarity or proportionality challenges should the network collectively reach agreements on certain issues.

The main weaknesses of Option 1 hinge upon its lack of centralization and potentially high costs of implementation. Coordination is sometimes difficult to achieve in the abstract without assigning a coordinator or leadership role. There is the threat of this option, if implemented, being underutilized for this reason. Certain tasks such as managing an EU-wide public database for works information, providing quasi-judicial proceedings for EU citizens, and issuing advisory opinions to be applied EU-wide, can be very difficult to achieve without a strong centralizing aspect of the means of national coordination, or the presence of a central institutional actor. In addition, because a transnational network of copyright institutions or regulators does not yet exist in the EU, each Member State would have to be tasked with the creation of such an institutional actor (or appointing a "competent authority") at the national level. Each of these authorities would also, ideally, share similar competences to be able to interact effectively at the same level.

Option 2, by contrast, exhibits the many benefits of introducing a centralized EU level actor for the advancement of copyright-related goals. ***Perhaps the most important benefit of introducing an EU level institutional regulator as proposed by Option 2 is that its institutional mandate can be specifically aimed at ensuring innovation in copyright and promoting EU culture and creativity***. In contrast to the current state of institutional regulation of copyright in the EU as discussed in Part I, this type of mandate would provide an EU level actor with sufficient room for manoeuvre in its activities, which can allow it to effectively consider rules and regulatory arrangements which are not necessarily tied to economic rationales. A broader institutional mandate, in support of "copyright innovation" -centred interests, and in promoting the overall public interest in a diverse, rich, and accessible cultural environment, can help to ensure the flexibilities necessary for advancing copyright law more uniformly and predictably in a rapidly-evolving digital context.

Option 2 is also a strong option specifically in terms of introducing a new institutional actor that has a "centralizing" function within the overall EU institutional order. As an independent administrative body located at the EU level, it can perform several functions which may serve to guide the practices of Member States and unify approaches to copyright regulation in the EU going forward. Administering a public database, performing quasi-judicial functions related to dispute resolution, and delivering advisory opinions based on gathered evidence and continuous monitoring can all be usefully achieved at the EU level by an EU level actor. Embedded within this Option, the possibility of either expanding the current mandate of the EUIPO to encompass new copyright-related responsibilities, or

introducing a completely new EU level regulator in the spirit of an EUIPO-like body, are both avenues that would achieve similar results.

The primary weakness of Option 2, however, lies in justifying its administrative functions as safely within the Treaty bounds of subsidiarity and proportionality. There is a high likelihood of Member State challenge in terms of accepting this proposed EU level regulator's authority to intervene in national tariff-setting proceedings, for example, or in issuing advisory options that shall be binding upon Member State practices. To at least partially address these concerns, all measures proposed can be implemented or utilized by Member States on a voluntary basis.

Finally, Option 3 considers a combination of these two Options, combining the ideas of a centralizing EU level regulatory body with the formation of a strong network of national-level authorities. ***The primary strength of Option 3 lies in its high level of cooperativeness by incorporating the inputs of all the Member States***. However, ***Option 3 suffers in terms of its centralization (and corresponding lack of authoritativeness), as some of the same issues that impede consensus in the political arena may re-emerge in this type of institutional arrangement.*** This arrangement is also the costliest of the Options, in that it requires the formation of both a network of national-level regulators, which does not as such exist yet, and the creation of a new EU level actor, which in itself would require considerable political will and costs to initiate. At its best, however, under this Option, regulations can be promoted without the influence of lobbying and instead on the basis of data and evidence gathered by the Member States, and Member States may be less likely to challenge the regulations on the basis of having some material input into the resulting regulation. This Option can potentially take the form of a centrally-located "European Copyright Innovation Board" or similar arrangement, incorporating the network of national regulators in the form of representative "seats" on the Board.[862]

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[862] This would generally follow a similar institutional structure and national regulatory arrangement of the "European Data Protection Board," with additional functionalities in relation to dispute resolution and issuing advisory opinions as outlined, *supra*.

FINAL RECOMMENDATION

Ultimately, the question of institutional choice – or the determination of whether political actors, courts, or the marketplace is/are suited to address certain issues – is a "procedural question with substantive consequences": though the allocation of authority is a matter of procedure, the regulatory strengths and weaknesses of the different institutions will have a substantive effect on the quality of the policies that can be promoted. There are limits as to what can be politically negotiated in the EU legislatures, how far a national court or the CJEU can go in terms of reinterpreting an established legal text, and how effective regulation using market efficiency principles can be. It is therefore crucial that the institutions we select to perform regulatory tasks is a reflection on the nature of the economic, social and cultural policies that we ultimately want to achieve.

This thesis raised the question of whether current institutional arrangements are capable of administering copyright law effectively, given the unique challenges presented by regulating in conduct on the online environment. As concluded in Part I, an examination of the current framework of institutional actors demonstrated the comparative strengths and weaknesses of institutions in each decisionmaking arena, discerning that administrative authorities in particular (political arena) are uniquely placed to pass regulations which are highly responsive to many different copyright stakeholder factions, balancing interests and costs inherent in passing regulation. In extrapolating this finding, Part II examined the roles and functions of administrative institutions for copyright in other jurisdictions to understand their relative strengths and limitations in their respective legal systems. This section concluded that, while not perfect, these specialized institutions served to effectively centralize and coordinate some functions, as well as balance the interests of many different copyright stakeholders as an authoritative public body. Part III then explored some approaches towards bridging regulatory gaps left by the current institutional framework for copyright, specifically focusing on what is still needed from a regulatory perspective to promote a truly "Digital Single Market." As observed above, while each of the proposed Policy Options has their own benefits and drawbacks, it is Option 2 suboption 2 – the introduction of a new EU level administrative actor for copyright – that seems to provide a balance of potential implementation costs, functionality, and feasibility.

Overall, the Options described above provide only an indication of several interesting potential avenues for the advancement of the EU's copyright laws, as well as the process itself

of how copyright laws are adapted, recognized and enforced in our society through our institutions. A modern, well-functioning copyright law fit for the digital age certainly deserves attention on its own, but if its institutions are stuck in a bygone era, it is clear that copyright laws will also fail to perform its important balancing of public and private interests in the face of new challenges. As demonstrated here, the way forward for regulating in the field of copyright necessitates a challenge to the longstanding institutional status quo, and these Options may offer the tools necessary to do just that.

APPENDIX I: ANALYTICAL FRAMEWORK AND DEFINITIONS

i. Breaking Down "Participation-Centred Comparative Institutional Analysis"

Reform efforts centred on the reform of institutions is often overlooked for a variety of reasons. Legal studies generally tend to focus on either caselaw or legislative analyses to advance ideas of challenging the status quo, while the characteristics of the decisionmaking institutions themselves are often taken for granted. The patterns of regulation which comprise market, judicial and legislative processes are perceived as immutable and bound by conventions. In addition, these processes are often analysed in a vacuum, considering changes to be implemented by one set of institutional actors while ignoring the effects of such changes in the others.

Yet, when considering how to expand the court's reading of a law, or proposing the implementation of a new piece of legislation, the question of institutional choice not only becomes apparent, but becomes essential: depending on the nature of the case, the Court may find that the issue is better resolved by the market or the legislature; depending on the aim of the law, a legislator might purposefully leave open opportunities for the market or courts to further refine provisions. As summarized by Komesar, "[e]mbedded in every law and public policy analysis that ostensibly depends solely on goal choice is the judgement, often unarticulated, that the goal in question is best carried out by a particular institution."[863] The question of institutional choice therefore ought not to be an arbitrary one, but must be closely aligned with social goals, and must consider institutional solutions in terms of both their competencies and capabilities to follow through on fulfilling the desired goals.

At its core, institutional choice theory is a reflection on why certain institutions have been selected to carry out certain tasks. The analysis of "institutions" according to this theory is in reference to complex set of institutional *processes* and their counterparts*:* the political process, market process and adjudicative process.[864] The political process (carried out by the legislature and administrative agencies), market and judicial processes serve distinct yet complementary roles in the construction of the overall socio-legal order. Actors who participate in these processes have their own interests that must be represented, and their choices may be influenced (or insulated from) pressures exerted by other institutions, external actors, or society-at-large. These actors, or "participants," may take the form of consumers,

[863] Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy* 5
[864] Ibid 3

producers, voters, lobbyists or litigants.[865] For them, participating in either of the three institutional decisionmaking processes means incurring certain costs – apart from transaction costs (market), the costs of litigation or lobbying are also inherent in participating in the judicial or political process, respectively. The analytical approach proposed by the public policy scholar Komesar, by focusing on weighing these various "participation" costs, essentially bridges the logic of economic-oriented transaction costs theory (e.g., Coase) into the realm of public policy and law.[866] With this approach, costs and benefits of participation are considered the main unit of measurement when determining the efficiency of alternative decisionmaking processes. Measuring the performance of one institution over another is therefore linked to an assessment of "the actions of the mass or participants as the factor that in general best accounts for the variation in how institutions function."[867]

Using this assessment of participation costs, a comparative element to the analysis can be added. Again, the choice between the market, judicial or legislative process is evaluated on the basis of the benefits or costs associated with participating in these processes; the objective of this comparison is to determine which institutional venue is most capable of following through with a goal. But what is the value in this comparison? Most economists and legal theorists choose to focus on a single institution and assess how that institution may function better (or worse) in a particular setting. For example, in a well-known body of legal-economic theory, Posner focuses on how the market (as a single institution) operates under different common law settings.[868] Likewise, John Ely focuses on constitutional law issues through the specific lens of the political process, suggesting that certain biases inherent in the legislative process should be counterbalanced by a strong judiciary; political malfunction takes up the primary part of the analysis without a parallel comparison to the malfunctions of the judiciary itself.[869] As posited by Komesar, such analyses are bound to be inadequate because they fail to fully consider the capabilities of institutional alternatives to address the same issues.[870]

In fact, engaging in comparative institutional analysis begins to reveal systemic issues that pervade each institutional process when tasked with designing adequate regulation. The organization and representation of the interests of many diverse participants at once can cause

[865] Ibid
[866] Bakardjieva Engelbrekt, Copyright from an Institutional Perspective: Actors, Interests, Stakes and the Logic of Participation 67
[867] Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy* 7
[868] Ibid 6
[869] Ibid 197
[870] Ibid 23

similar problems of representation in the market setting, political process, or in the process of adjudication, indicating that oftentimes a "perfect" decisionmaking process cannot be selected over the others.[871] Thus, the comparative element of institutional analysis tends to focus instead on selecting the "least imperfect alternative" among the available decisionmaking processes.[872] The essence of this comparison is captured as follows:

> "The correct question is whether, in any given setting, the market is better or worse than its available alternatives or the political process is better or worse than its available alternatives…Issues at which an institution, in the abstract, may be good may not need that institution because one of the alternative institutions may be even better. In turn, tasks that strain the abilities of an institution may wisely be assigned to it anyway if the alternatives are even worse."[873]

One of the most challenging aspects of the type of comparative institutional analysis set out by Komesar is determining how one process can be neutrally and systematically compared to another. According to him, focusing the analysis on the "mass of participants," at least initially, helps to bring the analysis of issues across institutions on more equal grounds.[874]

In this thesis, the relevant participant groups with respect to copyright issues will be centred on rightholders and the public more generally, and specifically within these groups certain types of rightholders (i.e., creators, publishers), intermediaries, and certain groups of the public (i.e., users, consumers). However, more research will need to be done in the future to bolster the preliminary conclusions of the researcher regarding the relative participation opportunities and costs afforded to each stakeholder group.

ii. Limitations of Institutional Choice Theory

While this thesis does not venture to provide a full accounting of all possible applications of institutional choice theory to EU institutions, nor provide a full analysis on all possible copyright issues dealt with by institutions, such an accounting would ultimately prove unnecessary to address the goal of the current research inquiry: namely, how can institutions in the EU modernize its regulatory capacities to respond to specific copyright-related legal issues brought about by digitization? Answering this question requires the type of close analysis that necessarily narrows the list of potential issues that can be treated, and

[871] Bakardjieva Engelbrekt, Copyright from an Institutional Perspective: Actors, Interests, Stakes and the Logic of Participation 68
[872] Ibid
[873] Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy* 6
[874] Ibid 7

the nature of those issues. For instance, considering the possibilities of a unitary title for copyright in the EU within the context of this thesis would be both too broad and likely require a considerable upheaval of the current institutional regulatory arrangement. Instead, the use of institutional choice theory (within the specific parameters of analysis specified above), as applied to very specific and narrowly-defined copyright issues selected for the analysis, is most likely to reveal unique and important insights for understanding the current role of institutions in the EU copyright norm-setting discourse, as well as a provide a gateway for discussing practically feasible ways of optimizing the current institutional regulatory system.

Nevertheless, this analytical approach itself comes with its limitations. While institutional choice theory can help to orient the analysis towards measuring the efficacy of current regulatory choices and the comparative advantages of alternatives, it is perhaps more difficult to reach a definitive "right and wrong" judgement regarding institutional choices. As held by Komesar, and summed up by Clune, "[t]he real world offers a 'least worst' choice of imperfect institutions."[875] As such, the perfect or ideal scenario regarding institutional choices may not exist. Underlying this conclusion is the acknowledgement that this particular type of analysis is challenging. This much is accepted by Komesar, who admits that, "[c]omparative institutional analysis is very difficult. Institutions are large, complex, and hard to delimit. More importantly, comparing institutions requires identifying parallels across institutions in some acceptable, understandable, and useable fashion."[876] Therefore, it is important that the issues selected for the purposes of engaging in comparative institutional analysis are sufficiently narrow, and could therefore lend themselves to the development of more useful inter-institutional insights.

Additionally, institutional development cannot be perceived within a vacuum. Current institutional configurations and current allocations of decisionmaking power are the product of historical influences and entrenched practices, or what Douglass North refers to as institutional "path dependence."[877] Though institutions also evolve over time, they can be constrained by the conventions that preceded it. This is where the notion of "historical institutionalism" finds its grounding in institutional analyses. According to this theory, institutions evolve as a direct result of the opportunities presented to it by the existing

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[875] Clune, Institutional Choice as a Theoretical Framework for Research on Educational Policy
[876] Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy* 7
[877] See generally, North, Institutions (Note: North distinguishes between institutions and organizations in his analysis, but for the sake of continuity within this thesis the same distinction will not be made.)

institutional framework. The notion of "path dependence" refers not only to "the incremental process of institutional evolution in which yesterday's institutional framework provides the opportunity set for today's organizations and individual entrepreneurs (political or economic)," but also references the complex web of inter-institutional co-dependencies that necessarily emerge as a result of the confines of the existing institutional framework.[878] Put simply, historical institutionalism as argued by North adopts a pragmatic view of institutional development which is not strictly linked to efficiency gains – the existing institutions and their institutional paths of development may not reflect a "better" or "more efficient" arrangement for the simple reason that change is costly.[879] Furthermore, current institutions tend to create incentives for the creation of new bodies which merely reinforce their own authority and stability within the established institutional framework.[880] Current institutions and their institutional mandates can therefore undermine the ability of a policymaker to consider new avenues of institutional reform which alter the status quo.

As argued by Bakardjieva Engelbrekt, specifically for the study of the development of EU law and institutions, the use of institutional choice theory combined with elements of historical institutionalism create a stronger framework for analysis. While the strand of institutional choice theory forwarded by Komesar is useful, it critically lacks the concreteness and context necessary to produce detailed comparisons or guidance on the development of EU institutions in particular.[881] Hence, acknowledging the importance of historical perspectives on the development of EU institutions specifically, the present analysis gives consideration to this additional layer of institutional analysis by situating institutional behaviours within an EU-specific historical/legal/institutional context. Concepts such as EU integration and multi-level governance, for example, will be expounded upon where relevant.

Overall, the choice of these complimentary analytical frameworks for the current task at hand, in comparison with other available frameworks, is justified in the interest of developing an EU-specific assessment of the regulatory capabilities of its institutions in the field of copyright. Viewed from another perspective, the pervasive nature of the copyright issues themselves presents a unique opportunity to engage in cross-institutional comparisons and to discern the impact of institutional choices on the current state of copyright regulation in the

[878] Ibid 109
[879] Bakardjieva Engelbrekt, Copyright from an Institutional Perspective: Actors, Interests, Stakes and the Logic of Participation 70
[880] Ibid
[881] Ibid 71

EU. While it is worth acknowledging that numerous other theories exist which each attempt to explain or contextualize regulatory and institutional decisionmaking, institutional choice theory lends itself well to developing a normative perspective on the functioning of multiple institutions, and a historical perspective will aid in grounding ideas for institutional reform into a more realistic context.[882]

[882] Gormley, Institutional Policy Analysis: A Critical Review

APPENDIX II: ADDITIONAL NOTES ON METHODOLOGY

1.) Jurisdiction Selection

The criteria for selection of the jurisdictions to be analysed in the research were primarily based on practical considerations. The selection necessarily had to be limited due to the time constraints inherent in the completion of the project (3 yrs.), as well as compliment the pre-determined research stays at GEMA and CISAC (3 months each, maximum). There was careful consideration of whether adding an analysis of common law jurisdictions made sense for drawing conclusions for a largely civil-law context (EU Member States), but the researcher determined the classification of the legal system not to be a limiting factor. Related to this decision, the researcher took special care in drawing narrow conclusions on EU legal/regulatory issues, being cognizant of the legal contexts of each other jurisdiction considered, to the extent possible. Some practical decisionmaking on behalf of the researcher, building on her prior background (U.S. law) and the location of the secondment institutions, also reinforced the final choice of jurisdictions that were considered for the analysis.

Based on the foregoing, the following non-EU jurisdictions and their copyright regulatory bodies were selected for analysis: United States and Canada. An investigation of other jurisdictions' copyright institutions might prove useful for furthering the research started here.

2.) Issue Selection and Limitations

At its most general, this thesis scrutinizes current institutional arrangements regarding the regulation of copyright, and considers how the roles of regulatory institutions can be adapted. To accomplish this task, the research efforts began with a close examination of the copyright institutions themselves and mapped their interactions within the selected jurisdictions. This approach led the researcher to first consider the extent to which institutional actors already participate in the regulation of copyright by analysing their capabilities and limitations in representing the interests of selected copyright stakeholders. Analysis was further accomplished through the use of specific examples and case studies to demonstrate the capabilities and limitations of the institutions in representing interests. From this baseline evaluation, the research then considers the ability of the institutions to resolve specific copyright regulatory issues, as defined in Part III. This analytical approach (both a general and copyright-specific evaluation of institutions) was adopted to ensure that the final

policy recommendations are issue-specific, pragmatic and potentially within the reach of the EU policymaker.

Regarding specific issues in copyright that will be addressed, the overarching theme of the selected issues is centred on *safeguarding public interests and user rights*. As such, the thesis presents only certain aspects of copyright-related issues with the greater goal of understanding how institutions might begin to address such issues. The goal of the present research is not to provide a single solution for all copyright-related issues, but to shed light on specific regulatory challenges presented by the current copyright context, and to examine how such challenges may benefit from a re-conceptualization of the role of copyright institutions in the EU.

3.) Interdisciplinarity

In an effort to form a more holistic assessment of copyright institutions, it was important to draw influences from other disciplines to compliment to legal analysis and to be able to propose more fully considered policy solutions. Modern legal research trends towards such interdisciplinary approaches, and the research realities of today encourage cross-checking ideas under different analytical frameworks to produce more robust conclusions.[883]

Therefore, this thesis is not limited to purely legal perspectives (copyright, competition, constitutional law): to the extent that it would make sense and was practicable for the researcher, the thesis also draws on theory from the disciplines of political science and economics. Regulators that operate in other sectors of IP, namely Patents and Trademarks, were further considered by the research, where appropriate.

4.) Methods

The thesis employs a mixed-method approach to answering the research question(s). Desk research was used as the primary source of the information used to construct the analysis. To help clarify and validate the findings of the desk research, interviews were initiated by the researcher with relevant actors to verify the researcher's understanding of the practical situation of copyright and regulatory issues. This approach took full advantage of the ability of the researcher to engage with stakeholders during the project's allotted secondments. Specifics of this method are summarized in Appendix II: Methodology.

i.) Research Materials and Facilities

[883] van Klink and S. Taekema, *Law and Method: Interdisciplinary Research Into Law* (Isd 2011)

To the extent possible, the desk research was built on “authoritative” sources; materials derived directly from academic and/or institutional actors took preference over secondary materials such as non-peer reviewed publications, websites and/or popular online blogs. The expertise and profession of the author, as well as the date of publication, were factors taken into consideration. Primary sources of information, and secondary sources of information that were closely linked with primary sources, were favoured above other types of sources. Academic publications such as textbooks and journal articles overall were given preference, and were obtained through the use of University database access (QMUL login/UNISTRA login). Finally, interviews were initiated to supplement the research with practical knowledge and expertise gathered from experts/legal professionals.

ii.) Interviews

The purpose of the interviews was to supplement and build on the researcher’s intuitions gleaned from the desk research. Interviews provided a practical perspective to counterbalance the legal/academic conclusions which formed the majority of the research work. These perspectives provided an additional layer of authentication to the early conclusions reached by the researcher, allowing for a more rigorous and thorough assessment of the validity of the conclusions. Ethical guidelines and procedures in collecting interview data have been certified to comply with the University of Strasbourg code of conduct. Interview data appearing in the thesis has been verified and approved by interviewees (transcripts have been checked, edited, and validated by all interviewees).

Interviewees asked to comment on various issues were selected based on their relevant expertise in the field, the researcher’s ability to contact them, their willingness to participate, and their consent to being interviewed. Experts encountered during the course of the program (i.e., legal staff of secondment institutions, conference speakers) were given priority over other potential interview subjects.

BIBLIOGRAPHY

Books and Book Sections

Davies K, *Understanding European Union Law* (Taylor & Francis Group 2013)

de Visser M, *Network-Based Governance in EC Law: The Example of EC Competition and EC Communications Law* (Bloomsbury Publishing 2009)

Gendreau Y, *Copyright administrative institutions* (Éditions Y. Blais 2002)

Goldstein P and Hugenholtz PB, *International Copyright: Principles, Law and Practice*, vol 3 (Oxford University Press 2013)

Husovec M, *Injunctions against Intermediaries in the European Union: Accountable but Not Liable?* (Cambridge University Press 2017)

Jütte BJ, *Reconstructing European Copyright Law for the Digital Single Market* (2017)

Klink v and Taekema S, *Law and Method: Interdisciplinary Research Into Law* (Isd 2011)

Komesar NK, *Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy* (University of Chicago Press 1996)

Littoz-Monnet A and others, *European Union and Culture : Between Economic Regulation and European Cultural Policy* (Manchester University Press 2007)

Mylly T, *Intellectual Property and European Economic Constitutional Law: The Trouble with Private Informational Power* (Publications of IPR University Center 4 2009)

Ramalho A, *The Competence of the European Union in Copyright Lawmaking: A Normative Perspective of EU Powers for Copyright Harmonization* (Springer International Publishing 2016)

Rosati E, *Originality in EU Copyright: Full Harmonization through Case Law* (Edward Elgar Publishing, Incorporated 2013)

Scharpf FW, *Community and Autonomy: Institutions, Policies and Legitimacy in Multilevel Europe* (Campus Verlag 2010)

Senftleben M, *Copyright, Limitations, and the Three-step Test: An Analysis of the Three-step Test in International and EC Copyright Law* (Kluwer Law International 2004)

Senftleben, M. (2020), "Institutionalized Algorithmic Enforcement—The Pros and Cons of the EU Approach to UGC Platform Liability", 14 FIU L. Rev. 299

Sganga C, *Propertizing European Copyright: History, Challenges and Opportunities* (Edward Elgar Publishing Limited 2018)

Siegel S, *The Political Economy of Noncompliance: Adjusting to the Single European Market* (Taylor & Francis 2011)

Bakardjieva Engelbrekt A, 'Institutional Theories, EU Law and the Role of the Courts for Developing a European Social Model' in Neergaard U, Nielsen R and Roseberry LM (eds), *The Role of Courts in Developing a European Social Model: Theoretical and Methodological Perspectives* (DJØF Publishing 2010)

Bakardjieva Engelbrekt A, 'Designing Institutions for Multi-level Copyright Governance in the EU and Beyond' in Lind A-S and Reichel J (eds), *Administrative Law Beyond the State: Nordic Perspectives* (Martinus Nijhoff Publishers 2013)

Bakardjieva Engelbrekt A, 'Globalisation and Law: A Call for a Two-fold Comparative Institutional Approach' in Komesar NK (ed), *Understanding Global Governance: Institutional Choice and the Dynamics of Participation* (European University Institutue 2014)

Bakardjieva Engelbrekt A, 'Toward Network Governance of Collective Management Organisations in Europe: The Problem of Institutional Diversity' in Rosén J (ed), *Liber Amicorum* (2016)

Bouchard M, 'Collective Management in Commonwealth Jurisdictions' in Gervais DJ (ed), *Collective Management of Copyright and Related Rights* (Kluwer Law International 2010)

Daigle GM and O'Neil JA, 'The Evidentiary Procedures of the Copyright Board of Canada' in Gendreau Y (ed), *The Copyright Board of Canada: Bridging Law and Economics for Twenty Years* (Carswell 2009)

de Beer J, 'Copyright Royalty Stacking' in Geist M (ed), *The Copyright Pentalogy: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law* (University of Ottawa Press 2013)

Dehousse R, 'The Community Method: Chronicle of a Death too Early Foretold' in Boussaguet L and Dehousse R (eds), *The transformation of EU Policies – EU Governance at Work* (Connex Report Series 8 2008)

Dehousse R, 'The Politics of Delegation in the European Union' in Ritleng D (ed), *Independence and Legitimacy in the Institutional System of the European Union* (Collected Courses of the Academy of European Law, OUP Oxford 2016)

Drexl J, 'Competition in the Field of Collective Management: Preferring 'Creative Competition' to Allocative Efficiency in European Copyright Law' in Torremans P (ed), *Copyright Law A Handbook of Contemporary Research* (Edward Elgar 2007)

Drexl J, 'Is there a 'more economic approach' to intellectual property and competition law?' in Drexl J (ed), *Research Handbook on Intellectual Property and Competition Law* (Edward Elgar Publishing, Incorporated 2010)

Dusollier S, '(Re)introducing Formalities in Copyright as a Strategy for the Public Domain' in Guibault L and Angelopoulos C (eds), *Open Content Licensing: From Theory to Practice* (Amsterdam University Press 2011)

Gangjee DS, 'Copyright formalities: A return to registration?' in Giblin R and Weatherall K (eds), *What if we could reimagine copyright?* (ANU Press 2017)

Gauld R, 'Principal-Agent Theory of Organizations' in Farazmand A (ed), *Global Encyclopedia of Public Administration, Public Policy, and Governance* (Springer International Publishing 2016)

Geiger C, 'The constitutional dimension of intellectual property' in Torremans P (ed), *Intellectual Property and Human Rights* (Kluwer Law International 2008)

Geiger C, 'Counterfeiting and the Music Industry: Towards a Criminalization of End Users? The French 'HADOPI' Example' in Geiger C (ed), *Criminal Enforcement of Intellectual Property: A Handbook on Contemporary Research* (Edward Elgar 2012)

Geiger C, 'The Social Function of Intellectual Property Rights, or How Ethics can Influence the Shape and Use of IP Law' in Dinwoodie G (ed), *Intellectual Property Law: Methods and Perspectives* (Edward Elgar 2013)

Geiger C, 'Challenges for the enforcement of copyright in the online world: Time for a new approach' in Torremans P (ed), *Research Handbook on the Cross-Border Enforcement of Intellectual Property* (Edward Elgar, 2014)

Geiger C, 'The Role of the Court of Justice of the European Union: Harmonizing, Creating and Sometimes Disrupting Copyright Law in the European Union' in Stamatoudi I (ed), *New Developments in EU and International Copyright Law* (Kluwer Law International 2016)

Geiger C, 'Statutory Licenses as Enabler of Creative Uses' in Hilty RM and Liu K-C (eds), *Remuneration of Copyright Owners* (Springer 2017)

Geiger C and Bulayenko O, 'General report: Scope and enforcement tools to ensure remuneration' in Von Lewinski S (ed), *Remuneration for the Use of Works: Exclusivity vs Other Approaches* (De Gruyter 2015)

Geiger C, Gervais D and Senftleben M, 'Understanding the 'three-step test'' in Gervais D (ed), *Research Handbook on International Intellectual Property Law* (Edward Elgar Publishing 2014)

Georgopoulos T, 'The Legal Foundations of European Copyright Law' in Synodinou TE (ed), *Codification of European Copyright Law: Challenges and Perspectives* (Information Law Series, Wolter Kluwer Law & Business 2012)

Gervais D, 'A Uniquely Canadian Institution: The Copyright Board of Canada' in Gendreau Y (ed), *An Emerging Intellectual Property Paradigm: Perspectives from Canada* (Queen Mary Studies in Intellectual Property series, Edward Elgar 2008)

Gervais D, 'Collective Management of Copyright: Theory and Practice in the Digital Age' in Gervais D (ed), *Collective Management of Copyright and Related Rights* (2nd edn, Kluwer Law International 2010)

Ghosh S, 'When Property is Something Else: Understanding Intellectual Property through the Lens of Regulatory Justice' in Gosseries A, Marciano A and Strowel A (eds), *Intellectual Property and Theories of Justice* (Palgrave Macmillan UK 2008)

Griffiths J, 'Taking power tools to the acquis -- The Court of Justice, The Charter of Fundamental Rights and European Union Copyright Law' in Geiger C, Nard CA and Seuba X (eds), *Intellectual Property and the Judiciary* (Edward Elgar Publishing Limited 2018)

Guibault L and van Gompel S, 'Collective Management in the European Union' in Gervais D (ed), *Collective Management of Copyright and Related Rights* (Kluwer Law International 2015)

Guibault L and van Gompel S, 'Collective Management in the European Union' in Gervais DJ (ed), *Collective Management of Copyright and Related Rights*, vol 3rd Ed. (Kluwer Law International 2016)

Hugenholtz B, 'The Wittem Group's European Copyright Code' in Synodinou TE (ed), *Codification of European Copyright Law: Challenges and Perspectives* (Kluwer Law International 2012)

Hugenholtz PB, 'The European Concern with Copyright and Related Rights' in van Eechoud M and others (eds), *Harmonizing European Copyright Law: The Challenges of Better Lawmaking* (Information Law Series, Kluwer Law International 2009)

Hugenholtz PB, 'Flexible copyright: Can the EU author's rights accommodate fair use?' in Okediji R (ed), *Copyright Law in an Age of Limitations and Exceptions* (Cambridge University Press 2017)

Kolstad O, 'Competition law and intellectual property rights - outline of an economics-based approach' in Drexl J (ed), *Research Handbook on Intellectual Property and Competition Law* (Edward Elgar Publishing 2010)

Kusy C, 'Comparative Study on Copyright Administrative Institutions' in Gendreau Y (ed), *Copyright Administrative Institutions* (Éditions Y. Blais 2001)

Larsson T and Trondal J, 'Agenda setting in the European Commission: how the European Commission structure and influence the EU agenda' in Hofmann HCH and Türk AH (eds), *EU Administrative Governance* (Edward Elgar Publishing 2006)

Lindner B, 'Alternative dispute resolution -- a remedy for soothing tensions between technological measures and exceptions?' in Torremans P (ed), *Copyright Law: A Handbook of Contemporary Research* (Research Handbooks in Intellectual Property series, Edward Elgar 2007)

Littoz-Monnet A, 'European Cultural Networks, Social Communication and the Construction Process of the European Community' in McMahon R (ed), *Post-identity?: Culture and European Integration* (Routledge 2013)

Lupia A, 'Delegation of Power: Agency Theory' in Smelser NJ and Baltes PB (eds), *International Encyclopedia of the Social and Behavioral Sciences*, vol 5 (Elsevier Science Limited 2001)

Maher I, 'The Networked (Agency) Regulation of Competition' in Drahos P (ed), *Regulatory Theory: Foundations and Applications* (ANU Press 2017)

Matanovac Vučković R, 'The Role of Collective Management Organizations in New Business Models – Challenges for the Legislature and Courts' in Von Lewinski S (ed), *Remuneration for the Use of Works: Exclusivity vs Other Approaches* (International Congress June 18-20 2015, ALAI Conference, De Gruyter 2015)

Mylly T, 'Intellectual property and competition law in the information society' in Geiger C (ed), *Constructing European Intellectual Property: Achievements and New Perspectives* (Edward Elgar 2013)

Neuhold C and Radulova E, 'The involvement of administrative players in the EU decision making process' in Hofmann HCH and Türk AH (eds), *EU Administrative Governance* (Edward Elgar Publishing 2006)

Peters M, 'Copyright Administrative Institutions: The United States Copyright Office' in Gendreau Y (ed), *Institutions administratives du droit d'auteur / Copyright Administrative Institutions* (Éditions Yvon Blais 2002)

Reinbothe J, 'Collective Management in Germany' in Gervais D (ed), *Collective Management of Copyright and Related Rights* (Wolters Kluwer 2015)

Riis T, Rognstad OA and Schovsbo J, 'Collective Agreements for the Clearance of Copyrights – The Case of Collective Management and Extended Collective Licenses' in Riis T (ed), *User Generated Law: Re-Constructing Intellectual Property Law in a Knowledge Society* (Edward Elgar 2016)

Rosén J, 'Administrative Institutions in Copyright: Notes on the Nordic Countries' in Schmidt FF (ed), *Scandinavian Studies in Law*, vol 42 (Almqvist & Wiksell 2002)

Scott WR, 'Institutional Theory: Contributing to a Theoretical Research Program' in Smith KG and Hitt MA (eds), *Great Minds in Management: The Process of Theory Development* (Oxford University Press 2005)

Scott WR, 'Crafting an Analytic Framework I: Three Pillars of Institutions', *Institutions and Organizations Ideas, Interests, and Identities* (SAGE Publications 2013)

Torremans P, 'Jurisdiction in intellectual property cases' in Torremans P (ed), *Research Handbook on Cross-border Enforcement of Intellectual Property* (Edward Elgar 2014)

van Gompel S, 'Contextualizing the International Prohibition on Copyright Formalities', *Formalities in copyright law: an analysis of their history, rationales and possible future* (Kluwer Law International 2011)

von Lewinski S, 'Copyright Contracts' in Synodinou T-E (ed), *Codification of European Copyright Law: Challenges and Perspectives* (Information Law Series, Wolters Kluwer 2012)

Weatherall K, 'A reimagined approach to copyright enforcement from a regulator's perspective' in Giblin R and Weatherall K (eds), *What if we could reimagine copyright?* (ANU Press 2017)

Westkamp G, 'One or Several Super-Rights? The (Subtle) Impact of the Digital Single Market on a Future EU Copyright Architecture' in Liu K-C and Hilty RM (eds), *Remuneration of Copyright Owners* (Springer 2017)

Geist M (ed), *The Copyright Pentalogy: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law* (University of Ottawa Press 2013)

Litman J, *Digital Copyright* (2017)

Journal Articles and Conference Publications

Bonadio E, 'Collective management of music copyright in the Internet age and the EU initiatives: from reciprocal representation agreements to open platforms' (World Library and Information Congress: 78th IFLA General Conference and Assembly)

Drier T, 'The Role of the ECJ for the Development of Copyright in the European Communities' (International Study Days of the Association Littérature et Artistique (ALAI))

Ficsor M, 'The hurried idea of a "European Copyright Code" in the light of the EU's (desirable) cultural and copyright policy ' (20th Annual Fordham IP Conference)

Hofmann A, 'Compliance or 'Rule Gain'? The Commission's Goals in the Infringement Procedure' (CES)

Samuelson P and Hashimoto K, 'Scholarly Concerns About a Proposed Small Copyright Claims Tribunal' (BCLT-Hastings Workshop)

Versluis E, 'Compliance Problems in the EU What potential role for agencies in securing compliance?' (3rd ECPR General Conference)

, *What Constitutes Evidence for Copyright Policy?* (2012)

Group W, *European Copyright Code* (2010)

Helmers C and others, *Who needs a copyright small claims court? Evidence from the UK's IP Enterprise Court* (2018)

Pallante M, *The Curious Case of Copyright Formalities* (Berkeley Technology Law Journal 2013)

Bridy A, 'ACTA and the Specter of Graduated Response' <https://ssrn.com/abstract=1619006>

Aistars S, 'The Next Great Copyright Act, or a New Great Copyright Agency? Responding to Register Maria Pallante's Manges Lecture' (2015) 38 Colum JL & Arts

Aistars S, 'Ensuring Only Good Claims Come in Small Packages: A Response to Scholarly Concerns about a Proposed Small Copyright Claims Tribunal' (2018) 26 George Mason L Rev 65-69 <http://georgemasonlawreview.org/wp-content/uploads/2019/04/26-1_3-Aistars.pdf>

Alter K, 'Who Are the "Masters of the Treaty"?: European Governments and the European Court of Justice' (2003) 52 International Organization

Bakardjieva Engelbrekt A, 'Copyright from an Institutional Perspective: Actors, Interests, Stakes and the Logic of Participation' (2007) 4 Review of Economic Research on Copyright Issues 65-97

Bannerman S, 'Canadian Copyright: History, Change, and Potential' (2011) 36 Canadian Journal of Communication 31-49

Benjamin S and Rai A, 'Fixing Innovation Policy: A Structural Perspective' (2009) 77 Faculty Scholarship

Bodó, B., Gervais, D., and Pedro Quintais, J., 'Blockchain and Smart Contracts: The Missing Link in Copyright Licensing' (2018) Int'l J. L. & Inf. Tech. 1–26

Börzel TA, 'Organizing Babylon: On the different conceptions of policy networks' (1998) 76 Public Administration 253-73

Bridy A, 'The Price of Closing the 'Value Gap': How the Music Industry Hacked EU Copyright Reform' (2020) 22 Vanderbilt Journal of Entertainment and Technology Law 323-58

Burk DL, 'Algorithmic Fair Use' (2019) 86 University of Chicago Law Review

Carrubba CJ, Gabel M and Hankla C, 'Judicial Behavior under Political Constraints: Evidence from the European Court of Justice' (2008) 102 American Political Science Review 435

Clune WH, 'Institutional Choice as a Theoretical Framework for Research on Educational Policy' (1987) 9 Educational Evaluation and Policy Analysis 117-32 <https://doi.org/10.3102/01623737009002117>

Craig CJ, 'Globalizing User Rights-Talk: On Copyright Limits and Rhetorical Risks' (2017) 33 Osgoode Legal Studies Research Paper 1-71

de Beer J, 'Canada's Copyright Tariff-Setting Process: An Empirical Review' (2016) 63 J Copyright Soc'y USA

de Beer J, 'Evidence-Based Intellectual Property Policymaking: An Integrated Review of Methods and Conclusions ' (2016) 19 The Journal of World Intellectual Property 150-77

Dehousse R, 'Regulation by networks in the European Community: the role of European agencies' (1997) 4 Journal of European Public Policy 246-61 <https://doi.org/10.1080/135017697709696341>

Dehousse R, 'Delegation of powers in the European union: The need for a multi-principals model' (2008) 31 West European Politics 789-805

Derclaye E, 'Infopaq International A/S v Danske Dagblades Forening (C-5/08): wonderful or worrisome? The impact of the ECJ ruling in Infopaq on UK copyright law'' (2010) 32 European Intellectual Property Review

Derclaye E, 'The Court of Justice copyright case law: quo vadis?' (2014) 36 European Intellectual Property Review (EIPR) 716-23

Dinwoodie GB, 'Private Ordering and the Creation of International Copyright Norms: The Role of Public Structuring' (2004) 1 Journal of Institutional and Theoretical Economics <https://ssrn.com/abstract=604161>

Dinwoodie GB and Dreyfuss RC, 'TRIPS and the Dynamics of Intellectual Property Lawmaking' (2004) 36 Case W Res J Int'l L <https://scholarlycommons.law.case.edu/jil/vol36/iss1/5>

Dusollier S, 'Sharing Access to Intellectual Property through Private Ordering' (2007) 82 Chicago-Kent Law Review

Favale M, Kretschmer M and Torremans P, 'Who Is Steering the Jurisprudence of the European Court of Justice? The Influence of Member State Submissions on Copyright Law' (2018) Modern Law Review [preprint version]

Freegard MJ, 'Quis Custodiet? The Role of Copyright Tribunals' (1994) 16 Eur Int Prop Rev

Frosio G, 'To Filter or Not to Filter? That Is the Question in EU Copyright Reform' (2017) 36 Cardozo Arts & Entertainment Law Journal 331-68

Gass A, 'Considering Copyright Rulemaking: the Constitutional Question' (2012) 27 Berkeley Tech LJ 1047-89

Geiger C, '"Constitutionalising" Intellectual Property Law? The Influence of Fundamental Rights on Intellectual Property in the European Union' (2006) 37 International Review of Intellectual Property and Competition Law 371-406

Geiger C, 'The Answer to the Machine should not be the Machine: Safeguarding the Private Copy Exception in the Digital Environment' (2008) European Intellectual Property Review 121-29

Geiger C, 'Promoting Creativity through Copyright Limitations: Reflections on the Concept of Exclusivity in Copyright Law' (2009) 12 Vand J Ent & Tech L 515-48

Geiger C, Bulayenko O and Frosio G, 'The Introduction of a Neighbouring Right for Press Publisher at EU Level: The Unneeded (and Unwanted) Reform' (2017) 39 European Intellectual Property Review

Geiger C and Izyumenko E, 'Freedom of Expression as an External Limitation to Copyright Law in the EU: The Advocate General of the CJEU Shows the Way' (2019) 41 European Intellectual Property Review

Geiger C and Izyumenko E, 'The Constitutionalization of Intellectual Property Law in the EU and the Funke Medien, Pelham and Spiegel Online Decisions of the CJEU: Progress, but Still Some Way to Go!' (2020) 51 IIC - International Review of Intellectual Property and Competition Law 282-306 <https://doi.org/10.1007/s40319-019-00901-1>

Geiger C and Jütte BJ, 'Platform liability under Article 17 of the Copyright in the Digital Single Market Directive, Automated Filtering and Fundamental Rights: An Impossible Match' (2021) Forthcoming in GRUR International

Giblin R, 'Evaluating Graduated Response' (2013) 37 Colum JL & Arts

Gormley WT, 'Institutional Policy Analysis: A Critical Review' (1987) 6 Journal of Policy Analysis and Management 153-69 <www.jstor.org/stable/3324512>

Griffiths J, 'Constitutionalising or Harmonising? The Court of Justice, the Right to Property and European Copyright Law' (2013) 38 European law review 65-78

Hancock K, '1997 Canadian Copyright Act Revisions' (1998) 13 Berkeley Tech LJ <https://s3-eu-west-1.amazonaws.com/tind-customer-berkeleylaw/9177a138-a55d-40b9-910e-4ae09d620f36?response-content-disposition=attachment%3B%20filename%2A%3DUTF-8%27%27fulltext.pdf&response-content-type=application%2Fpdf&X-Amz-Algorithm=AWS4-HMAC-SHA256&X-Amz-Expires=86400&X-Amz-Credential=AKIAXL7W7Q3XNDXVUP4O%2F20200423%2Feu-west-1%2Fs3%2Faws4_request&X-Amz-SignedHeaders=host&X-Amz-Date=20200423T193259Z&X-Amz-Signature=18913ca4cf087dab1b582d5aae91c9801c182c294f80425c3df0afa899294e36>

Handke C and Towse R, 'Economics of Copyright Collecting Societies' (2007) 38 International Review of Intellectual Property and Competition Law 937-57

Hugenholtz B, 'Why the Copyright Directive Is Unimportant, and Possibly Invalid' (2000) 11 European Intellectual Property Review

Husovec M, 'Intellectual Property Rights and Integration by Conflict: The Past, Present and Future' (2016) 18 Cambridge Yearbook of European Legal Studies 239-69 <https://www.cambridge.org/core/article/intellectual-property-rights-and-integration-by-conflict-the-past-present-and-future/619B15C8ED20F84A8197DE2489CC35FB>

Hviid M, Schroff S and Street J, 'Regulating Collective Management Organisations by Competition: An Incomplete Answer to the Licensing Problem?' (2016) 7 JIPITEC

Jančiūtė L, 'European Data Protection Board: A Nascent EU Agency or an ‘Intergovernmental Club’?' (2019) 10 International Data Privacy Law 57–75 <http://dx.doi.org/10.2139/ssrn.3398026>

Jiang F and Gervais D, 'Collective Management Organizations in China: Practice, Problems and Possible Solutions' (2012) 15 The Journal of World Intellectual Property 221-37

Kur A and Maunsbach U, 'Choice of law and Intellectual Property Rights' (2019) 6 Oslo Law Review 43-61 <https://doi.org/10.18261/issn.2387-3299-2019-01-07>

Leistner M, 'Europe's copyright law decade: Recent case law of the European Court of Justice and policy perspectives' (2014) Common Market Law Review 559-600 <http://www.kluwerlawonline.com/api/Product/RenderPDF?file=Journals\COLA\COLA2014037.pdf >

Liesbet H and Marks G, 'Types of Multi-Level Governance' (2002) 5 Les Cahiers européens de Sciences Po, European Integration online Papers (EIoP)

Litman J, 'The Exclusive Right to Read' (1994) 13 Cardozo Arts & Ent LJ

Litman J, 'Real Copyright Reform' (2010) 96 Iowa L. Rev. 23

Littoz-Monnet A, 'Agenda-Setting Dynamics at the EU Level: The Case of the EU Cultural Policy' (2012) 34 Journal of European Integration 505-22 <https://doi.org/10.1080/07036337.2011.638065>

Liu JP, 'Regulatory Copyright' (2004) 83 NC L Rev <http://scholarship.law.unc.edu/nclr/vol83/iss1/5>

Maier P, 'OHIM's Role in European Trademark Harmonization: Past, Present and Future' (2013) 23 Fordham Intell Prop Media & Ent LJ

Matanovac Vučković R, 'Implementation of Directive 2014/26/EU on Collective Management and Multi-Territorial Licensing of Musical Rights in Regulating the Tariff-Setting Systems in Central and Eastern Europe' (2016) 47 IIC - International Review of Intellectual Property and Competition Law 28-59

Matanovac Vučković R, 'Remunerations for authors and other creators in collective management of copyright and related rights' (2016) 66 Zbornik Pravnog Fakulteta u Zagrebu 35-60

Meyer T, 'Graduated Response in France: The Clash of Copyright and the Internet' (2012) 2 Journal of Information Policy 107-27

Mitra-Kahn BH, 'Copyright, Evidence And Lobbynomics: The World After The UK's Hargreaves Review' (2011) 8 Review of Economic Research on Copyright Issues 65-100

Musa A, 'Reforming the European Union Agency Governance: More Control, Greater Accountability' (2014) 14 Croatian and Comparative Public Administration 317–53

North DC, 'Institutions' (1991) 5 The Journal of Economic Perspectives 97-112 <www.jstor.org/stable/1942704>

Pedro Quintais J and Rendas T, 'EU copyright law and the Cloud: VCAST and the intersection of private copying and communication to the public' (2018) 13 Journal of Intellectual Property Law & Practice 711-19 <https://doi.org/10.1093/jiplp/jpy004>

Perel M and Elkin-Koren N, 'Accountability in Algorithmic Copyright Enforcement' (2016) 19 Stan Tech L Rev 473

Perzanowski A, 'The Limits of the Copyright Office' (2018) 33 Berkeley Tech LJ

Perzanowski A and Hoofnagle CJ, 'What We Buy When We 'Buy Now'' (2017) 165 U Penn L Rev 317 <https://ssrn.com/abstract=2778072>

Peukert A, 'A European Public Domain Supervisor' (2011) International Review of Intellectual Property and Competition Law (IIC) 125-29

Rahmatian A, 'A Fundamental Critique of the Law-and-Economics Analysis of Intellectual Property Rights' (2013) 17 Marquette Intellectual Property Law Review <http://scholarship.law.marquette.edu/iplr/vol17/iss2/2>

Rahmatian A, 'Originality in UK Copyright Law: The Old "Skill and Labour" Doctrine Under Pressure' (2013) 44 IIC - International Review of Intellectual Property and Competition Law 4-34 <https://doi.org/10.1007/s40319-012-0003-4>

Rai AK, 'Engaging Facts and Policy: A Multi-Institutional Approach to Patent System Reform' (2003) 103 Columbia Law Review 1035-135

Rayna T and Barbier L, 'Fighting consumer piracy with graduated response: An evaluation of the French and British implementations' (2010) 6 Int J Foresight and Innovation Policy 294-314 <http://www.inderscience.com/browse/index.php?journalID=78>

Richard Arnold ER, 'Are National Courts the Addressees of the InfoSoc Three-Step Test?' (2015) 10 Journal of Intellectual Property Law & Practice 741-49 <https://ssrn.com/abstract=2627014>

Rieder B and Hofmann J, 'Towards platform observability' (2020) 9 Internet Policy Review <https://doi.org/10.14763/2020.4.1535 >

Rosati E, 'Originality in US and UK copyright experiences as a springboard for an EU-wide reform debate. IIC 41(5):524' (2010) 41 IIC - International Review of Intellectual Property and Competition Law 524-43

Rosati E, 'What Does the European Commission Make of the EU Copyright Acquis When It Pleads Before the CJEU? The Legal Service's Observations in Digital/Online Cases' (2020) 45 European Law Review 67-99

Samuelson P, Litman J and Members C, 'The Copyright Principles Project: Directions for Reform' (2010) 25 Berkeley Tech LJ 1175-245

Scharpf F, 'The Joint-Decision Trap: Lessons From German Federalism and European Integration' (1988) 66 Public Administration 239-78

Scharpf FW, 'Introduction: the problem-solving capacity of multi-level governance' (1997) 4 Journal of European Public Policy 520-38 <https://doi.org/10.1080/135017697344046>

Schroff S and Street J, 'The politics of the Digital Single Market: culture vs. competition vs. copyright' (2017) 21 Information, Communication & Society 1305-21

Segoin D, 'A French Government View of Recent CJEU Case Law on Literary and Artistic Property' (2020) RIDA

Simmons JL, 'The Next Great Copyright Office' (2015) 7 Landslide 23-29

Sledge JS, 'Mediating Copyright and Intellectual Property Disputes' (2013) 6 Landslide

Snijders T and van Deursen S, 'The Road Not Taken – the CJEU Sheds Light on the Role of Fundamental Rights in the European Copyright Framework – a Case Note on the Pelham, Spiegel Online and Funke Medien Decisions' (2019) 50 IIC - International Review of Intellectual Property and Competition Law 1176-90 <https://doi.org/10.1007/s40319-019-00883-0>

Stephenson P, 'Twenty years of multi-level governance: 'Where Does It Come From? What Is It? Where Is It Going?'' (2013) 20 Journal of European Public Policy 817-37

Stone Sweet A, 'The European Court of Justice and the Judicialization of EU Governance' (2010) Living Reviews in EU Governance

Thatcher M and Stone Sweet A, 'Theory and Practice of Delegation in Non-Majoritarian Institutions' (2008) 25 West European Politics 1-22

Trimble M, 'Advancing National Copyright Policy in Transnational Context' (2015) 74 Maryland Law Review

Vetulani-Cęgiel A, 'EU Copyright Law, Lobbying and Transparency of Policy-Making: The cases of sound recordings term extension and orphan works provisions' (2015) 6 JIPTEC

Wall G, 'Remarks to the SERCI panel on Regulatory Copyright Tariff Setting' (2017) 14 Review of Economic Research on Copyright Issues

Xalabarder R, 'The Role of the CJEU in Harmonizing EU Copyright Law' (2016) 47 IIC - International Review of Intellectual Property and Competition Law 635-39 <https://doi.org/10.1007/s40319-016-0509-2>

Yu PK, 'The Graduated Response' (2010) 62 Florida Law Review 1373-430

Carrera S, De Somer M and Petkova B, *The Court of Justice of the European Union as a Fundamental Rights Tribunal: Challenges for the Effective Delivery of Fundamental Rights in the Area of Freedom, Security and Justice* (2012)

Reports

Abbott A and Mossoff A, *Creativity and Innovation Unchained: Why Copyright Law Must be Updated for the Digital Age by Simplifying It*, 2017) <https://regproject.org/wpcontent/uploads/RTP-Intellectual-Property-Working-Group-Paper-Copyright.pdf>

Alliance CLR, *Analysis of National Levy Schemes and the EU Copyright Directive*, 2006) <http://eurimag.eu/index.php?id=12&cid=31&fid=15&task=download&option=com_flexicontent&Itemid=11>

Bently L and others, *Strengthening the Position of Press Publishers and Authors and Performers in the Copyright Directive*, 2017)

Bulayenko O and others, *Emerging Issues on Collective Licensing Practices: Final Report (forthcoming, 2021)*)

Callary S, *Annual Report 2004-2005*, 2005) <http://publications.gc.ca/collections/Collection/RG81-1-2005E.pdf>

Castex F, *Report on private copying levies (2013/2114(INI))*, 2013)

CISAC, *Private Copying Global Study*, 2017)

CMRRA/SODRAC, *Reproduction of Musical Works by Commercial Radio Stations*, 2003) <http://www.cb-cda.gc.ca/decisions/2003/20030328-rm-b.pdf>

Commission E, *Commission Staff Working Paper on the review of the EC legal framework in the field of copyright and related rights*, 2004)

Commission E, *Green paper on the online distribution of audiovisual works in the European Union: opportunities and challenges towards a digital single market*, 2011)

Commission E, *A Single Market for Intellectual Property Rights: Boosting creativity and innovation to provide economic growth, high quality jobs and first class products and services in Europe* (Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 2011) <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0287:FIN:en:PDF>

Copyright A, *Reforming the Copyright Board of Canada*, 2017) <https://www.ic.gc.ca/eic/site/693.nsf/vwapj/CBconsulations_2017_Submission_Access_Copyright.pdf>

CSPLA/Hadopi/CNC, "Les Outils De Reconnaissance Des Contenus Sur Les Plateformes Numériques De Partage. Propositions Pour La Mise En Œuvre De L'article 17 De La Directive Européenne Sur Le Droit D'auteur" (Report #2), 19 January 2021: https://www.hadopi.fr/sites/default/files/sites/default/files/ckeditor_files/2021_01_19_Rapport_CSPLA_Hadopi_CNC_Outils_de_reconnaissance.pdf

Daly P, *Best Practices in Administrative Decision-Making: Viewing the Copyright Board of Canada in a Comparative Light* (Report Prepared for the Canadian Heritage and Innovation, Science and Economic Development Canada, 2016) <https://ssrn.com/abstract=2782487>

Drexl J, *Copyright, Competition and Development*, 2013)

Geiger C, Bulayenko O and Frosio G, *Opinion of the CEIPI on the European Commission's Copyright Reform Proposal with a Focus on the Introduction of Neighbouring Rights for Press Publishers in EU Law*, 2016)

Guibault L, Westkamp G and Rieber-Mohn T, *Study on the Implementation and Effect in Member States' Laws of Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society* (Report to the European Commission, DG Internal Market, 2007)

Handke C, *Economic Effects of Copyright: The Empirical Evidence So Far* (Report for the National Academies of the Sciences, 2011)

Hargreaves I, *Digital Opportunity A Review of Intellectual Property and Growth*, 2011)

Helberger N, Dufft N and van Gompel S, *Digital Rights Management and Consumer Acceptability: A Multi-Disciplinary Discussion of Consumer Concerns and Expectations, State-of-the-Art Report*, 2004)

Hugenholtz B, Guibault L and van Geffen S, *The Future of Levies in a Digital Environment*, 2003)

Hugenholtz PB and others, *Recasting of Copyright Related Rights Knowledge Economy*, 2006) <ec.europa.eu/internal_market/copyright/docs/studies/etd2005imd195recast_report_2006.pdf>

Kretschmer M, *Private Copying and Fair Compensation: An empirical study of copyright levies in Europe*, 2011) <https://ssrn.com/abstract=2063809>

Majone G, Poli S and Surdej A, *Risk Regulation in the European Union: Between Enlargement and Internationalization*, 2003)

Manley J, *Copyright Board Canada: 1997-1998 Estimates. Part III Expenditure Plan*, 1997)

Mazziotti G, *Copyright in the EU Digital Single Market: Report of the CEPS Digital Forum*, 2013)

Office USC, *United States Copyright Office Annual Report 2019*, 2020)

Olivennes D, *'Le developpement et la protection des oeuvres culturelles sur les nouveaux reseaux novembre, Rapport au ministre de la culture et de la communication*, 2007)

Rose M, Clough R and Panjwani R, *Captured: Systemic Bias at the U.S. Copyright Office*, 2016)

Scharpf FW, *The double asymmetry of European integration: Or: why the EU cannot be a social market economy* (MPIfG Working Paper, 2009)

SOCAN, *Financial Report 2016*, 2016) <http://socanannualreport.ca/wp-content/uploads/2017/06/8773_SOCAN_Annual_Report_Print_V2_ENG_Financial.pdf>

Tkachuk D and Day J, *Copyright Board: A Rationale for Urgent Review* (Report of the Standing Senate Committee on Banking, Trade and Commerce, 2016) <https://sencanada.ca/content/sen/committee/421/BANC/Reports/FINALVERSIONCopyright_e.pdf>

Vitorino A, *Recommendations resulting from the mediation on private copying and reprography levies*, 2013) <http://ec.europa.eu/internal_market/copyright/docs/levy_reform/130131_levies-vitorinorecommendations_en.pdf. Alternatively https://www.mkcr.cz/doc/cms_library/130131_levies-vitorino >

Vos E, *EU Agencies, Common Approach and Parliamentary Scrutiny* (European Implementation Assessment, 2018)

WIPO, *Guide on Surveying the Economic Contribution of the Copyright Industries*, 2015)

WIPO and Thuiskopie Sd, *International Survey on Private Copying: Law and Practice 2016* (WIPO Publication No 1037E/17, 2017)

International Legal Instruments

Berne Convention for the Protection of Literary and Artistic Works, (1982)

WIPO Copyright Treaty, (1996)

WIPO Performances and Phonograms Treaty (1996)

Convention on the Protection and Promotion of the Diversity of Cultural Expressions, 1440 UNTS 311 (18 March 2007) (2007)

EU Directives and Regulations

Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society, OJ L 167 (2001)

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 (2001)

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 (2004)

Regulation 386/2012/EU of the European Parliament and of the Council of 19 April 2012 on ensuring the Office for Harmonization in the Internal Market (Trade Marks and Designs) with tasks related to the enforcement of intellectual property rights, including the assembling of public and private sector representatives as a European Observatory on Infringements of Intellectual Property Rights OJ L 129 (2012)

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 (2014)

Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) OJ L 119 (2016)

Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark, OJ L 154 (2017)

Directive 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, 17.5.2019 (2019)

EU Official Documents

Commission E, *Green Paper on Copyright and the Challenge of Technology* (1988)

Commission E, *European Governance - A White Paper* (2001)

Commission E, *Communication from the Commission: The operating framework for the European Regulatory Agencies* (2002)

Commission E, *Draft INTERINSTITUTIONAL AGREEMENT on the operating framework for the European regulatory agencies* (2005)

Commission E, *Intellectual Property Strategy – Frequently Asked Questions, MEMO/11/332* (2011)

Commission E, *Commission Staff Working Paper: Impact Assessment Accompanying the document 'Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation)' and 'Directive of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data. SEC(2012) 72 final* (2012)

Commission E, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Digital Single Market Strategy for Europe* (COM (2015) 192 final 2015)

Commission E, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Promoting a fair, efficient and competitive European copyright-based economy in the Digital Single Market* (2016)

Commission E, *Communication From The Commission To The European Parliament, The European Council And The Council: Further strengthening the Rule of Law within the Union State of play and possible next steps* (2019)

Commission E, *Communication from the Commission to the European Parliament and the Council: Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market* (2021)

Council E, *Council Regulation No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty* (2002)

Dialogue S, *Licenses for Europe: Ten pledges to bring more content online* (2013)

Virkkunen H, *Question for written answer E-002342/2020 to the Commission: Subject: Inaction on private copying levies* (2020)

Consolidated version of the Treaty on European Union, OJ C 326

Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326

Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1 (2003)

Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC, COM/2020/825 final (2020)

'Better Regulation' Guidelines, (2017)

EU Cases

Case C-230/16, Coty Germany [2017] ECLI:EU:C:2017:941

Case C-275/06, Productores de Música de España (Promusicae) v Telefónica de España SAU [2006] ECLI:EU:C:2008:54

Case C-301/15, Soulier [2016] ECLI:EU:C:2016:878

Case 9/56, Meroni & Co., Industrie Metallurgiche, SpA v High Authority of the European Coal and Steel Community ECLI:EU:C:1958:7

Case C-245/00, SENA ECLI:EU:C:2003:68

Case C-192/04, Lagardère Active Broadcast v SPRE and GVL ECLI:EU:C:2005:475

Case C-306/05, SGAE v Rafael Hoteles ECLI:EU:C:2006:764

Case C-5/08, Infopaq International ECLI:EU:C:2009:465

Case C-145/10, Painer ECLI:EU:C:2011:798

Case C-393/09, Bezpečnostní softwarová asociace ECLI:EU:C:2010:816

Case C-462/09, Stichting de Thuiskopie v. Opus Supplies Deutschland GmbH ECLI:EU:C:2011:397

Case C-467/08, Padawan ECLI:EU:C:2010:620

Case C-162/10 Phonographic Performance (Ireland) v Ireland ECLI:EU:C:2012:141

Case C-604/10, Football Dataco and Others ECLI:EU:C:2012:115

Joined cases C-274/11 and C-295/11, Judgment of the Court (Grand Chamber) of 16 April 2013 — Kingdom of Spain and Italian Republic v Council of the European Union ECLI:EU:C:2013:240 (CJEU)

Case C-201/13, Johan Deckmyn v. Helena Vandersteen ECLI:EU:C:2014:2132

Case C-435/12, ACI Adam and Others ECLI:EU:C:2014:254

Case C-466/12, Svensson and Others v Retriever Sverige AB ECLI:EU:C:2014:76

Case C 572/13, Hewlett-Packard Belgium SPRL v Reprobel SCRL ECLI:EU:C:2015:750

Case C-160/15, GS Media v Sanoma Media Netherlands BV and Others ECLI:EU:C:2016:644

Case C-470/14, EGEDA and Others ECLI:EU:C:2016:418

Case C-265/16, VCAST Limited v RTI SpA ECLI:EU:C:2017:913

Case C-310/17, Levola Hengelo BV ECLI:EU:C:2018:899

Austro-Mechana 33 R 50 / 20w (Oberlandesgericht Wien (Federal Chancellery of Austria, Higher Regional Court Vienna))

Case C-401/19, Republic of Poland v European Parliament and Council of the European Union

US Laws and Caselaw

Oil States Energy Services v. Greene's Energy Group U S

, *U.S. Constitution*

Graham SL, *S. 4632 "Online Content Policy Modernization Act"* (2020)

Office USC, *Music Modernization Act Implementing Regulations for the Blanket License for Digital Uses and Mechanical Licensing Collective: Notice of Inquiry* (2019)

Oman R and Peters M, *Letter to the Senate Subcommittee from Former Registers of Copyright Re: Removal of Maria Pallante as Register of Copyrights* (2016)

Pallante M, *Letter to Ranking Member of the Committee on the Judiciary John Conyers, Jr. Re: The U.S. Copyright Office: Its Functions and Resources* (2015)

Representatives USHo, *H.R.1695 - Register of Copyrights Selection and Accountability Act of 2017* (2017)

Strong M, *Section 512 of Title 17: A report of the Register of Copyrights* (2020)

Canadian Laws and Caselaw

Copyright Act (Canada), R.S.C., c. C-42 (last amended 1 July 2020), (1985)

Internet Sources

CREATe, *The Copyright Directive is failing (Open Letter to Members of the European Parliament and the Council of the European Union)* (2018)

Derclaye E, *Football Dataco: skill and labour is dead!* (2012)

EDRi, *The Netherlands, aim for a more ambitious copyright implementation!* (2019)

Goldman E, *Senator Graham Cares More About Trolls Than Section 230 (Comments on Online Content Policy Modernization Act)* (2020)

Guibault L, *Private copying levy: The aftershocks of Padawan* (2013)

Lausson J, *Pending reform, Hadopi will be entitled to 9 million euros in 2019* (2018)

Legal OC, *Private copy levy system: how do recent developments in Spain compare with other EU jurisdictions?* (2017)

Observatory CE, *Copyright Directive: how competing big business lobbies drowned out critical voices* (2018)

Ramalho A, *EU: Playing Sherlock, or spotting copyright consequences in patent cases* (2013)

Reda J, *EU Copyright Reform: Our Fight Was Not In Vain* (2019)

Rosati E, *New paper: What does the European Commission make of the EU copyright acquis when it pleads before the CJEU? The Legal Service's Observations in digital/online cases* (2019)

Samuelson P, *The US Copyright Office Section 512 Study: Why the Entertainment Industry Is Claiming Victory* (2020)

Schultis LA, Tune CA and O'Reardon ME, *More Ringtones To Choose Among: New Copyright Office Decision Simplifies Acquisitions With Compulsory Licensing* (2006)

Synodinou TE, *ECJ: Private copying levies II – the Stichting de Thiuskopie v. Opus Supplies Deutschland GmbH case* (2011)

Tinnefield C, *Copyright Levies in Germany – Settlement for Computers, Netbooks & Co.* (2014)

Weiss M-A, *What is in the Future for Private Copy Levies in the EU?* (2014)

CISAC, 'The History of Collective Management' <https://fr.cisac.org/content/download/1127/19620/file/CISACUniversity_The_History_of_Collective_Management_FINAL.pdf.>

, 'International agreements and the EU's external competences' (*Eur-LEX,*<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=legissum:ai0034>

(DPMA) GPaTO, 'Collective Management Organizations, Copyright' (<https://www.dpma.de/english/our_office/about_us/further_duties/cmos_copyright/index.html>

Board EDP, 'The CNIL's restricted committee imposes a financial penalty of 50 Million euros against GOOGLE LLC' (2019)<https://edpb.europa.eu/news/national-news/2019/cnils-restricted-committeeimposes-financial-penalty-50-million-euros_en>

Board USCR, 'United States Copyright Royalty Board: About Us' (2020) 25 October 2020 <https://www.crb.gov/>

Canada CBo, 'Model Directive on Procedure' (2010) 25 May 2018 <http://www.cb-cda.gc.ca/about-apropos/directive-e.html>

Canada CBo, 'Fact Sheet: Re:Sound Tariff 6.B – Use of Recorded Music to Accompany Physical Activities, 2008-2012' (2012) 29 May 2018 <www.cb-cda.gc.ca/tariffs-tarifs/certified-homologues/2012/06-07-2012_sheet.pdf>

Canada CBo, 'Raison d'être, mandate and role: who we are and what we do' (2018) 28 May 2018 <http://www.cb-cda.gc.ca/about-apropos/role-role/raisons-etre-e.html>

Canada Go, 'Copyright Collecting Societies' (<http://www.cb-cda.gc.ca/societies-societes/index-e.html>

Canada Go, 'History of Copyright in Canada' (2017)<https://www.canada.ca/en/canadian-heritage/services/history-copyright-canada.html>

Canada Go, 'Copyright Board of Canada: Information about programs and informational holdings' (2018)<https://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/access-information/information-about-programs-information-holdings/copyright-board-canada.html>

Canada Go, 'Governor in Council appointments: Government appointments' (2018)<https://www.canada.ca/en/privy-council/topics/appointments/governor-council.html>

Canada Go, 'Intellectual Property Strategy: Quotes' (*Innovation, Science and Economic Development Canada,* 2018) 28 May 2018 <https://www.canada.ca/en/innovation-science-economic-development/news/2018/04/quotes-backgrounder-intellectual-property-strategy.html>

CISAC, 'Information Services: CIS-Net' (2020) 1 October 2020 <https://www.cisac.org/What-We-Do/Information-Services/CIS-Net>

Commission E, 'The Directorate-General for Communications Networks, Content and Technology ' (<https://ec.europa.eu/info/departments/communications-networks-content-and-technology_en>

Commission E, 'Smart Regulation Impact' (<http://ec.europe.eu/smart-regulation/impact/index_en.htm>

Commission E, 'Strategy: Shaping Europe’s digital future' (<https://ec.europa.eu/digital-single-market/en/content/copyright-unit-i2>

Commission E, 'Modernization of the EU copyright rules' (2003) 28 May 2018 <https://ec.europa.eu/digital-single-market/en/modernisation-eu-copyright-rules>

Commission E, '"Licenses for Europe" Stakeholder Dialogue' (2013)<https://ec.europa.eu/digital-single-market/en/news/licences-europe-stakeholder-dialogue>

Commission E, 'Questions & Answers: EU negotiators reach a breakthrough to modernise copyright rules' (2019)<https://ec.europa.eu/commission/presscorner/detail/en/MEMO_19_1151>

Communia Association, “German Article 17 implementation law sets the standard for protecting user rights against overblocking”, 20 May 2021 <https://www.communia-association.org/2021/05/20/german-article-17-implementation-law-sets-the-standard-for-protecting-user-rights-against-overblocking/>

EASME, 'European IP Helpdesk' (2020) 9 October 2020 <http://www.iprhelpdesk.eu/>

EUIPO, 'AGORATEKA: The European Online Content Portal' (2020)<https://agorateka.eu/ea/>

Europe L, 'Rules and Regulations' (<https://lobbyeurope.org/rules-and-regulations/>

Frye BL, 'The CASE Act Is for Trolls' (2020)<https://www.jurist.org/commentary/2020/04/brian-frye-case-act/>

Germain A, 'Qu'est-ce que le NPVR ?' (2018)<https://www.programme-tv.net/news/evenement/la-tele-et-vous/208167-quest-ce-que-le-npvr/>

Helpdesk EI, 'Mediation on private copying and reprography levies: recommendations now available' (2012)<http://www.iprhelpdesk.eu/news/mediation-private-copying-and-reprography-levies-recommendations-now-available>

ICANN, 'Uniform Domain-Name Dispute Resolution Policy ' (<https://www.icann.org/resources/pages/dndr-2012-02-25-en#udrp>

JUSTIA, 'Executive Agencies' (2020) 25 October 2020 <https://www.justia.com/administrative-law/executive-agencies/>

Lex E, 'Glossary of summaries: COREPER' (<https://eur-lex.europa.eu/summary/glossary/coreper.html>

Observatory E, 'Online copyright infringement in the European Union' (2019) October 2020 <https://euipo.europa.eu/ohimportal/en/web/observatory/online-copyright-infringement-in-eu>

Office USC, 'Copyright Act of 1790' (2020) 21 October 2020 <https://copyright.gov/about/1790-copyright-act.html#:~:text=An%20Act%20for%20the%20encouragement,during%20the%20times%20therein%20mentioned.>

Office USC, 'Copyright Office Modernization -- September 2020' (2020)<https://www.copyright.gov/copyright-modernization/Quick%20Facts%20September%202020.pdf>

Office USC, 'Eighth Triennial Section 1201 Proceeding (2021)' (2020) 25 October 2020 <https://www.copyright.gov/1201/2021/>

Office USC, 'Music Modernization Act' (2020) 25 October 2020 <https://www.copyright.gov/music-modernization/>

Powered I, 'Ideas Powered: About Us' (2020) 9 October 2020 <https://www.ideaspowered.eu/en/about-us>

privee Lc, 'What is Private Copying? Private Copying in France' (2020 <http://www.copieprivee.org/en/la-copie-privee-cest-quoi/copie-privee-en-france/>

Relations QUIoI, 'Multilevel Governance Bodies: European Union institutions' (<https://www.queensu.ca/iigr/links/multilevel-governance-bodies-eu-institutions>

WIPO, 'WIPO Guide to the Uniform Domain Name Dispute Resolution Policy (UDRP)' (<https://www.wipo.int/amc/en/domains/guide/>

WIPO, 'WIPO PROOF' (2020) 25 October 2020 <https://wipoproof.wipo.int/wdts/>

Misc. Sources

School SL, *Tips for Writing Policy Papers: A Policy Lab Communications Workshop*

(Urheberrechtsgesetz – UrhG) Copyright Act of 9 September 1965 (Federal Law Gazette I, p. 1273), as last amended by Article 1 of the Act of 28 November 2018 (Federal Law Gazette I, p. 2014),

CISAC, *The Role of Collective Management Organisations*

Working Papers

Jordana J and Triviño-Salazar JC, 'European Union Agencies: A transnational logic?' <https://www.jstor.org/stable/resrep14166>

Lucchi N, 'Regulation and Control of Communication: The French Online Copyright Infringement Law (HADOPI)' Max Planck Institute for Intellectual Property and Competition Law Research Paper No 11-07

Favale M, Kretschmer M and Torremans P, *Is There a EU Copyright Jurisprudence? An Empirical Analysis of the Workings of the European Court of Justice* (2015)

Geradin D and Petit N, *The Development of Agencies at EU and National Levels: Conceptual Analysis and Proposals for Reform*

Karagiannis Y, *Why the EU does not have an independent competition agency: French Interests and Transaction Costs in Early European Integration* (2008)

Majone G, *The Agency Model: The Growth of Regulation and Regulatory Institutions in the European Union* (1994)

Mazziotti G, *New Licensing Models for Online Music Services in the European Union: From Collective to Customized Management* (2011)

Pelkmans J and Simoncini M, *Mellowing Meroni: How ESMA can help build the single market* (2014)

Gervais D and Renaud D, *The Future of United States Copyright Formalities: Why We Should Prioritize Recordation, And How To Do It* (Vanderbilt University Law School Public Law and Legal Theory 2013)

Golberg E, *'Better Regulation': European Union Style* (Mossavar-Rahmani Center for Business & Government, Harvard Kennedy School 2018)

Thesis Manuscripts

Klobučník L, 'Innovative Models for Multi-territorial Licensing of Musical Works for Online Use: An Answer to Rights' Fragmentation Problem?' (Queen Mary University of London, University of Augsburg (MIPLC) forthcoming, 2021)

Schönherr F, 'Construction of an EU Copyright Law: Towards a Balanced Institutional and Legal Framework' (Ph.D. Thesis Manuscript, Universite de Strasbourg 2015)

Wechs Hatanaka A, 'Mediation and intellectual property law: A European and comparative perspective' (University of Strasboug 2016)

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RESUME LONG (EN FRANÇAIS)

La technologie a offert de nombreuses nouvelles possibilités d'épanouissement de la créativité. À l'ère de l'interconnexion accrue, les réseaux numériques réunissent plus de consommateurs et d'œuvres créatives que jamais auparavant. Pourtant, ce phénomène a entraîné une foule de nouveaux défis réglementaires, les gouvernements se trouvant pressés par les parties prenantes d'examiner minutieusement l'application des lois sur le droit d'auteur dans un nouveau contexte numérique. Dans ce domaine très contesté du droit, il n'est pas surprenant que les discussions relatives à la modernisation de la législation sur le droit d'auteur soient devenues incroyablement conflictuelles. Les opinions des politiciens, des acteurs de l'industrie, des universitaires, des créateurs, des éditeurs et des utilisateurs individuels tendent à s'opposer sur l'orientation des solutions réglementaires - et sur l'orientation de la loi sur le droit d'auteur elle-même.

Si l'on remonte à ses premières formes, la conception des systèmes de droit d'auteur était centrée sur la réglementation d'un nombre limité de types différents d'œuvres tangibles qui circulaient sur des marchés relativement simples. Les supports physiques tels que les livres, les cartes et les partitions de musique, ainsi que les droits qui s'y rattachent, étaient beaucoup plus faciles à gérer dans un monde analogique qui évoluait lentement. Au fur et à mesure que la technologie progressait, la législation sur le droit d'auteur s'est élargie pour s'adresser à un ensemble diversifié de nouvelles parties prenantes ainsi qu'à de nouveaux types d'œuvres créatives circulant sur des marchés de plus en plus vastes, mondiaux et sans frontières.

La numérisation a provoqué un bouleversement de nombreuses notions fondamentales et préconçues sur le rôle et les fonctions d'un système de droit d'auteur dans la société. Contrairement aux transactions uniquement fondées sur des échanges physiques d'œuvres tangibles, le contenu créatif est désormais produit, téléchargé et accessible à un rythme beaucoup plus rapide et à une plus grande échelle. Sur les appareils et sur l'internet, un seul fichier peut être consommé un nombre illimité de fois sans perte de qualité entre le fichier original et les copies. Contrairement aux marchés "relativement simples" d'autrefois, ce nouveau marché du contenu pourrait plutôt être considéré comme un "réseau" d'échange, où l'accès - et non la propriété - est le principal article de commerce.

En outre, l'engagement du public à l'égard des œuvres créatives a pris de nouvelles formes. L'ère numérique a donné naissance à une vague de créativité sous la forme de contenu "généré

par l'utilisateur", transformant les citoyens ordinaires en créateurs amateurs en contact direct avec des questions complexes de droit d'auteur. Les utilisateurs disposent également d'un plus grand nombre d'options pour obtenir des œuvres, soit directement auprès des titulaires de droits, soit en y accédant par le biais d'intermédiaires en ligne.

Les intermédiaires en ligne, sous la forme de plateformes de partage de contenus créatifs, sont devenus de nouveaux acteurs importants ces dernières années et ont révolutionné le fonctionnement du marché des biens créatifs. La réglementation des intermédiaires en ligne qui traitent des contenus protégés par le droit d'auteur occupe une place controversée dans les sphères politiques internationales. La tâche est difficile, non seulement parce que les intermédiaires ont connu une croissance considérable en peu de temps, mais aussi parce que leur position sur le marché de la création les place au carrefour de nombreux intérêts publics et privés. Étant donné que d'importants droits fondamentaux sont en jeu - tels que la liberté de parole et d'expression, la protection de la vie privée et la sécurité -, il est essentiel de comprendre l'intersection de tous ces droits avec le droit d'auteur pour concevoir une réglementation appropriée. En d'autres termes, il n'est plus possible de concevoir le droit d'auteur comme un régime spécifique réglementant uniquement des comportements spécifiques. Le discours sur le droit d'auteur doit être plus large et interdisciplinaire que jamais à la lumière des utilisations potentielles du droit d'auteur pour défendre le discours politique, empêcher l'accès aux documents dans l'intérêt public, ou permettre de nouvelles formes de diffusion de contenu et de nouvelles utilisations du contenu pour le bien public.

Bien que la nécessité d'un discours plus large sur le droit d'auteur à l'ère numérique soit évidente, les efforts de réforme se sont concentrés sur des groupes d'intérêts étroits et sur des changements progressifs de la loi. Ces dernières années, les efforts d'adaptation du droit d'auteur ont le plus souvent pris la forme d'un renforcement des protections des titulaires de droits plutôt que d'un affaiblissement de celles-ci. Le droit d'auteur, lorsqu'il est reconnu comme un droit de propriété, incite les législateurs à "définir les droits d'une manière plus précise", ce qui ajoute des complexités et de nouveaux défis à l'application des droits. Un exemple clé de ce phénomène est apparu en mai 2015, lorsque la Commission a proposé pour la première fois la stratégie du "marché unique numérique" pour l'UE, visant à moderniser les politiques en matière de marketing numérique, de commerce électronique et de télécommunications d'ici à 2020. Cette stratégie, qui aboutira à l'adoption de la directive CDSM en 2019, a fait l'objet d'un débat acharné entre les parties prenantes et a représenté un investissement politique et financier massif pour l'UE. Cependant, en tentant de répondre à la

numérisation, la directive semble ajouter plus de complexités qu'elle n'en réduit, en découpant des protections plus particulières pour des groupes de parties prenantes spécifiques. En 2020, alors que les États membres entreront dans la phase de mise en œuvre, leurs approches divergentes compliqueront encore davantage l'environnement réglementaire du droit d'auteur dans l'UE pour les années à venir. Compte tenu du défi actuel que représente l'adaptation du droit d'auteur dans un contexte numérique, est-il encore possible de trouver une "approche européenne" cohérente du droit d'auteur ?

Pour comprendre la complexité d'une conception unifiée du droit d'auteur dans l'UE, on peut identifier deux ensembles de questions fondamentales : l'un concerne les divergences dans la théorie sous-jacente du droit d'auteur dans l'UE, et l'autre les limites des institutions actuelles qui mettent en œuvre les politiques et les normes de l'UE en matière de droit d'auteur, l'accent étant mis sur ce dernier point dans la présente thèse.

De nombreuses institutions européennes ont des compétences qui sont définies par l'avancement de missions orientées vers l'économie, et tendent à favoriser la rhétorique d'une "industrie" créative qui bénéficie de régimes plus forts basés sur les droits de propriété. C'est notamment le cas des acteurs politiques et des législateurs au niveau de l'UE. Les pressions extérieures aux institutions, y compris de la part de l'industrie créative elle-même, se sont particulièrement intensifiées au fil des ans pour soutenir le renforcement de la protection des titulaires de droits en tant que droit de propriété. Ces pressions se sont traduites par de nombreuses exceptions législatives complexes et à court terme, garantissant des niveaux de protection toujours plus élevés pour des types de droits spécifiques et permettant des restrictions d'utilisation plus importantes. Ces types de dispositions juridiques représentent sans doute des compromis politiques plutôt qu'un véritable intérêt pour la promotion d'un corpus équilibré ou totalement harmonisé de lois sur le droit d'auteur dans l'UE. En négociant constamment entre l'application de règles économiques, basées sur la propriété et orientées socialement/culturellement, les États membres peuvent, dans la mise en œuvre de la législation de l'UE, adopter des solutions réglementaires très différentes pour les mêmes problèmes, perpétuant ainsi des messages politiques contradictoires dans les législatures et les tribunaux nationaux. Alors que l'environnement réglementaire des biens créatifs continue de se complexifier, il devient difficile de trouver un terrain d'entente pour réglementer les droits d'auteur dans l'UE. Il est donc nécessaire d'envisager des voies alternatives et non conventionnelles pour la réforme du droit d'auteur.

ii. Envisager une approche institutionnelle de la réforme du droit d'auteur

Au fil des ans, un certain nombre d'études ont mis l'accent sur le rôle des institutions dans la résolution des problèmes réglementaires croissants posés par la législation sur le droit d'auteur. Ces travaux identifient globalement les problèmes liés à l'incapacité de la législation à fixer efficacement des objectifs à long terme en matière de droit d'auteur et renforcent les doutes quant à la capacité de la loi seule à résoudre les problèmes systémiques liés à la réglementation du droit d'auteur. Alors que les propositions législatives continuent d'encourager les approches "uniques" de la réforme et que les tribunaux continuent de faire référence à des notions floues ou vagues dans la loi, les chercheurs continuent de s'interroger sur la trajectoire de ces efforts.

Les institutions méritent d'être examinées de près parce qu'elles servent de balises principales pour orienter le fonctionnement du droit. En tant que construction sociale, les institutions donnent une forme organisationnelle aux idées politiques et sociales qui définissent une société. Les institutions représentent les intérêts des parties prenantes, renforcent la légitimité de leur domaine réglementaire spécifique et facilitent la coordination entre les différents niveaux d'acteurs gouvernementaux afin d'atteindre des objectifs politiques cohérents. Les institutions peuvent également permettre aux intérêts sous-représentés de se faire entendre et, parfois, leurs actions peuvent viser explicitement à sauvegarder le bien-être public par le biais de la conception de leur mandat. À certains égards, les institutions peuvent être porteuses d'un sentiment de "mémoire institutionnelle", ou de l'idée que leur mission peut survivre à la durée de vie de régimes politiques changeants et aux changements de gouvernement. Lorsqu'elles sont suffisamment indépendantes de l'influence du gouvernement, les institutions peuvent également se voir confier la tâche complexe d'équilibrer les intérêts d'une manière politiquement neutre. Ce type d'équilibre actif ne se produit pas nécessairement "de la base au sommet" dans les régimes privés ou d'autorégulation, qui manquent souvent du niveau de transparence nécessaire pour garantir que les intérêts publics sont correctement sauvegardés.

Alors que la Commission européenne publie des instruments politiques qui continuent à mettre en avant des objectifs ambitieux pour soutenir un "marché unique numérique", il est surprenant que ces instruments n'abordent souvent pas les questions de gouvernance et de conception institutionnelles. Lorsqu'il s'agit d'objectifs politiques à mettre en œuvre par un système de gouvernance aussi complexe et interdépendant que celui de l'UE, une analyse des capacités et des limites des institutions de l'UE à réglementer les caractéristiques importantes du système du droit d'auteur devient cruciale. C'est particulièrement le cas lorsque les objectifs politiques visent à établir des objectifs sociétaux plus larges, qui nécessitent des

niveaux élevés de coopération interinstitutionnelle pour réaliser une réforme véritablement "à l'échelle de l'UE". L'examen des systèmes et institutions de régulation du droit d'auteur dans l'UE est donc une enquête nécessaire et opportune, compte tenu du besoin pressant de réexaminer la manière dont la régulation peut être rendue plus cohérente et mieux adaptée aux innovations en matière de technologie, d'accès au contenu et de diffusion.

III. QUESTION DE RECHERCHE, MÉTHODOLOGIE ET DÉFINITIONS

En associant la "théorie du choix institutionnel" à une analyse de l'adaptation de la législation sur le droit d'auteur dans l'UE, cette thèse vise à atteindre deux objectifs interdépendants d'un point de vue institutionnel. Premièrement, le cadre institutionnel actuel de l'UE pour la réglementation du droit d'auteur sera évalué, en pesant les forces et les limites de la configuration actuelle en termes de réalisation des objectifs du droit d'auteur. Deuxièmement, en examinant certains problèmes spécifiques de droit d'auteur auxquels les États membres de l'UE sont actuellement confrontés, le potentiel de nouvelles formes de coordination et/ou d'intervention institutionnelle sera envisagé.

i. Question de recherche

La question principale et les sous-questions de la recherche ont été définies comme suit :

- Comment les institutions du droit d'auteur dans l'UE devraient-elles être reconceptualisées et/ou optimisées pour réglementer le droit d'auteur à l'ère numérique ?
    - Quelles sont les lacunes dans la représentation des parties prenantes qui existent dans le cadre institutionnel et réglementaire actuel du droit d'auteur ? [Partie I].
    - Comment les expériences d'autres organismes de réglementation du droit d'auteur dans d'autres juridictions peuvent-elles contribuer à influencer la conception des institutions de l'UE pour faire face aux problèmes liés au droit d'auteur ? [Partie II]
    - Quelles sont les questions spécifiques à l'UE qui subsistent en matière de droit d'auteur et qui pourraient être abordées d'un point de vue institutionnel ? [Partie III]
    - Quelles devraient être les principales caractéristiques d'un nouveau cadre pour les institutions européennes chargées du droit d'auteur ? [Options politiques, recommandation finale]

ii. Méthodologie

Dans la première partie, cette thèse évaluera comment les limites actuelles du cadre institutionnel de l'UE contribuent à l'incohérence politique globale en matière de droit d'auteur, en utilisant la théorie du choix institutionnel pour guider l'analyse institutionnelle comparative. Cette partie combinera des méthodes descriptives et normatives pour analyser

l'efficacité du système actuel dans la régulation et l'application du droit d'auteur. La conclusion de cette partie portera sur les points forts et les limites de la configuration institutionnelle actuelle de l'UE, en procédant à une analyse comparative pour mettre en évidence les domaines nécessitant une réforme.

La partie II examine les institutions administratives chargées du droit d'auteur dans d'autres juridictions (États-Unis et Canada) afin d'offrir une perspective sur la manière dont les questions de droit d'auteur peuvent être traitées par les acteurs institutionnels. L'analyse des institutions du droit d'auteur sélectionnées dans ces juridictions sera finalement utilisée en partie pour informer la conception d'un acteur institutionnel ou d'un arrangement institutionnel potentiellement nouveau dans l'UE, comme développé dans la partie III.

Dans la partie III, cette thèse proposera comment les institutions de l'UE peuvent être adaptées pour répondre aux problèmes actuels de régulation du droit d'auteur dans les contextes numériques. Cette partie comprend une analyse normative des différentes "fonctions" potentielles d'un acteur administratif face à des questions juridiques spécifiques liées au droit d'auteur. Comme le montre cette partie, la résolution adéquate de ces problèmes peut nécessiter la création d'un nouvel organe de régulation au niveau de l'UE, capable de garantir que la politique du droit d'auteur est menée de manière plus uniforme et plus cohérente dans l'UE.

La conclusion de cette thèse prend la forme de recommandations politiques, soulignant plusieurs options potentielles d'adaptation, de coopération ou de réforme institutionnelle. Le choix des "options" pour la révision du système institutionnel actuel sera discuté et les options proposées seront brièvement comparées les unes aux autres en termes d'efficacité potentielle pour traiter les problèmes identifiés et de faisabilité pratique.

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EU Copyright Reform: An Institutional Approach

Résumé de Thèse

Cette thèse a pour objet d'étudier comment le dispositif institutionnel actuel pour l'adaptation du droit d'auteur dans l'Union européenne peut être reconsidéré afin de promouvoir le niveau de cohérence plus élevé dans les pratiques réglementaires des États membres, ainsi que dans l'intérêt de la promotion d'un corps de règles européennes plus dynamiques en la matière.

À l'aide de l'outil normatif de l'analyse institutionnelle comparative, les dispositions institutionnelles actuelles sont examinées, en se concentrant sur la qualité de la participation des parties prenantes du droit d'auteur dans le système politique, le marché et les tribunaux. Des exemples d'institutions administratives du droit d'auteur dans certaines juridictions (États-Unis et Canada) sont analysés plus en détail, en tirant des conclusions sur leurs fonctions et leurs rôles dans leurs systèmes juridiques respectifs. Enfin, cette thèse propose plusieurs solutions politiques, y compris la possibilité d'envisager une nouvelle autorité au niveau de l'Union européenne pour le droit d'auteur. En fin de compte, la remise en question du statu quo institutionnel dans l'Union européenne peut révéler de nouvelles voies prometteuses pour développer les fonctions administratives, quasi judiciaires, d'observation et de conseil nécessaires à la gestion du droit d'auteur à l'ère du numérique.

Mots-clés : droit de la propriété intellectuelle, droit d'auteur, institutions, analyse institutionnelle comparative, marché unique numérique.

This thesis investigates how the current institutional arrangement for adapting copyright law in the EU can be reconsidered in light of promoting greater levels of coherency in Member State regulatory practices, as well as in the interest of promoting a more dynamic body of EU copyright rules fit for a digital age.

Using the normative tool of comparative institutional analysis, the current institutional arrangement for administering copyright law in the EU is scrutinized, focusing on the quality of copyright stakeholders' participation in the political system, marketplace, and courts. Examples of copyright administrative institutions in selected jurisdictions (U.S. and Canada) are further analysed, drawing inferences from their functions and roles in their respective legal systems. Finally, the research proposes several policy options, including consideration of a new EU level authority for copyright. Such an institution may provide a promising new avenue for developing administrative, quasi-judicial, observatory and advisory functions, thereby improving copyright regulatory practices in the EU.

Keywords: Intellectual Property Law, Copyright, Institutions, Comparative Institutional Analysis, Digital Single Market.