Interlegality - Symposium

The 'Two Suns' of EU Digital Copyright Law: Reconciling Rightholders' and Users' Interests via Interlegality

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Abstract

Copyright law is an emblematic example of the restless relationship between law and technology. The discipline fundamentally aims at striking a fair balance between the interests of copyright owners and users and, as the ongoing process of EU copyright reform demonstrates, digital technologies play a key role in pursuing this objective. The EU transition towards a digital-based copyright paradigm shows how achieving a balanced and context-sensitive legal framework requires taking into account elements from coexisting legal systems as well as from the technological normative ecosystem. Providing concrete examples of the intertwined nature of copyright law and digital technologies when it comes to protecting clashing interests, the article illustrates the 'interlegal' pattern emerging from the CJEU, which unveils a composite understanding of law and offers meaningful insights into the future of the EU digital copyright legal framework.

I. Introduction

In 14th century Florence, poet and philosopher Dante Alighieri thought that 'a twofold directive' was necessary to mankind in order to achieve a 'twofold end', namely terrestrial and eternal happiness.[1] By doing so, he passionately endorsed the so-called theory of the two suns, according to which the State and the Church enjoyed separate and equally legitimate power to govern society. Looking at today's digital world, Dante's imagery is inspiring, to say the least. Within a staggering number of activities and transactions moving online, it is not hard to notice how our economic and social life is illuminated by 'two suns': law and technology. Both legal and technological rules play an essential role in governing our behaviors and interactions in the digital environment, creating incentives and disincentives, enabling or prohibiting certain actions, and they

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[1] See A. Henry ed and transl, *The De Monarchia of Dante Alighieri* (Boston: Houghton Mifflin Company, 1904), available at https://tinyurl.com/46828r22 (last visited 31 December 2021).

do so not without frictions.

Copyright law is a good example to showcase the interplay of these two dimensions. After having regulated for almost three centuries a wide range of creative sectors – including and not limited to literature, music, audiovisual, press, scientific publishing – the copyright discipline has faced an unprecedented need to adapt and re-state its validity in an Internet-dominated world. As we create and consume cultural and creative contents increasingly in a digital format, copyright legal systems are showing considerable difficulties in addressing new issues and ensuring legal certainty in the online world. The digital dimension represents, in fact, a major disruption in the way copyright rules are conceived, applied, and enforced for numerous reasons.[2] Among them, the Internet's consolidating capacity to self-regulate[3] and the substantial political influence of Internet-based actors serving as intermediaries in the markets of copyrighted content[4] are two distinctive features that make digital technologies not a mere piece of the contextual background of the copyright discipline, but one of the two 'suns' illuminating its evolution.

Against this backdrop, Dante's words become even more insightful. Both copyright legislations and Internet's operative rules pursue a 'twofold end', that is to protect rightholders and, at the same time, to enable access and wide dissemination of their works. To achieve such objective and ensure a sustainable balance between the interest of authors and users, the need is – in Dante's words – for a 'twofold directive', that is to say a coordinated and context-aware guidance stemming both from law, and from technology. This article aims to explore to what extent EU copyright law, in particular, has taken into consideration external and technological factors while addressing the needs and interests involved in the digital society. In this vein, the analysis retraces the most recent developments relevant to the discipline, which since 1991 has been moving towards an ever-higher degree of harmonization and, lately, modernization (Section 2).

[2] The disruptive impact of the digital dimension over copyright law has been so overwhelming to make some scholars wonder whether the discipline could survive the digital era at all. See, among others, E. Samuels, 'Can our current conception of copyright law survive the Internet age?' 46 *New York Law School Law Review*, 221-230 (2002); G.S. Lunney, 'The death of copyright: Digital technology, private copying, and the Digital Millennium Copyright Act' 87(5) *Virginia Law Review*, 813-920 (2001).

[3] The questions as to whether and to what extent the Internet can be considered a self-standing normative order has been subject to seminal studies across the spectrum of social sciences. Common denominator of most contributions is the emphasis on the Internet's overwhelming capacity to influence decision-making processes at both individual and collective levels, thus evolving towards – if not already displaying – a normative potential that distinctively characterizes the Internet as a 'non-neutral' technology. See, among others, L. Floridi, *The Fourth Revolution. How the Infosphere is Reshaping Human Reality* (Oxford: Oxford University Press, 2004); M.C. Ketteman, *The Normative Order of the Internet. A Theory of Rule and Regulation Online* (Oxford: Oxford University Press, 2020).

[4] B. Farrand, *Networks of Power in Digital Copyright Law and Policy. Political Salience, Expertise and the Legislative Process* (London: Routledge, 2014).

Attention is paid to the role and impact of digital technologies in this process of legal reform, inquiring into the expressed need to achieve copyright's objectives in a sustainable and effective way in the online environment (Section 3). Against this legislative background, the study unveils how the influence of both 'suns' in the evolution of the copyright discipline has recently led the Court of Justice of the European Union (CJEU) to develop a composite, or interlegal, interpretation of EU copyright rules (Section 4), shedding some light on how the future of the digital copyright legal framework in Europe may look like.

II. The One Sun: *Law* and the Quest for a Fair Balance

The copyright legal paradigm is notoriously associated with the protection of the author. In Continental Europe, where the discipline has taken the label of *droit d'auteur*, as well as in the Anglophone tradition, moral and economic rights of those creating original content have been at the forefront of the development of the discipline.[5] Subsequently, until very recently, the end-user has been the great absentee in the copyright discourse.[6] Across the national legal systems, the consumers of creative contents have been an unspoken stakeholder. Since the vague reference to the 'encouragement of learning' evoked in the very first copyright legislation – the Statute of Anne of 1710[7] – and the hints to the 'social utility' of protected works in the French Revolutionary Decrees of 1791 and 1793,[8] the pursuit of a greater public good has long remained the elephant in the room both in the common law and civil law copyright traditions. Along these lines, copyright has consolidated over the centuries in the form of a bundle of exclusive rights allowing authors to authorize and retain control over the exploitation of their works and, in turn, profit from it. At the same time, the need to enable society to access copyrighted content and flourish has determined the limits of such entitlements and, in particular, their limited duration and scope.

Even though the definition of these boundaries has been a key constitutive

[5] See, among others, the historical analyses of P. Baldwin, *The Copyright Wars. Three Centuries of Trans-Atlantic Battle* (Princeton: Princeton University Press, 2014), 126; J.C. Ginsburg, ' "Une Chose Publique"? The Author's Domain and the Public Domain in Early British, French and US Copyright Law' 65 *Cambridge Law Journal*, 637-638 (2006).

[6] See J. Cohen, 'The place of the user in copyright law' 74 *Fordham Law Review*, 347-374 (2005).

[7] An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, During the Times therein mentioned, 1710, 8 Anne, c 19 (Statute of Anne) available in L. Bently and M. Kretschmer eds, 'Primary Sources on Copyright (1450-1900)', available at https://www.copyrighthistory.org (last visited 31 December 2021). See also M. Rose, 'The Public Sphere and the Emergence of Copyright: Areopagitica, the Stationers' Company and the Statute of Anne' in R. Deazley et al eds, *Privilege and property: Essays on the history of copyright* (Cambridge: Open Book Publishers, 2010), 67-88.

[8] Report of Le Chapelier accompanying the Decree of 1791; Report of Lakanal accompanying the Decree of 1793, both available in L. Bently and M. Kretschmer eds, n 7 above.

moment of national, supranational, and international copyright systems,[9] the protection of copyright exclusive rights has progressively expanded over time. Not only their duration has been extended,[10] but also their expansive interpretation,[11] the recognition of additional sui generis and related rights,[12] and restrictive approaches towards permitted uses[13] have further promoted an author-centric perspective in copyright legislation. As a result, the role of end-users has remained marginalized, thus marking a fundamental imbalance in the protection of rights and interests involved.[14] The process of harmonization of national copyright rules initiated in 1991 in the EU[15] has perpetuated this imbalance, consolidating and uniformizing the central role of the exclusive rights to exploit one's own works,[16] ensuring their long duration,[17] and addressing only to a minimal extent their

[9] See M. Borghi, 'A Venetian Experiment on Perpetual Copyright' in R. Deazley et al eds, n 7 above, 137-156; G. Ghidini, *Rethinking Intellectual Property. Balancing Conflicts of Interest in the Constitutional Paradigm* (Chelthenham: Edward Elgar, 2018), 177-183.

[10] It has been argued that the current duration, internationally harmonized to a minimum of fifty years *post mortem auctoris* and crystallized in the EU to seventy years *post mortem auctoris*, virtually corresponds to a perpetual protection. See L. Zemer, *The Idea of Authorship in Copyright* (Farnham: Ashgate, 2007), 224; J. Boyle, *The Public Domain: Enclosing the Commons of the Mind* (New Haven: Yale University Press, 2008), 11; D.R. Desai, 'The Life and Death of Copyright' 2 *Winsconsin Law Review,* 219 (2002).

[11] A phenomenon often described as a 'second strand of protection' or 'second enclosure', characterized by a 'persistent hegemony of the exclusionary model'. See, respectively, M. Ricolfi, 'Intellectual Property Rights and Legal Order' 2 *Global Jurist* (2002); J. Boyle, 'The Second Enclosure Movement and the Construction of the Public Domain' 66 *Law and Contemporary Problems*, 33 (2003); G. Ghidini, n 9 above, 219.

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

[13] See M. Senftleben, 'From Flexible Balancing Tool to Quasi-Constitutional Straitjacket. How the EU Cultivates the Constraining Function of the Three-Step Test' in T. Mylly and J. Griffiths eds, *The Transformation of Global Intellectual Property Protection* (Oxford: Oxford University Press, 2021); T. Aplin and L. Bently, 'Displacing the Dominance of the Three-Step-Test: The Role of Global Mandatory Fair Use' in S. Balganesh et al eds, *The Cambridge Handbook of Copyright Limitations and Exceptions* (Cambridge: Cambridge University Press, 2021), 37-58; J.P. Quintais, 'Rethinking Normal Exploitation: Enabling Online Limitations in EU Copyright Law' 6 *AMI - tijdschrift v oor auteurs-, media- en informatierecht*, 197-205 (2017).

[14] M. Ricolfi, n 11 above ('The delicate balance of copyright is tilted; and is tilted in favor of holders and to the detriment of users').

[15] With the Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs [1991] OJ L122/42 (Computer Programs Directive). See also Green Paper of the European Commission, 'Copyright and the Challenges of Technology - Copyright Issues Requiring Immediate Action' [1988] 172 final.

[16] Arts 2, 3 and 4 of European Parliament and Council Directive 2001/29/EC of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society [2001] OJ L167 (InfoSoc Directive).

[17] See Art 9 Berne Convention for the Protection of Literary and Artistic Works of 1886; Art 1 of Directive 2006/116/EC on the term of protection of copyright and certain related rights [2006] OJ L372/12 (Term Directive). See also Recital 11 Term Directive, which counterintuitively justifies the enhancement of the protection of rightholders listing also consumers and the whole society as beneficiaries ('The level of protection of copyright and related rights should be high, since those rights are fundamental to intellectual creation. Their protection ensures the maintenance

limitations.[18] This has caused a substantial fragmentation across the EU with regards to permitted uses and protection of end-users' interests.

However, recent developments in EU copyright law show a growing sensitivity in this direction. The EU legislator has put forward an agenda of copyright modernization, aiming, among others, at taking end-users' interests more seriously. Epitomizing this shift is the notion of 'fair balance of rights and interests',[19] which has become a lighthouse of EU copyright law-making and its related interpretation. In this vein, since 2021 with the adoption of the Orphan Works Directive,[20] the EU legislator has strategically intervened to promote the use of orphan works, out-of-commerce content, and the public domain,[21] as well as to facilitate access to works by persons with visual impairments and other disabilities,[22] support cultural heritage institutions,[23] and foster education and scientific research across the Union.[24] The most recent 2019 CDSM Directive represents the most advanced recognition of the role of end-users within the EU copyright legal framework, stressing the need to strike a fair balance of rights and provide legal certainty to rightholders of creative content as well as its users.[25] As highlighted by Séverine Dusollier, the recent legislative steps undertaken towards a more balanced copyright protection in the EU not only help overcome the problem of legal fragmentation, but also unveil a deeper paradigmatic shift in the discipline: the EU's approach towards the boundaries of copyright protection and, in particular, of permitted uses seems to have 'mutated from mere limitations of exclusive rights to proper enabling devices sustaining socially-benefiting uses of works and creations',[26] thus raising the question of how – rather than whether – end-users' interests can be protected online.

and development of creativity in the interest of authors, cultural industries, consumers and society as a whole').

[18] See Art 5 InfoSoc Directive.

[19] ibid Recital 31 ('A fair balance of rights and interests between the different categories of rightholders, as well as between the different categories of rightholders and users of protected subject-matter must be safeguarded'). See also Recital 6 of Directive 2019/790/EU on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L130 (CDSM Directive).

[20] European Parliament and Council Directive 2012/28/EU of 25 October 2012 on certain permitted uses of orphan works [2012] OJ L299 (Orphan Works Directive). See also European Commission Communication 'Copyright in the Knowledge Economy' COM (2009) 532 final.

[21] Respectively, Art 6 Orphan Works Directive and Arts 8, 9, and 14 CDSM Directive.

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

[23] Art 6 CDSM Directive.

[24] ibid Arts 3-5.

[25] ibid Recitals 3, 6.

[26] S. Dusollier, 'The 2019 Directive on Copyright in the Digital Single Market: Some Progress, a Few Bad Choices, and an Overall Failed Ambition' 57 *Common Market Law Review*, 981 (2020).

III. The Other Sun: *Technology* and the Need for Effectiveness

The two main drivers of EU copyright reform can be identified in international legal obligations and the digital environment. Whereas the former places the EU process of copyright harmonization within a wider frame of coordinated trade, advancement of democratic values and social inclusivity,[27] the latter necessarily brings the discipline to face changes occurring outside the realm of blackletter law. In particular, the focus on digital technologies has strongly characterized the evolution of EU copyright rules. The EU legislator took up the challenge of the digital age and embarked on a journey of modernization of the discipline, specifically aiming at turning the EU single market into a prosperous and highly competitive digital economy.[28] It is thus by no means an overstatement to argue that the main push towards a more modern, more European, and more balanced copyright legal framework[29] comes from the Internet.

In fact, the advent of digital technologies has notably exacerbated the imbalance underlying copyright regulation, further polarizing the claims at stake: on the one side, rightholders seek stronger protection from digital piracy, while, on the other side, end-users advocate their rights and freedoms to access content and participate to the cultural life now that technology unprecedently enables them to do so.[30] Furthermore, copyright owners can rely not only on a stronger legal protection, but also on a decisive apparatus of collective representation and management of their rights. On the contrary, the end-users' efforts to plead their causes and secure their legitimate interests are inevitably more fragmented, and the legal scholarship has lagged behind in conceptualizing ways to provide them with equal legal footing, with the exception of a few pioneering attempts[31] and a few proposals dovetailing the copyright and consumer protection landscapes.[32] On top of the polarization of claims involved in the

[27] See, among others, World Intellectual Property Organization (WIPO) Copyright Treaty of 1996; WIPO Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled of 2013.

[28] European Commission Communication 'A digital agenda for Europe' COM (2010) 245 final/2; European Commission Communication 'Shaping Europe's digital future' (2020), available at https://tinyurl.com/47dv5dnb (last visited 31 December 2021).

[29] European Commission Communication 'Towards a more modern, more European copyright framework' COM (2015) 626 final.

[30] See K. Gracz and P. De Filippi, 'Regulatory Failure of Copyright Law Through the Lenses of Autopoietic Systems Theory' *International Journal of Law and Information Technology*, 1-33 (2014).

[31] See Z. Efroni, *Access-Right: The Future of Digital Copyright Law* (Oxford: Oxford University Press, 2011); M. Borghi, 'Exceptions as Users' Rights in EU Copyright Law' *CIPPM Jean Monnet Working Papers,* no 06 (2020). See also J. Cohen, n 6 above; J.C. Ginsburg, 'Authors and Users in Copyright' 1 *Journal of the Copyright Society of the USA*, 45 (1997); L.R. Patterson and S.W. Lindberg, *The Nature of Copyright: A Law of Users' Rights* (Athens: University of Georgia Press, 1991).

[32] See N. Helberger and B.P. Hugenholtz, 'No place like home for making a copy: Private copying in European copyright law and consumer law' 22 *Berkeley Technology Law Journal*,

expanded digital markets of copyrighted contents, the Internet's ability to self-regulate – famously conveyed by Lawrence Lessig's expression 'code is law'[33] – adds to the picture, unveiling the non-neutral role of digital technologies and their embedded potential to side with either rightholders or end-users. In this specific regard, it is as counterintuitive as evident to observe how the protectionist approach embraced in the terms and conditions of online services and platforms,[34] the reliance on technological protection measures and lock-up mechanisms that more often than not fails to secure adequate room for the exercise of copyright limitations,[35] and the de facto enabling of a pay-for-access and on-demand culture[36] play in favor of the former, disfavoring end-users.

Against this backdrop, the EU legislator advances the agenda of copyright modernization putting emphasis not only on the need to strike a fair balance of rights and interests, but also to ensure that such balance is effectively achieved in the digital environment. In particular, the EU legislator expresses the intention to intervene on the permitted uses allowed *ex lege* by way of copyright exceptions and limitations, whose weakened role and fragmented regulation across the EU puts the interests of end-users and the public at large in jeopardy, especially in the digital environment. It is in this vein that already in 2001, with the InfoSoc Directive, attention was paid to the need to 'reassess' copyright provisions on permitted uses to make them fit for the transborder exploitation of works and cross-border activities.[37] Even more explicitly, the CDSM Directive aims to

1061-1098 (2007); J. Schovsbo, 'Integrating Consumer Rights into Copyright Law: From a European Perspective' 31(4) *Journal of Consumer Policy*, 393-408 (2008); Y. Benkler, 'From Consumers to Users: Shifting the Deeper Structures of Regulation Toward Sustainable Commons and User Access' 52 *Federal Communications Law Journal*, 561 (2000).

[33] L. Lessig, *Code and Other Laws of Cyberspace* (New York: Basic Books, 1999). See also L. Lessig, 'Code Is Law. On Liberty in Cyberspace' *Harvard Magazine*, 1 January 2000.

[34] See S. Dusollier, 'Sharing Access to Intellectual Property Through Private Ordering' 82 *Chicago-Kent Law Review*, 1393 (2007) ('Generally, use of private ordering mechanisms has been a way to expand the monopoly granted by the law and to constrain or prevent the free use of resources by the public'); M. Ricolfi, n 11 above ('What are the terms or conditions which are accepted under a click-wrap license? (...) You accept that you cannot re-sell or even lend for free the accessed material. Therefore, you give up the benefits conferred on you by the first sale doctrine. That you give up also any fair use defence you may have: you can neither reuse it in whole or in part, not even for the purpose of teaching nor you may quote from it, even for the purpose of discussion and criticism. The prohibition concerns protected as well as unprotected material and therefore concerns not only the form of representation of the work but its contents; it extends to the facts, to the ideas').

[35] See S. Dusollier, 'Technology as an Imperative for Regulating Copyright: From the Public Exploitation to the Private Use of the Work' 27 *European Intellectual Property Review*, 201 (2005); N. Elkin-Koren and M. Perel, 'Accountability in Algorithmic Copyright Enforcement' 19 *Stanford Technology Law Review*, 473 (2016); M. Myška, 'The True Story of DRM' 2 *Masaryk University Journal of Law and Technology*, 267-278 (2009).

[36] See E. Lucchi, Digital Media and Intellectual Property. Management of Rights and Consumer Protection in a Comparative Analysis (Berlin: Springer, 2006).

[37] Recital 31 InfoSoc Directive ("The existing exceptions and limitations to the rights as set out by the Member States have to be reassessed in the light of the new electronic environment. Existing differences in the exceptions and limitations to certain restricted acts have direct

'adapt' copyright exceptions and limitations to the digital environment,[38] introducing new EU-wide provisions protecting end-users' interests in the use of online tools for the purposes of research, innovation, education and preservation of cultural heritage,[39] and insisting on their 'effective application'.[40] Whereas the EU legislator lays the groundwork for a context-sensitive copyright legal framework and a digital recalibration of rights and interests at stake, the CJEU moves a step further inquiring into the interplay between EU copyright law and digital technologies in specific real-life scenarios. Even though without providing judgements in the merits, the Court's binding interpretation of EU copyright rules offers a snapshot of the response of the discipline to the Internet, and a detailed account of the contamination between law and technology in achieving an 'effective fair balance' in the online world, as illustrated in the following Section.

IV. The CJEU's Take: The Rise of an Interlegal Perspective

Over the past two decades, the CJEU has showed a strong commitment to filling legislative gaps and enhancing the harmonization of copyright rules.[41] Regularly reached by preliminary ruling requests concerning digital scenarios, the Court has developed a vast copyright case law and has consolidated patterns in its reasoning. Among them, both the notion of fair balance of rights and interests[42] and the emphasis on the effectiveness of EU copyright rules in the digital environment[43] have become essential building blocks of the interpretation of copyright law all across the EU. Both these elements, which respectively

negative effects on the functioning of the internal market of copyright and related rights. Such differences could well become more pronounced in view of the further development of transborder exploitation of works and cross-border activities.').

[38] Recital 3 CDSM Directive.

[39] ibid Recital 5.

[40] ibid Recitals 16, 23, 70.

[41] The so-called third phase of EU copyright case law is characterized by a steep increase in preliminary ruling requests and what has been described as an activist approach by the Court. See C. Geiger, 'The Role of the Court of Justice of the European Union: Harmonizing, Creating and Sometimes Disrupting Copyright Law in the European Union' Centre for International Intellectual Property Studies Research Paper no 3, 8 (2016); J. 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. Allen Nard and X. Seuba eds, *Intellectual Property and the Judiciary* (Cheltenham: Edward Elgar, 2018).

[42] 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' 79 *Modern Law Review*, 64 (2015).

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

evoke the 'twofold end' of protecting rightholders and users, and the need for a coordinated 'twofold guidance' by way of law and digital technologies in this direction, carry a particularly teleological flavor, prompting the Court to focus on the purposes of EU copyright law.[44] As vastly observed by the scholarship, this teleological turn leads to a considerable degree of flexibility in the judicial interpretation.[45] Investigating how this purpose-oriented flexibility plays out in the CJEU's reasoning, Joxerramon Bengoetxea identifies numerous patterns, differentiating between strictly teleological, functional, and consequentialist approaches.[46] While the former directly refer to the objectives set in EU primary legislation, the latter two place EU law within a broader picture adding to its literal and systematic interpretation considerations on the concrete effectiveness of its application.[47]

The recent CJEU's case law on EU copyright rules in the digital environment well showcases this expanding room for flexibility. Electing the notions of fair balance and effectiveness to guiding lines of its teleological interpretation, the Court acknowledges that (i) several legal systems have a say when it comes to regulating digital uses of protected content, thus calling for *regulatory consistency*, and that (ii) technology itself embeds regulatory aspects of more pragmatic nature, which determine the *technological viability* of EU copyright rules. By doing so, the CJEU takes into consideration the presence of multiple concurrent legal dimensions, whose interactions are not necessarily ruled by way of hierarchy of legal sources or conflict of law rules. It is for instance the case when the CJEU takes into consideration the European Court of Human Rights' (ECtHR) take on freedom of expression, or the national rules on permitted uses of copyright works set by specific Member State, to which the CJEU reminds the need to overcome fragmentation and align their legal approaches.[48] As illustrated more

[44] Inquiring into the rising teleological interpretation in the CJEU copyright case law are, among others, C. Sganga, 'A New Era for EU Copyright Exceptions and Limitations? Judicial Flexibility and Legislative Discretion in the Aftermath of the Directive on Copyright in the Digital Single Market and the Trio of the Grand Chamber of the European Court of Justice' 21 *ERA Forum*, 317 (2020); T. Rendas, 'Copyright, Technology and the CJEU: An Empirical Study' 49 *International Review of Intellectual Property and Competition Law*, 153 (2017).

[45] See E. Rosati and C.M. Rosati, 'Data-Based Case Law Applied to EU Copyright (1998-2018): A Quantitative Assessment' *Intellectual Property Quarterly,* 196, 210 (2019); M. Favale, M. Kretschmer and P. Torremans, n 42 above; M. Leistner, 'Europe's Copyright Law Decade: Recent Case Law of the European Court of Justice and Policy Perspectives' 51 *Common Market Law Review*, 595 (2014). See also, beyond the copyright legal landscape, J. Bengoetxea, *The Legal Reasoning of the European Court of Justice: Towards a European Jurisprudence* (Oxford: Oxford University Press, 1993), 251.

[46] J. Bengoetxea, n 45 above, 204–251.

[47] ibid. See also G. Beck, *The Legal Reasoning of the Court of Justice of the EU* (Oxford: Hart Publishing, 2012), 208.

[48] Among others, Case C-466/12 *Nils Svensson et al* v *Retriever Sverige AB* [2014] EU:C:2014:76 (*Svensson*), paras 6-7; *Pelham*, paras 63-64; Case C-516/17 *Spiegel Online GmbH* v *Volker Beck* [2019] EU:C:2019:625 (*Spiegel Online)*, paras 47-48; Case C-572/13 *Hewlett-Packard Belgium SPRL* v *Reprobel SCRL* [2015] EU:C:2015:750 (*Reprobel*), paras 38-39.

in details below, the Court accounts not only for legislative sources, but also for the Internet's 'rules of the game'. In particular, by considering how the digital context allows – or rather hinders – the protection of copyright owners' and end-users' interests, the CJEU increasingly acknowledges the concurrent role of technological norms in the pursuit of EU copyright's objectives, de facto advancing a composite idea of law.

This approach shows a remarkable affinity with the perspective offered by the notion of interlegality, as defined by Jan Klabbers and Gianluigi Palombella.[49] The notion refers to the overlapping of legal domains that are simultaneously 'all valid and applicable in principle', yet do not necessarily have to rely on each other.[50] Suffice to think of the influence exercised by policy approaches pursued by neighboring or otherwise influential foreign countries in the drafting of a national regulation over problems of global relevance, or the key role played by technological standards or social norms in certain critical Court decisions. The specific aim of interlegality is to capture the intertwined nature of concurrent normative orders that coexist and may contaminate each other during the formation or application of their rules, without a clear-cut imperative of doing so stemming from the positivist hierarchy of legal sources.

In other words, interlegal is any understanding of the law that encompasses considerations stemming from external but equally legitimate norms, contextualizing legal provisions in a more holistic way. The coordination of different 'legalities'[51] characterizing such an approach carries the potential of building bridges between regulatory domains, national jurisdictions, supranational legal orders, legal and technological norms – thus moving beyond the pluralistic view of parallel regulatory dimensions and stressing on the intertwined nature of the legal considerations required to assess, among others, any digital scenario. In this vein, interlegality offers a valuable theoretical entry point into EU digital copyright rules. As the following landmark CJEU decisions show, it serves both as a descriptive tool to observe its evolution and as a method to approach relevant issues avoiding the

> 'one-jurisdiction-at-a-time perspective – the perspective of mutual alternative or exclusion – but by showing the relevance of – and the caring for – all the relevant normativities actually controlling the case'.[52]

[49] J. Klabbers and G. Palombella eds, *The Challenge of Inter-legality* (Cambridge: Cambridge University Press, 2019). See also G. Palombella, 'Interlegalità. L'interconnessione tra Ordini Giuridici, il Diritto, e il Ruolo delle Corti' 18 *Diritto e Questioni Pubbliche*, 318-342 (2018).

[50] J. Klabbers and G. Palombella eds, 'Situating Inter-legality' n 49 above, 10.

[51] G. Palombella and E. Scoditti, 'L'interlegalità e la ragione giuridica del diritto contemporaneo', in E. Chiti, A. di Martino and G. Palombella, *L'era dell'interlegalità* (Bologna: il Mulino, forthcoming), 29-64.

[52] J. Klabbers and G. Palombella, 'Situating Inter-legality' n 50 above. See also G. Palombella, n 49 above, 324. On the theoretical affinity between the concept of interlegality and EU

1. Spiegel Online

In Spiegel Online, the CJEU has been consulted upon the interpretation of two EU copyright exceptions, ie Art 5(3)(c) and (d) InfoSoc Directive, to assess whether the non-authorized online publication of the full version of a politician's essay may fall within the scope of the permitted uses for the so-called informatory purpose. The Court outlines the trade-off between rightholders' and end-users' interests by highlighting how the right to copyright protection clashes with the fundamental freedom of information, and stressing with particular emphasis the crucial role of free press in the European democratic society.[53] Instructing national judges on how to strike a fair balance between the two in the online environment, the CJEU touches upon four different normative rationalities: (i) national law, as said exceptions are not subject to full harmonization;[54] (ii) EU law, as its objectives, effectiveness, and fundamental rights framework shall be safeguarded;[55] (iii) the ECtHR, which requires to qualify the information at stake based on its importance for the public and political debate;[56] and, lastly, (iv) the Internet, pointing out its structural necessity to make available and circulate information rapidly via the web to all users: if the authorization of the copyright owner were required to publish content about current events – the Court argues – the information would be provided to readers and society at large with a significant delay, thus jeopardizing the effectiveness of the related copyright exception.[57] Opening towards an inclusive understanding of the notion of current events[58] to safeguard information flows and public discussion,[59] the CJEU promotes a composite legal approach: the fragmented national copyright landscape, the ECtHR's take on the freedom of information, and even the required fast transmission of press content over the Internet become integral

copyright law, see G. Priora, 'Dall'armonizzazione all'interlegalità: la tutela dell'utente finale nella disciplina europea del diritto d'autore' in E. Chiti, A. di Martino and G. Palombella eds, *L'era dell'interlegalità* (Bologna: il Mulino, 2021), 441-464.

[53] Spiegel Online para 72.

[54] ibid paras 27-29.

[55] ibid paras 20-21, 37-48.

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

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

[58] ibid para 67.

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

part of the CJEU's balancing exercise between copyright protection and fundamental freedoms – a balance that becomes interlegal in its structure and highly sensitive towards the needs of the digital environment.

2. GS Media and VG Bild-Kunst

One of the main issues tackled by the recent CJEU copyright case law is the practice of linking to protected content already available online.[60] Particularly exhaustive reasonings in this regard have been provided in *GS Media*[61] and, more recently, in *VG Bild-Kunst*.[62] Both decisions address the need to strike a fair balance between the protection of the copyright owners of the content, and the end-users' freedom to access and link to it online. More precisely, the former case tackles hyperlinking, while the latter analyzes the practice of framing. On both occasions, the Court recalls that, according to Art 3 InfoSoc Directive, any of these linking practices would duly require authorization if it amounted to an act of communication by the user to a fairly large number of people, whom had not been addressed by the first publication of the work by the copyright owner.[63] However, the CJEU proceeds by emphasizing that the determination of the scope of the copyright holder's exclusive right of communication to the public requires an assessment based on 'several complementary criteria, which are not autonomous and are interdependent'.[64] In the haze of this vague sentence, the CJEU opts for embracing onto its reasoning considerations on the functioning of the Internet that are external and concurrent to EU copyright law.

More precisely, in *GS Media*, the Court reaches the conclusion that non-commercial digital users who hyperlink to protected contents do not require authorization from the respective copyright owners for three main reasons: (i) because the Internet is made of hyperlinks;[65] (ii) because Internet users hardly

[60] See, among others, *Svensson* paras 28-30; Case C-348/13 *BestWater International GmbH* v *Michael Mebes* [2014] EU:C:2014:2315 (*BestWater*).

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

[62] Case C-392/19 *VG Bild-Kunst* v *Stiftung Preußischer Kulturbesitz* (VG Bild-Kunst) [2021] EU:C:2021:181 (VG Bild-Kunst).

[63] *GS Media* paras 35-38; *VG Bild-Kunst* para 32.

[64] *GS Media* para 34; *VG Bild-Kunst* para 34.

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

know or could possibly know whether the content they access online was published with or without the consent of the copyright owners;[66] and (iii) because the user hyperlinking to an unlawfully published work communicates it to an audience that, de facto, has already potential access to it.[67] Similarly, in *VG Bild-Kunst*, the balancing exercise between the protection of copyright owners and the users' interests in framing someone else's works in their website has been construed taking into account the Internet's own operative rules. According to the CJEU, the practice of framing someone else's work online does not requires specific authorization, unless the copyright owner has restricted use of it by way of technological protection measures (TPMs).[68] The consideration that TPMs are the *only* effective means available in the digital environment for the copyright owners to retain control over their work and for end-users to clearly ascertain the intentions of rightholders[69] is so central to the reasoning to evoke the interlegal approach priorly displayed by the *GS Media* decision: it is technology and its normative significance to open up the interpretation of EU copyright rules, hinting at a context-sensitive and composite idea of law.

V. Conclusion

The CJEU's reasoning in the cases illustrated above hints at an emerging trend within EU copyright law. The need to strike a fair and effective balance of rights and interests in the digital environment is key to the ongoing process of modernization of the discipline. How this goal will be eventually achieved remains yet to be seen. Thus far, what emerges is a growing attention dedicated to the multiplicity of concurrent legal systems attempting to regulate the digital dimension, and, even more curiously, to the Internet' operative rules. The rising awareness of the interconnection between law and digital technologies as well as the consolidation of the Internet as a self-regulating system of norms and practices are becoming integral part of the balancing exercise between copyright protection and other fundamental rights and freedoms. This inevitably prompts to a more holistic understanding of EU copyright law as a legal and technological matter – or, echoing the romanticism of Dante's words – towards the 'twofold

reticent to post them, which would be to the detriment of the proper functioning and the very architecture of the internet, and to the development of the information society.').

[66] *GS Media* paras 46-47.

[67] ibid para 48. Following the judgement, this favorable approach towards hyperlinking by non-commercial Internet users has been further expanded by the EU legislator to all information society service providers with regards to their hyperlinking to press publications. See Art 15(1) third sentence CDSM Directive.

[68] VG Bild-Kunst paras 37-38 with reference to Svensson, BestWater, and Case C-301/15 *Marc Soulier and Sara Doke* v *Premier ministre and Ministre de la Culture et de la Communication* [2016] EU:C:2016:878 (Soulier), all cases regarding uses of works that were freely available online without TPMs implemented.

[69] VG Kunst-Bild para 46.

guidance' that is required to regulate our digital society under the light of its 'two suns': law and technology. Along these lines, the emerging trend in the evolution of EU copyright law seems to be of interlegal nature. As regulatory effectiveness and contextual awareness are ever more often deployed in the frontline of legal reasoning, the interpretation of EU copyright rules is taking into account multi-faceted elements stemming from concurrent legal and technological domains regulating the creation and consumption of creative content online. It is in these terms that interlegality promises to accompany and solidly support the future evolution of the discipline, proving to be both a valid theoretical framework to outline the existing interconnections between normative sources, and an 'emancipatory opportunity' in the interpretation of today and tomorrow's EU digital copyright law.[70]

[70] See G. Palombella, 'Theory, realities and promise of Inter-legality. A Manifesto', in J. Klabbers and G. Palombella eds, n 49 above, 371: 'Inter-Legality bears a conceptual emancipatory strength in this state of affairs insofar as it allows for scrutiny – not necessarily for unconditional acceptance – of normative claims, and its perspective refers to the legal assessment of countervailing reasons on a different stage of rightness other than sheer power.'