

Catching sight of a glimmer of light:

Fair remuneration and the emerging distributive rationale in the reform of EU Copyright Law

by Giulia Priora*

Abstract: In the haze of highly polarized debates on the recently adopted EU Directive on Copyright in the Digital Single Market (CDSM), its focus on the notion of fair remuneration has passed over rather quietly. Three provisions in the Directive deal specifically with the fair distribution of revenue from online platforms to producers and, in turn, from producers to authors. Taking the cue from these new rules, the article investigates the restrictive interpretation of fair

remuneration as fairly distributed income among right holders. The analysis purports to unearth the underlying distributive rationale of the new Directive as well as identify traces of it throughout the evolution of EU copyright law. By this token, the controversial CDSM Directive proves a valid opportunity to shed new light on the objectives of EU copyright law and assess its modernization in light of a distributive perspective.

Keywords: EU copyright law, digital single market, copyright purpose, distributive rationale, fair remuneration

© 2019 Giulia Priora

Everybody may disseminate this article by electronic means and make it available for download under the terms and conditions of the Digital Peer Publishing Licence (DPPL). A copy of the license text may be obtained at <http://nbn-resolving.de/urn:nbn:de:0009-dppl-v3-en8>.

Recommended citation: Giulia Priora, *Catching sight of a glimmer of light: Fair remuneration and the emerging distributive rationale in the reform of EU Copyright Law* 10 (2019) JIPITEC 330 para 1.

A. Introduction

1 The European Union (EU) copyright legal framework is undergoing a pivotal phase of reform, which began in 2016 with the proposed Digital Single Market strategy plan and is now heading towards an enhanced harmonization and modernization of rules within the Union.¹ The Digital Single Market is

not a recent entry into the EU's policy discourse. The European Commission advanced its first observations in 2009; the digital environment being confidently seen as a major opportunity to boost the markets of creative content, and, in turn, the EU economy.² In this vein, the EU legislator started feeling the necessity to modernize the *acquis communautaire* to

* Postdoctoral Researcher, Institute of Law, Politics and Development, Sant'Anna University. Email address: g.priora@santannapisa.it. The author wishes to thank the organizers and participants to the Queen Mary Postgraduate Legal Conference 2019 and, in particular, Dr. Angelos Dimopoulos for the insightful comments on the first draft of this article.

1 See Commission, 'A Digital Agenda for Europe' (2010) (Communication) 245 final/2.

2 Commission, 'European Commission launches reflection on a Digital Single Market for Creative Content Online' (2009) (Press Release) IP/09/1563 ("[A] truly Single Market without borders for Creative Online Content could allow retail revenues of the creative content sector to quadruple if clear and consumer-friendly measures are taken by industry and public authorities."). See also Commission, 'A Digital Single Market Strategy for Europe' (2015) (Communication) 192 final; Commission, 'Over 400% growth for creative content online, predicts Commission study – an opportunity for Europe' (2007) (Press Release) IP/07/95.

remove market obstacles, make protected content more easily available across the Union, fight online piracy, and ensure the protection of copyright holders in this process of market expansion.³

- 2 In 2016, the Digital Single Market strategy plan led to a package of copyright-related legislative proposals. Among them, the proposed Directive on Copyright in the Digital Single Market (CDSM)⁴ not only represents the most encompassing piece of legislation in the package, but also an attempt to advance the horizontal harmonization of copyright rules in the EU, second only to the InfoSoc Directive of 2001.⁵ Due to its ambitious scope and the delicate task of reconciling conflicting interests, the CDSM Directive was adopted in April 2019⁶ in a haze of heated debates. Generally speaking, this showcases a persistent fragmentation between stakeholders' claims in the copyright scene, but also a renewed informative public debate that has raised awareness of unsettled key issues. The Directive has triggered highly polarized reactions: on the one side, the reform rests on the shoulders of those advocating in favor of a stronger copyright protection as a necessary measure to confront digital threats; on the other side, the critical views emphasize its inadequacy to address the tremendous economic imbalances occurring in copyright-based markets.
- 3 Putting the Directive into context, its controversial nature turns out not to be unique in the long-standing process of EU copyright harmonization, characterized by an interplay of multiple drivers, which reflect both the unsettled question of the

function(s) of EU copyright law⁷ and the varying influence of the stakeholders at play.⁸ Among them is the so-called distributive rationale, which refers to the - often overlooked - elements of copyright protection aiming at ensuring and promoting distributive justice in copyright relations.⁹ The origin of this rationale can be traced to the

- 3 See, inter alia, Commission, 'A Digital Agenda for Europe' (n 1); Commission, 'Creative Content in a European Digital Single Market: Challenges for the Future. A Reflection Document of DG INFSO and DG MARKT' (2009) (Report) 14-20; 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' (2011) (Communication) 287 final, 9-10.
- 4 Commission, 'Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market' (2016) (Communication) 593 final.
- 5 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 [2001] OJ L167/10 (hereinafter InfoSoc Directive).
- 6 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 [2019] OJ L130/92 (hereinafter CDSM Directive).

- 7 The literature shows significant difficulties in determining the core purpose(s) of copyright law in the European context and beyond. See, inter alia, Ansgar Ohly, 'A Fairness-Based Approach to Economic Rights' in Bernt Hugenholtz (ed), *Copyright Reconstructed. Rethinking Copyright's Economic Rights in a Time of Highly Dynamic Technological and Economic Change*, vol 41 (Wolters Kluwer 2018) 109 ("[T]here is one considerable difficulty here: there is no agreement about what the proper function of copyright is."); Stefan Bechtold, 'Deconstructing Copyright' in Bernt Hugenholtz (ed), *Copyright Reconstructed. Rethinking Copyright's Economic Rights in a Time of Highly Dynamic Technological and Economic Change*, vol 41 (Wolters Kluwer 2018) 76-77 ("[C]opyright scholars and courts seem to agree much less on the ultimate goal of copyright protection."); Martin Husovec, 'The Essence of Intellectual Property Rights Under Article 17(2) of the EU Charter' (2019) 20 German Law Journal 840, 842 ("Why do all IP rights exist? As simple as this question seems, it is actually very difficult to answer. Centuries of law-making have created a very fragmented landscape that cannot be explained with a single reason.").
- 8 See Benjamin Farrand, *Networks of Power in Digital Copyright Law and Policy: Political Salience, Expertise and Legislative Process* (Routledge 2014).
- 9 The conceptual compatibility between distributive justice and copyright has been vastly explored in the literature, taking into particular account Rawls' theory of justice. See, inter alia, Ananay Aguilar, 'We want Artists to be Fully and Fairly Paid for their Work: Discourses on Fairness in the Neoliberal European Copyright Reform' (2018) 9 Journal of Intellectual Property, Information Technology and Electronic Commerce Law (JIPITEC) 160; Justin Hughes and Robert P Merges, 'Copyright and Distributive Justice' (2017) 92 Notre Dame Law Review 513; Peter Drahos, *A Philosophy of Intellectual Property* (Australian National University Press 2016) 201 ff.; Oren Bracha and Talha Syed, 'Beyond Efficiency: Consequence-Sensitive Theories of Copyright' (2014) Berkeley Technology Law Journal 29(1) 287 ff.; Maciej Barczewski and Dorota Pyc, 'Intellectual Property and Sustainable Development: A Distributive Justice Perspective' in Graeme Dinwoodie (ed), *Methods and Perspectives in Intellectual Property* (Edward Elgar 2013) 208; Robert P Merges, *Justifying Intellectual Property* (Harvard University Press 2011) 102-138; Molly van Houweling, 'Distributive Values in Copyright' (2005) 83 Texas Law Review 1536; Joost Poort, 'Borderlines of Copyright Protection: An Economic Analysis' in Bernt Hugenholtz, *Copyright Reconstructed. Rethinking Copyright's Economic Rights in a Time of Highly Dynamic Technological and Economic Change* (Wolters Kluwer 2018) 284.

national copyright systems of the Member States and, in particular, to the intent to safeguard the remuneration of the author, be it for a moral reason of justice or a utilitarian viewpoint of incentivizing further creation.¹⁰ Shedding light on the centrality of remuneration in copyright practices and on the legislators' intent to fairly distribute such revenue among right holders, the distributive rationale translates into national copyright contract law provisions that have not been harmonized to a significant extent.¹¹ In this light, the article purports to unearth whether and, if so, how the CDSM Directive represents a step forward in this direction.

B. The dark cloud: A highly controversial Directive

4 Much of the discussion accompanying the legislative process and adoption of the CDSM Directive has focused on the controversial Articles 15 and 17 (former Articles 11 and 13 of the proposed Directive).¹² The goal pursued by both provisions

is to establish a “fair marketplace for copyright”¹³ by containing the losses faced by right holders during the rise of the digital environment and shifting the burden to the online service providers, who increasingly profit from it. Here lies the main reason why the stakeholders' reactions to the Directive and, in particular, to these two specific provisions, are so polarized. On the one side, traditional creative industries, captained by press publishers, fiercely support the Directive and express confidence that it will succeed in “correct[ing] the on-going unfairness in the marketplace by establishing legal certainty and ensuring effective protection of creators and producers rights”.¹⁴ On the opposite side, the so-called web giants – epitomized by the four main Internet-based companies under the acronym of GAFAs (Google, Amazon, Facebook and Apple) – foreshadow enhanced imbalances stemming from

10 Respectively described as so-called “backward-looking” and “forward-looking” approaches to copyright by Alain Strowel, *Droit d'Auteur et Copyright. Divergences et Convergences. Etude de droit comparé* (Bruylant, 1993) 235-238. See also Joost Poort, ‘Borderlines of Copyright Protection: An Economic Analysis’ in Bernt Hugenholtz, *Copyright Reconstructed. Rethinking Copyright's Economic Rights in a Time of Highly Dynamic Technological and Economic Change* (Wolters Kluwer 2018) 284 (“In addition to moral rights, which primarily aim to protect the reputation of the author, and the economic rights, which can be closely linked to the incentives to create and exploit works, copyright contains elements primarily aimed at promoting distributive justice. This is the case, for instance, for provisions designed to improve the position of authors towards publishers or other stakeholders through author's contract rights or through provisions such as the *droit de suite* or resale right.”).

11 See Lionel Bently et al, ‘Strengthening the Position of Press Publishers and Authors and Performers in the Copyright Directive’ (2017) Study commissioned by the JURI Committee of the European Parliament PE 596.810, 43 (“Typical examples of such regulation include rules requiring remuneration to be specified for each mode of exploitation licensed (or transferred), rules prohibiting the transfer of rights to exploit by way of unforeseen technological means, rules on termination, rules on construction (*contra proferentem*, purpose-limited etc), rules on duties to provide accounts, rules on equitable remuneration and so-called ‘best-seller’ clauses.”). See also Commission, ‘Impact Assessment on the modernization of EU copyright rules’ (2016) (Staff Working Document) 301 final, Annex 14A (hereinafter CDSM Impact Assessment).

12 The opinions voiced in the public and academic debates

are countless. See, inter alia, Joao Pedro Quintais et al, ‘Safeguarding User Freedoms in Implementing Article 17 of the Copyright in the Digital Single Market Directive: Recommendations From European Academics’ (2019) <<https://ssrn.com/abstract=3484968>> accessed 28 November 2019; Sophie Stalla-Bourdillon et al, ‘An academic perspective on the copyright reform’ (2017) *Computer Law & Security Review* 33, 3-13; Reto Hilty and Valentina Moscon (eds), ‘Modernisation of the EU Copyright Rules. Position Statement of the Max Planck Institute for Innovation and Competition’ (2017) Max Planck Institute for Innovation and Competition Research Paper No. 17-12, <<https://www.ip.mpg.de/en/publications/details/modernisation-of-the-eu-copyright-rules-position-statement-of-the-max-planck-institute-for-innovation-and-competition.html>> accessed 28 November 2019; Lionel Bently et al, ‘Response to Article 11 of the Proposal for a Directive on Copyright in the Digital Single Market, entitled “Protection of press publications concerning digital uses” on behalf of 37 professors and leading scholars of Intellectual Property, Information Law and Digital Economy’ (2016) <<https://www.civil.law.cam.ac.uk/press/news/2016/12/cambridge-academics-respond-call-views-european-commissions-draft-legislation>> accessed 28 November 2019.

13 CDSM Directive recital 3 (“In order to achieve a well-functioning and fair marketplace for copyright, there should also be rules on rights in publications, on the use of works or other subject matter by online service providers storing and giving access to user-uploaded content [...]”). See also Commission, ‘Promoting a fair, efficient and competitive European copyright-based economy in the Digital Single Market’ (2016) (Communication) 592 final.

14 The Association of Commercial Television in Europe et al, ‘Europe's Creators, Cultural and Creative Industries’ Call to the European Council: Secure the aims of the Proposed Copyright Directive in the DSM’ (2018) <<https://www.ifpi.org/news/IFPI-and-wide-range-of-European-creators-producers-and-performers-urge-no-fudging-of-EU-Value-Gap-fix>> accessed 24 April 2019.

the new provisions, leading to an ever-widening divide in the media industry between winners (large players) and losers (small businesses).¹⁵ In such a scenario, the claim to protect the interests of authors and end-users has been raised from both sides, respectively emphasizing the need for fairer compensation for the creative efforts,¹⁶ and a warning of substantial threats to the freedoms of expression and communication online.¹⁷

- 5 Along with the stakeholders' standpoints, the academic debate has delivered numerous opinions and thorough analyses, going beyond the specificities of Articles 15 and 17. The vast majority of scholars demonstrate consensus on three main points of weaknesses of the CDSM Directive.¹⁸ First, the

15 Richard Gingras, 'Proposed copyright rules: bad for small publishers, European consumers and online services' (2018) <<https://www.blog.google/around-the-globe/google-europe/proposed-copyright-rules-bad-small-publishers-european-consumers-and-online-services/>> accessed 24 April 2019.

16 International Publishers Association, 'European publishers react to EU's adoption of the Copyright Directive' (2019) <<https://www.internationalpublishers.org/news/845-european-publishers-react-to-eu-s-adoption-of-the-copyright-directive>> accessed 24 April 2019; International and European Federations of Journalists, 'IFJ/EFJ hail adoption of Copyright Directive and urge EU Member States to adopt laws that ensure fair and proportionate remuneration for journalists' (2019) <<https://www.ifj.org/media-centre/news/detail/category/press-releases/article/ifjefj-hail-adoption-of-copyright-directive-and-urge-eu-member-states-to-adopt-laws-that-ensure-fair>.html> accessed 24 April 2019.

17 EDiMA, 'EDiMA reaction: EU Copyright Directive is not fit for digital era' (2019) <<http://edima-eu.org/news/edima-reaction-eu-copyright-directive-is-not-fit-for-digital-era/>> accessed 24 April 2019; Diego Naranjo, 'EDRI calls on MEPs to not rush the vote on Copyright Directive' (2019) <<https://edri.org/>> accessed 24 April 2019.

18 The scientific positions expressed during the legislative iter and following it have been unusually coherent. See Bently et al, 'Strengthening the Position of Press Publishers and Authors and Performers in the Copyright Directive' (n 11) 17 ("[T]here is nearly universal criticism of the proposal, with particularly critical interventions from academics based not only in Spain, France, Finland and the UK, but also the country where the right originated, Germany."); Institute for Information Law, 'Academics against Press Publishers' Right' (2018) <<https://www.ivir.nl/academics-against-press-publishers-right/>> accessed 24 April 2019; Christina Angelopoulos et al, 'The Copyright Directive: Misinformation and Independent Enquiry. Statement from European Academics to Members of the European Parliament in advance of the Plenary Vote on the Copyright

persistently cautious and sectorial approach of the EU legislator towards copyright regulation is deemed problematic. More precisely, it has been highlighted how the CDSM reform package lacks systematic efficacy and does not solve – on the contrary, exacerbates – the complexity and inconsistency of the EU copyright legal framework.¹⁹ Second, scholars highlight the insufficient evidentiary support backing the Directive.²⁰ Third, they warn against the possibility of renewed and strengthened market imbalances, as suggested by the overrepresentation of big market players in the legislative negotiation phases.²¹

- 6 By and large, despite the several amendments the Directive has eventually incorporated, scholars are far from optimistic and stakeholders still profoundly divided in their reactions. In light of this, the ability to strike a sustainable balance between the interests advanced by the parties at stake can still be questioned as mere wishful thinking. Yet, while awaiting the outcomes of the national implementations and application of the new legal provisions, it is particularly worth investigating what the EU legislator means by "fair marketplace of copyright" and how this Directive is expected to play out within the currently harmonized framework of copyright rules in the EU in this specific regard.

Directive on 5 July 2018' (2018) <<https://www.create.ac.uk>> accessed 26 April 2019.

19 E.g. Hilty and Moscon, 'Modernisation of the EU Copyright Rules' (n 12) 17, 22, 39, 52, 117; Bernd Justin Jütte, *Reconstructing European Copyright Law for the Digital Single Market. Between Old Paradigms and Digital Challenges* (Nomos/Hart 2017) 51.

20 Stalla-Bourdillon et al, 'An academic perspective on the copyright reform' (n 12) 11-13; Bently et al, 'Response to Article 11 of the Proposal for a Directive on Copyright in the Digital Single Market' (n 12).

21 Pamela Samuelson, 'The EU's controversial Digital Single Market Directive' (2018) <<http://copyrightblog.kluweriplaw.com/2018/07/10/eus-controversial-digital-single-market-directive-part-proposed-internet-content-filtering-mandate-controversial/>> accessed 26 April 2019.

C. The distributive rationale in the Copyright in the Digital Single Market Directive

- 7 Despite the open controversies the CDSM Directive embraces the laudable and ambitious intention to modernize the EU copyright legal framework.²² Since the start of the so-called second generation of Directives,²³ such modernization has been envisioned as a legislative process of adaptation of the existing EU copyright rules, so to accommodate the evolution of digital technology and facilitate the online distribution of creative content.²⁴ As highlighted above, this intention dovetails with the Digital Single Market strategy plan, which aspires to expand markets while protecting the interests of right holders.
- 8 Within this picture, the *fairness* of the EU copyright legal framework acquires paramount importance. In light of the goals set in the CDSM Directive, to modernize means to achieve a well-functioning and fair marketplace for copyright.²⁵ The notion of well-functioning marketplace is a traditional justificatory component of EU copyright law, as it directly refers to the EU legislator's competence in harmonizing national rules affecting the internal market.²⁶ More

peculiar is the use of the term “fair”, which Recital 3 attempts to clarify: on the one hand, it refers to the *fair balance* between the objectives of a high level of protection of the copyright holder and easier access to content for the user;²⁷ on the other, the Recital hints at the notion of *fair remuneration* of the right holder and, in particular, of the author and the performer.²⁸

- 9 This twofold understanding of a “fair marketplace of copyright” finds consolidation in the substantive provisions of the Directive. The intent to strike a fair balance of rights and interests between copyright holders and users underlies a vast range of articles, which aim to adapt copyright exceptions and limitations to the digital environment.²⁹ From the text and data mining to the teaching exception up to the preservation of cultural heritage, the EU legislator has introduced new permitted uses, which the Member States shall implement in their national legal systems. Despite their mandatory nature, the effectiveness of such provisions is called into question by the critique advanced by the scholarship in the fashion described above: the attempt to enhance the harmonization of copyright exceptions³⁰ proves overly cautious, highly sectorial,³¹ lacking

22 CDSM Directive, recital 83; Commission, ‘Towards a modern, more European copyright framework’ (2015) (Communication) 626 final.

23 The classification of a so-called first generation of EU copyright Directives, characterized by their narrow scope and vertical harmonization, and a second generation of broader, more horizontal interventions, epitomized by the InfoSoc and Enforcement Directives, has been largely agreed upon in the scholarship. See, inter alia, Irini Stamatoudi and Paul Torremans (eds), *EU Copyright Law. A Commentary* (Edward Elgar 2014) 397.

24 CDSM Directive, recital 83. Worth noting is the fact that the modernization of EU copyright law does not aim to introduce new rules, but rather to adapt the existing provisions to new technological uses. See InfoSoc Directive, recital 5.

25 CDSM Directive, recital 3.

26 See Consolidated version of the Treaty on European Union [2012] OJ C326, art 3(3); Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326, arts 26 and 114. Throughout the process of harmonization of national copyright laws, the main legal basis and justification has been the establishment of the EU internal market. This led the legal doctrine to assert that “[...] [i]t is the internal market – rather than copyright – that has driven the harmonization of EU copyright law to date.” See Thomas Margoni, ‘The Harmonisation of EU Copyright

Law: The Originality Standard’ in Mark Perry (ed), *Global Governance of Intellectual Property in the 21st Century* (Springer 2016) 85.

27 CDSM Directive, recital 3 (“[W]ith a view to ensuring wider access to content. It also contains rules to facilitate the use of content in the public domain.”).

28 *ibid* (“[T]here should also be rules on [...] the transparency of authors’ and performers’ contracts, on authors’ and performers’ remuneration, as well as a mechanism for the revocation of rights that authors and performers have transferred on an exclusive basis.”).

29 The provisions under analysis are part of Title II and Title III of the CDSM Directive, respectively entitled ‘Measures to adapt exceptions and limitations to the digital and cross-border environment’ and ‘Measures to improve licensing practices and ensure wider access to content’.

30 CDSM Directive, recital 5 .

31 While the sectorial nature of the provisions is self-evident from their scope and rubrics, a fitting example for the cautious approach is represented by CDSM Directive, art 5: the first paragraph sets the mandatory permitted digital use for the purpose of illustration for teaching, followed by the second paragraph providing Member States with the possibility to limit the applicability of the exception for the purpose of license priority. See also Jütte, *Reconstructing European Copyright Law for the Digital Single Market* (n 19) 332; Thomas Margoni and Martin Kretschmer, ‘The Text and Data Mining exception in the Proposal for a Directive on

supporting evidence,³² and likely to generate legal uncertainty and imbalances between holders of legitimate interests.³³

- 10 The second meaning of the “fair marketplace for copyright”, i.e. the fair remuneration of the right holder, is the core focus of this paper. With the CDSM Directive, the remuneration gains an unprecedented centrality and qualifies as a prerequisite for both an efficient and fair marketplace of copyrights.³⁴ A consistent terminology is used across the provisions, pivoting on the notions of appropriate and proportionate remuneration³⁵ and appropriate share of revenues.³⁶ Both terms evoke the copyright holder’s entitlement to receive a satisfactory amount of income from the exploitation of the protected work onto the market.
- 11 A fundamental divide lies between the concepts of fair (or equitable) remuneration and fair compensation. The two have been interchangeably used and, at times, confused, as they present a pragmatic overlap in *de facto* entitling the copyright holder to receive payments, which shall be appropriate. The notion

Copyright in the Digital Single Market: Why it is not what EU copyright law needs’ (2018) <<http://www.create.ac.uk/blog/2018/04/25/why-tdm-exception-copyright-directive-digital-single-market-not-what-eu-copyright-needs/>> accessed 28 November 2019.

- 32 The sectorial and partially optional nature of copyright exceptions and limitations finds no correlation in the needs of the users to have a more general and straight-forward regulation of permitted uses. See Christophe Geiger and Franciska Schönherr, ‘Frequently Asked Questions (FAQ) of Consumers in relation to Copyright, Summary Report’ (2017) Report commissioned by the European Union Intellectual Property Office; Hilty and Moscon, ‘Modernisation of the EU Copyright Rules’ (n 12) 27, 48–49.
- 33 For instance, the exclusion of private researchers and individual citizens from the scope of the text and data mining exception as well as from the permitted digital access for teaching purposes. See on this point Pamela Samuelson, ‘The EU’s controversial Digital Single Market Directive’ (n 21); Jütte, *Reconstructing European Copyright Law for the Digital Single Market* (n 19) 354–355; Hilty and Moscon, ‘Modernisation of the EU Copyright Rules’ (n 12) 35.
- 34 CDSM Impact Assessment (n 11) 173–174 (“Creators should be able to license or transfer their rights in return for payment of appropriate remuneration which is a *prerequisite* for a sustainable and functioning marketplace of content creation, exploitation and consumption.”) (emphasis added).
- 35 CDSM Directive arts 18 and 20, recitals 61 and 73.
- 36 *ibid* art 15(5) and recital 59.

of fair compensation stands for the payment due to the right holder (of not only original copyright entitlements, thus also including assignees, e.g. producers and publishers) and justified by the need to compensate a (presumed) harm, in the form of an economic loss deriving from the uses permitted by law via exceptions and limitations.³⁷ By embracing the big picture of “copyright marketplace” – that is by including right holders as well as users – in the design of this legal institution, the payment involved in the fair compensation patently represents a means to achieve the end of a fair balance of rights and interests, which has been illustrated above.³⁸

- 12 In contrast, fair remuneration specifically refers to the intention that fundamentally underlies the exclusivity granted by way of copyright, that is to ensure an appropriate amount of income to the *creator*, so that he or she can enjoy the fruit of the work and be encouraged to create more. In this case, the presumption is no longer of a suffered harm, but rather of a weaker contractual position vis-à-vis the “big” players involved in the exploitation of copyrights, which has been deemed the “real value gap” emerging in copyright practices.³⁹
- 13 Both concepts of compensation and remuneration appear in the CDSM Directive,⁴⁰ yet greater attention

37 See InfoSoc Directive, recital 35 (“In certain cases of exceptions or limitations, right holders should receive fair compensation to compensate them adequately for the use made of their protected works or other subject-matter.”). On the questionable and empirically unsubstantiated character of such a presumption, see Branislav Hazucha, ‘Private Copying and Harm to Authors: Compensation vs Remuneration’ (2017) 133 *Law Quarterly Review* 269; Christophe Geiger, ‘Promoting Creativity through Copyright Limitations: Reflections on the Concept of Exclusivity in Copyright Law’ (2010) 12 *Vanderbilt Journal of Entertainment and Technology Law* 3, 529 (“One should speak of ‘remuneration’ instead of ‘compensation’. Hence, there would be remuneration by way of license and remuneration through a copyright limitation.”).

38 This argument is strongly supported by the scholarship suggesting alternative mechanisms to copyright, based on compensation schemes. See, *inter alia*, Joao Pedro Quintais, *Copyright in the Age of Online Access: Alternative Compensation Systems in EU Law* (Wolters Kluwer 2017); Ville Oksanen and Mikko Valimaki, ‘Copyright levies as an alternative compensation method for recording artists and technological development’ (2005) 2 *Review of Economic Research on Copyright Issues* 2, 25–39.

39 See Joao Pedro Quintais ‘The New Copyright in the Digital Single Market Directive: A Critical Look’, forthcoming in (2020) 42 *European Intellectual Property Review* (EIPR) 1.

40 CDSM Directive art 16 provides Member States with

is paid to the latter, the EU legislator setting a level playing field for the harmonization of fair remuneration schemes, without doing so for the national provisions on fair compensation.⁴¹ This emphasis becomes evident already from the Recitals, where the method of quantification of the payment is specified only for the national remuneration schemes.⁴² The EU legislator's effort to establish virtuous national systems of fairly distributed commercial revenues between copyright holders⁴³ is the reason why this article focuses solely on the legal institution of remuneration *stricto sensu*, thus referring to the distribution among copyright holders of the revenue stemming from the exploitation of the work onto the market. Aspects related to the income generated from the compensated exceptions lie, therefore, beyond the scope of this analysis.

14 The CDSM Directive not only acknowledges

the possibility to grant publishers a share of the fair compensations, when exclusive rights are transferred or licensed to them.

41 As pinpointed by Hilty and Moscon in the analysis of the Directive Proposal, numerous issues related to the fair compensation to right holders remain unsettled, among which when Member States can allow a statutory remuneration to replace a fair compensation calculated after the actual suffered harm. See Hilty and Moscon, 'Modernisation of the EU Copyright Rules' (n 12) 19. See also CDSM Directive, recital 60 ("While this Directive should apply in a non-discriminatory way to all Member States, it should respect the traditions in this area and not oblige Member States that do not currently have such compensation-sharing schemes to introduce them.").

42 *ibid* recital 73 ("The remuneration of authors and performers should be appropriate and proportionate to the actual or potential economic value of the licensed or transferred rights, taking into account the author's or performer's contribution to the overall work or other subject matter and all the other circumstances of the case, such as market practices or the actual exploitation of the work. A lump sum payment can also constitute proportionate remuneration but it should not be the rule.").

43 See the declarations of the European Commission at the release of the draft proposal of the CDSM Directive on the occasion of the State of the Union on 14 September 2016, articulated by the European Commission President Jean-Claude Juncker: "I want journalists, publishers and authors to be paid fairly for their work, whether it is made in studios or living rooms, whether it is disseminated offline or online, whether it is published via a copying machine or commercially hyperlinked on the web." See Commission, 'State of the Union 2016: Commission proposes modern EU copyright rules for European culture to flourish and circulate' (2016) (Press release) <http://europa.eu/rapid/press-release_IP-16-3010_en.htm> accessed 2 April 2019.

the weaker contractual position of individual authors and performers, caused by an information asymmetries,⁴⁴ but it also sets mandatory provisions, which directly tackle this imbalance. The regulatory intervention encompasses new obligations concerning the transparency of the information provided to individual artists at the moment of the transfer and during the exploitation of their rights, the adequacy of their remunerations and the possibility of revocation of licenses or assignments.⁴⁵ Three provisions are glaring examples of the great importance given to the fair distribution of copyright revenues among right holders.

15 Article 18 enshrines a principle of appropriate and proportionate remuneration,⁴⁶ which is meant as an "umbrella provision" inspiring the following articles on transparency obligations, contract adjustment and contract revocation,⁴⁷ as well as the whole EU copyright legal framework.⁴⁸ The provision enjoins

44 The weaker contractual positions of individual authors and performers is recognized at the moment of stipulation of a transfer or license contract as well as afterwards, with a particular emphasis on the crucial role of symmetric information in enabling contractual parties to assess the economic value of what they are exchanging. See CDSM Directive, recitals 72 and 75; CDSM Impact Assessment (n 11) 174-175 ("Transparency is also affected by the increasing complexity of new modes of online distribution, the variety of intermediaries and the difficulties for the individual creator to measure the actual online exploitation [...] Online distribution is expected to become the main form of exploitation in many content sectors. Transparency is, therefore, even more essential in the online environment to enable creators to assess and better exploit these new opportunities. [...] The main underlying cause of this problem is related to a market failure: there is a natural imbalance in bargaining power in the contractual relationships, favoring the counterparty of the creator, partly due to the existing information asymmetry.").

45 CDSM Directive, arts 18-22, recitals 3, 73-81.

46 It is worth noting that the provision has been added after the proposed Directive of 2016 under the original rubric of "Unwaivable right to remuneration". See JURI Committee Tabled Amendments as reported by Bently et al, 'Strengthening the Position of Press Publishers and Authors and Performers in the Copyright Directive' (n 11) 80-81.

47 This interpretation emerges also from the JURI Draft Compromise Amendments of 19 March 2018, para 39a.

48 An interesting case emerges with regards to orphan works. Article 6(5) of the Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works [2012] OJ L 299/5 (hereinafter Orphan Works Directive) enjoins Member States to provide fair compensation to authors who come

Member States to ensure that authors and performers receive adequate remuneration whenever they transfer or license their copyrights to a publisher, producer or intermediary.⁴⁹ Important to note is that the principle applies only to contracts stipulated for the purpose of exploitation of copyrights and, hence, not with end-users.⁵⁰

- 16 Article 20 provides for a corrective mechanism, in light of which the author or performer can rely on the ability to claim additional payments whenever, after having transferred or licensed their exclusive rights, the remuneration received turns out to be disproportionately low compared to the revenues deriving from the exploitation of the work.⁵¹ This

forward and put an end to the orphan work status of their creation, for the unremunerated uses made of the work. The question as to the author, under these circumstances, can also claim fair remuneration under Article 18 of the CDSM Directive remains open.

- 49 CDSM Directive art 18: “1. Member States shall ensure that where authors and performers license or transfer their exclusive rights for the exploitation of their works or other subject matter, they are entitled to receive appropriate and proportionate remuneration. 2. In the implementation in national law of the principle set out in paragraph 1, Member States shall be free to use different mechanisms and take into account the principle of contractual freedom and a fair balance of rights and interests.” For an in-depth analysis of the provision, see Ananay Aguilar, ‘The New Copyright Directive: Fair Remuneration in Exploitation Contracts of Authors and Performers – Part 1, Articles 18 and 19’ (2019) Kluwer Copyright Blog, <http://copyrightblog.kluweriplaw.com/2019/07/15/the-new-copyright-directive-fair-remuneration-in-exploitation-contracts-of-authors-and-performers-part-1-articles-18-and-19/?doing_wp_cron=1563207253.8664081096649169921875> accessed 28 November 2019; Giulia Priora, ‘The Principle of Appropriate and Proportionate Remuneration in the CDSM Directive: A Reason for Hope?’ forthcoming in (2020) 42 EIPR 1, 1-3.
- 50 CDSM Directive, recital 72: “[The] need for protection does not arise where the contractual counterpart acts as an end user and does not exploit the work or performance itself, which could, for instance, be the case in some employment contracts.” See also *ibid* recital 82: “Nothing in this Directive should be interpreted as preventing holders of exclusive rights under Union copyright law from authorizing the use of their works or other subject matter for free, including through non-exclusive free licenses for the benefit of any users.”
- 51 CDSM Directive, art 20: “Member States shall ensure that, in the absence of an applicable collective bargaining agreement providing for a mechanism comparable to that set out in this Article, authors and performers or their representatives are entitled to claim additional, appropriate and fair remuneration from the party with

ex-post remuneration adjustment mechanism aims to correct the imbalance between individual artists and exploiters after the moment of contractual stipulation⁵² and should not be confused with the so-called “best seller clause”, which applies only to the works that reach the top of the sales lists.⁵³ In fact, Article 20 encompasses *any* “significant disproportion between the agreed remuneration and the actual revenues which can happen to any kind of work, even of low/medium success”.⁵⁴

Article 20 finds no application in licensing contracts stipulated by collecting societies⁵⁵ as well as in licenses concerning the right to adaptation (e.g. translation, film dramatization), as Recital 78 specifies that the adjustment mechanism addresses contracts for the exploitation of harmonized rights only.⁵⁶

whom they entered into a contract for the exploitation of their rights, or from the successors in title of such party, when the remuneration originally agreed turns out to be disproportionately low compared to all the subsequent relevant revenues derived from the exploitation of the works or performances.”

- 52 Authors, performers or their representatives can also claim this right against the successors in title contractual counterparties.
- 53 For an overview of best seller clauses in national copyright systems, see Bently et al, ‘Strengthening the Position of Press Publishers and Authors and Performers in the Copyright Directive’ (n 11) 43; Annex 14A of CDSM Impact Assessment (n 11). A closer association of this provision to the notion of best seller clause and a critical view on its effectiveness are offered by Ananay Aguilar, ‘The New Copyright Directive: Fair remuneration in exploitation contracts of authors and performers - Part II, Articles 20-23’ (2019) Kluwer Copyright Blog, <<http://copyrightblog.kluweriplaw.com/2019/08/01/the-new-copyright-directive-fair-remuneration-in-exploitation-contracts-of-authors-and-performers-part-ii-articles-20-23/>> accessed 28 November 2019 (“The harmonisation of the bestseller provision at European level is a positive development that acknowledges that success should trigger improved financial conditions for everyone involved in the creative value chain, not simply those with the highest bargaining power. That said, it is a corrective measure that is activated upon success, so its effect on the larger creative ecosystem is limited.”).
- 54 CDSM Impact Assessment (n 11) 180. The notion of actual revenue is meant in a broad sense and includes all relevant sources of revenues (e.g. sale of merchandising), see CDSM Directive recital 78.
- 55 *ibid* art 20(2).
- 56 *ibid* recital 78.

17 Less intuitively, the reliance on the copyright distributive rationale may be traced also in provisions beyond Chapter 3 of Title IV of the Directive. Resulting from an intense stakeholders' dialogue and remarkable pressures from opposing industrial sectors and civil society,⁵⁷ the highly controversial Article 15, famously known as the press publishers' right, embraces the distributive logic in its fifth paragraph: it obliges Member States to ensure that authors of works incorporated in press publications receive an appropriate share of the revenues deriving from the digital uses of the press content.⁵⁸ This specific provision, introduced during the phase of amendment of the proposed Directive of 2016,⁵⁹ is expected to protect the interests of reporters and photojournalists, which are often subjugated to the corporate players in the sector.⁶⁰ From a critical point of view, it may be highlighted that the source of the press publishers' income is the exploitation of their own new and original neighboring right, rather than the exploitation of the copyrights of journalists and photo reporters. Yet, two observations flesh out the distributive ratio of the provision. First, by nature its results are misleading, as what took the shape of a neighboring right has been largely deemed for all purposes as a fee.⁶¹ Second, under a teleological

approach, the aim of the provision, besides securing a sustainable, free and pluralistic press⁶² and helping publishers recoup their investments,⁶³ is to prevent that the empowerment of press publishers vis-à-vis digital commercial service providers occurs to the detriment of journalists and photographers.⁶⁴

18 Although it will be possible to properly assess the effectiveness of the above-mentioned provisions only in light of the national implementations,⁶⁵ these may well represent the silver lining of the CDSM Directive. Supported by strong evidence,⁶⁶ the EU

freely available elsewhere online”).

57 See Quintais 'The New Copyright in the Digital Single Market Directive' (n 39) (“[T]he lobbying by rights holders’ representatives – especially publishers, the recording industry and (*music*) collecting societies – appears to have been the most intense and effective, often outweighing empirical research in support of opposite views.”); Benjamin Farrand, ‘Towards a modern, more European copyright framework, or, how to rebrand the same old approach?’ (2019) 41 EIPR 2.

58 CDSM Directive art 15(5); *ibid* recital 59.

59 ITRE Amendment 46 and CULT Amendment 75 as reported by Bently et al, ‘Strengthening the Position of Press Publishers and Authors and Performers in the Copyright Directive’ (n 11).

60 Javier Diaz Noci (ed), ‘Copyright and News Reporting: Towards New Business Models and Legal Regulation?’ (2014) Pompeu Fabra University Department of Communication 13-19.

61 The discussion on early stage drafting of the provision being precisely on the option to shape it as a compulsory license (such as the national regulation in Spain) or rather as an exclusive right to authorize or prohibit (like the German equivalent). See Fabian Zuleeg and Iva Tasheva, ‘Rewarding Quality Journalism or Distorting the Digital Single Market? The Case for and against Neighbouring Rights for Press Publishers’ (2017) European Policy Center Discussion Paper (“It uses private law to reallocate profits between private players and is designed to enable press publishers to charge online aggregators for displaying short texts that are often

62 CDSM Directive, recital 54.

63 CDSM Directive recitals 54, 55. See also Quintais, ‘The New Copyright in the Digital Single Market Directive’ (n 39) (“The re-use of press publications is a core part of the business model of certain information society providers, such as online news aggregators and media monitoring services. Publishers have difficulty in licensing their rights to these providers. As a result, they cannot recoup their investment, namely their organisational and financial contribution to producing press publications. This investment is essential to ‘ensure the sustainability of the publishing industry and thereby foster the availability of reliable information.’”).

64 Bently et al, ‘Strengthening the Position of Press Publishers and Authors and Performers in the Copyright Directive’ (n 11) 22.

65 The legal doctrine voiced some skepticism towards the original version of the proposed Directive regarding the real impact of the provisions protecting the author’s remuneration. See European Copyright Society, ‘General Opinion on the EU Copyright Reform Package’ (2017) <<https://europeancopyrightsociety.org/how-the-ecs-works/ecs-opinions/>> accessed 14 April 2018; Max Planck Institute for Innovation and Competition, ‘Position Statement on the Modernisation of European Copyright Rules’ (2017) <<https://www.ip.mpg.de/en/projects/details/modernisation-of-european-copyright-rules.html>> accessed 14 April 2018. As highlighted in the section, amendments have been made to the proposed version of the CDSM Directive and the national implementations of the Directive will majorly help to gauge the effect of the adopted provisions. In particular, it will be crucial to determine how national employment contract laws will interfere with Article 15(5), and how Member States will ensure the principle of fair remuneration as set in Article 18. The judicial interpretations of “appropriate and proportionate remuneration” as well as of “disproportionately low remuneration” are expected to weigh heavily on the impact of the harmonizing provisions. See, in this regard, CDSM Directive, recital 78; CDSM Impact Assessment (n 11) 174.

66 See *ibid* 173-176, reporting statistics, outcomes of the public consultations and declarations provided by representative

legislator tackles specific and core power imbalances in the copyright marketplace, attempting to correct them in a systematic way by setting a general mandatory principle of fair remuneration and specific mandatory rules offering *ad hoc* mechanisms of prevention and adjustment.

D. Tracing the distributive rationale in the EU copyright legislation

19 It becomes relevant to investigate whether traces of the distributive rationale can also be found elsewhere in the EU copyright legal framework. EU copyright law fully embraces the intention to fairly remunerate the creator. It does so by way of various justificatory nuances, among which the intent to ensure authors and performers receive an adequate income, reward the creative effort, solve problems related to piracy, and help to finance new talent for the purpose of cultural diversity.⁶⁷ Nevertheless,

groups of authors, artists and creators. The copyright scholarship first detected the problem of imbalanced contractual power, then turned into advocating for a more sensitive EU copyright harmonization towards the different positions of the various “right holders”. See, inter alia, Lucie Guibault and Bernt Hugenholtz, ‘Study in the Conditions Applicable to Contracts Relating to Intellectual Property in the EU’ (2002) Study commissioned by the European Commission Internal Market Directorate General ETD/2000/B5-3001/e/69, 154; Sylvie Nérysson, ‘Ownership of Copyright and Investment Protection Rights in Team and Networks: Need for New Rules?’ in Jan Rosén (ed), *Individualism and Collectiveness in Intellectual Property Law* (Edward Elgar 2012) 129–130.; Séverine Dusollier et al, ‘Contractual arrangements applicable to creators: law and practice of selected Member States’ (2014) Study commissioned by the European Parliament Directorate General Internal Policies PE.493.041, 2014; Europe Creative et al, ‘Remuneration of authors and performers for the use of their works and the fixations of their performances’ (2015) Study commissioned by the European Commission Directorate General Communications Networks MARKT/2013/080/D.

67 See e.g. Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property [2006] OJ L376/28 (hereinafter Rental Directive), recitals 5, 12, 13; InfoSoc Directive, recital 10; 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 (hereinafter Resale Directive), recital 3; Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights [2006] OJ L 372/12 (hereinafter Term Directive), recital 6; Orphan

the EU legislator has been wary of harmonizing copyright contract law provisions. Traces of the general intention to address authors and performers with specific protection can be found in the InfoSoc Directive, the Term Directive and the Collective Rights Management Directive.

20 The InfoSoc Directive represents not only the first encompassing piece of legislation pursuing a horizontal harmonization of copyright rules in the EU, but also a beacon for the harmonization process itself, as it sets its main objectives and limits, to which the following Directives refer. Of particular relevance are Recitals 10 and 11, which state:

*“If authors or performers are to continue their creative and artistic work, they have to receive an appropriate reward for the use of their work [...] A rigorous, effective system for the protection of copyright and related rights is one of the main ways of ensuring that European cultural creativity and production receive the necessary resources and of safeguarding the independence and dignity of artistic creators and performers.”*⁶⁸

21 The expressed intent to protect authors and performers, however, does not translate into any binding provision in this Directive. It is with the Term Directives that both categories of creators start gaining not only the attention of the EU legislator, but also mandatory provisions in their favor. In compliance with the minimum standards set by international copyright law, the Term Directive of 2006 and the Amendment thereof of 2011 provide for long harmonized durations of copyright protection to the benefit of authors, their descendants, and performers.⁶⁹ Slightly different is the case of the Collective Rights Management Directive, where the EU legislator does not explicitly and solely refer to authors and performers, but rather aims to protect all “members of collective management organizations”,⁷⁰

Works Directive, recital 5; 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 (hereinafter CRM Directive), recitals 28, 31.

68 InfoSoc Directive, recitals 10, 11.

69 Term Directive, art 1; *ibid* recital 6; Directive 2011/77/EU of the European Parliament and of the Council of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights [2011] OJ L 265/1 (hereinafter Amendment to Term Directive) art 1; *ibid* recital 5.

70 CRM Directive, recitals 45, 55.

including individual artists, imposing obligations on collecting societies to enhance the transparency and fairness of their management of rights revenue.⁷¹

- 22 The distributive rationale can be detected in the 2011 Amendment to the Term Directive, the Resale Directive and the Rental Directive. Besides extending the duration of their related rights, the Term Directive of 2011 aims to ensure that performers receive a fair remuneration from the transfer of their rights to phonogram producers.⁷² For this purpose, the Directive provides for a mandatory and unwaivable right to a supplementary remuneration, which applies if the performer receives a non-recurring (i.e. lump sum) remuneration in exchange for her rights.⁷³ Interestingly, the EU legislator sets concrete parameters for the calculation of such supplementary remuneration.⁷⁴ While this distributive mechanism is available only to performers, the Resale Directive addresses solely “authors of graphic and plastic works of art” to ensure an adequate share in the economic success of their works.⁷⁵ Also in this case, while introducing a mandatory and unwaivable right of the artist to receive a royalty for any resale of the original artwork,⁷⁶ the EU legislator sets detailed benchmarks to determine the due amount of royalties.⁷⁷ Lastly, the Rental Directive presents a broader scope, granting an unwaivable right to equitable remuneration to any author and performer of a song or movie, who transferred her rental right to the producer.⁷⁸ No further indication is provided regarding the quantification of the due remuneration, except from Recital 13 stating that it may be paid “

on the basis of one or several payments at any time [...] [i]t should take account of the importance of the contribution of the authors and performers concerned to the phonogram or film.”⁷⁹

E. The distributive rationale in the CJEU jurisprudence

- 23 Within the case made by the scholarship for a so-called activism⁸⁰ of the judges sitting at the Court of Justice of the European Union (CJEU), there is also a proactive role in harmonizing copyright contract rules.⁸¹ Within its interpretative effort to better define the notion of “right holder”, indeed, the Court has touched upon the balance of rights between copyright holders and, in particular, the notion of fair remuneration of the author vis-à-vis the producer. In this respect, three CJEU decisions are of crucial relevance. The first case is *Luksan*, which deals with a dispute between the director and the producer of a documentary movie.⁸² The case pivots on the assignment contract, with which the movie director transferred his rights to the producer. Among the main issues, the question arises as to whether the national statutory rights of remuneration can be presumed transferred to the producer by way of the assignment contract.⁸³ Although the statutory rights of remuneration primarily refer to those entitlements to a fair compensation in the cases of

71 *ibid* arts 11-13, 18-22.

72 Amendment to Term Directive, recitals 9-14.

73 *ibid* art 1(2) Amendment to Term Directive.

74 *ibid* (“The overall amount to be set aside by a phonogram producer for payment of the annual supplementary remuneration referred to in paragraph 2b shall correspond to 20% of the revenue which the phonogram producer has derived, during the year preceding that for which the said remuneration is paid, from the reproduction, distribution and making available of the phonogram in question, following the 50th year after it was lawfully published or, failing such publication, the 50th year after it was lawfully communicated to the public.”).

75 Resale Directive, recital 3.

76 *ibid* art 1.

77 *ibid* arts 3(2), 4, 5.

78 Rental Directive, art 5.

79 *ibid* recital 13.

80 E.g. Caterina Sganga, *Propertizing European Copyright. History, Challenges and Opportunities* (Edward Elgar 2018) 115 ff.; Vincent Cassiers and Alain Strowel, ‘Intellectual Property Law Made by the Court of Justice of the European Union’ in Christophe Geiger, Craig Allen Nard and Xavier Seuba, *Intellectual Property and the Judiciary* (Edward Elgar 2018) 183-186; Jonathan Griffiths, ‘Taking Power Tools to the Acquis. The Court of Justice, the Charter of Fundamental Rights and European Union Copyright Law’ in Christophe Geiger, Craig Allen Nard and Xavier Seuba, *Intellectual Property and the Judiciary* (Edward Elgar 2018) 174; Bernt Hugenholtz, ‘Is Harmonization a Good Thing? The Case of the Copyright Acquis’ in Ansgar Ohly and Justine Pila (eds), *The Europeanization of Intellectual Property Law: Towards a European Legal Methodology* (Oxford University Press 2013) 62.

81 Bently et al, ‘Strengthening the Position of Press Publishers and Authors and Performers in the Copyright Directive’ (n 11) 44.

82 Case C-277/10 *Martin Luksan v Petrus van der Let* [2012] EU:C:2012:65 (hereinafter *Luksan*).

83 According to §38(1) of the Austrian Copyright Law. See *Luksan*, paras 21, 30.

exceptions and limitation of copyright (e.g. private use exception), it should not be forgotten that they also include the author's right to equitable remuneration imposed by the Rental Directive. Austrian copyright law sets a general principle of equal share of such remunerations between the director and the producer, if not otherwise agreed by the parties.⁸⁴

- 24 In inquiring whether this national provision is compliant with EU copyright law, the CJEU draws a clear-cut line of arguments regarding the protection of authors.⁸⁵ It emphasizes that, according to EU copyright law, the original ownership of copyright vests in the movie director,⁸⁶ who shall always be able to rebut a statutory presumption of transfer of her copyrights by way of contract.⁸⁷ Moreover, recalling the objectives of the Rental and Lending Directive, according to which, first, adequate income of the authors and performers must be ensured, and, second, the producer's investment must be protected,⁸⁸ the CJEU ruled that the movie director must be entitled to statutory rights of remuneration⁸⁹ and cannot waive them to the benefit

of the producer.⁹⁰ The Court stuck within the literal boundaries of the preliminary ruling question and interpreted EU copyright law from the perspective of the right to fair compensation of the author or performer.⁹¹ Nonetheless, its reasoning can be read, in conjunction with the unwaivable nature of the remuneration right set in the Rental Directive,⁹² as a broader and categorical rejection of "any system that would transfer the compensation [or equitable remuneration] to publishers without obliging them to ensure that authors benefit from it, even if only indirectly".⁹³

- 25 The other two relevant CJEU decisions pivot on the interpretation of the Rental Directive and the Resale Directive. In *SENA* the core legal issue concerns the determination of the equitable remuneration to be paid to performers and producers for the broadcasting of music works by radio and TV.⁹⁴ In absence of a specific definition, or any guidance on the method of quantification, of such remuneration in the Rental and Lending Rights Directive, the CJEU posits that the notion of equitable remuneration is an autonomous EU concept of law.⁹⁵ Nevertheless, it leaves the national legislator in charge of laying down the criteria to determine the fairness of the remunerations, voicing a "call upon the Member States to ensure the greatest possible adherence

84 §38(1) of the Austrian Copyright Law. See *Luksan*, para 33.

85 In agreement with the Advocate General's opinion, which emphasizes the protection of the movie director in light of Article 17 of the Charter of Fundamental Rights of the European Union. See Case C-277/10 *Martin Luksan v Petrus van der Let* [2011] EU:C:2011:545, Opinion of AG Trstenjak, para 133 ("[T]he principal director's authorship, which is protected by fundamental rights, risks being undermined by the allocation of the exclusive exploitation rights to the film producer."). Oliver and Stothers deem this a paternalistic approach, according to which 'if the allocation of rights is left to be decided in the contract between the parties, directors will be unable to ensure adequate compensation for their rights.' See Peter Oliver and Christopher Stothers, 'Intellectual Property under the Charter: Are the Court's Scales Properly Calibrated?' (2017) 54 *Common Market Law Review* 517, 544. according to which "if the allocation of rights is left to be decided in the contract between the parties, directors will be unable to ensure adequate compensation for their rights" Peter Oliver and Christopher Stothers, 'Intellectual Property under the Charter: Are the Court's Scales Properly Calibrated?' (2017).

86 *Luksan*, para 53.

87 *ibid* paras 80, 87.

88 *ibid* para 77. The Court highlights that a balance shall be struck between, on the one side, authors and performers, and, on the other side, investors. See *ibid* para 78.

89 *ibid* paras 94-95.

90 *ibid* paras 100-102, 105-108. See also Matthias Leistner, 'Europe's Copyright Law Decade: Recent Case Law of the European Court of Justice and Policy Perspectives' (2014) 51 *Common Market Law Review* 578-579.

91 *Luksan*, paras 89, 99, 103.

92 Worth noting is that on the unwaivable nature of the fair compensation, especially in the case of the private copying exception, the CJEU case law is consolidated. See e.g. Case C-463/12 *Copydan Båndkopi v Nokia Danmark A/S* [2015] EU:C:2015:144; Case C-572/13 *Hewlett-Packard Belgium SPRL v Reprobel SCRL (Reprobel)* [2015] EU:C:2015:750; Joined Cases C457/11 to C460/11 *Verwertungsgesellschaft Wort v Kyocera, Epson Deutschland GmbH, Xerox GmbH, Canon Deutschland GmbH and Fujitsu Technology Solutions GmbH, Hewlett-Packard GmbH v Verwertungsgesellschaft Wort* [2013] EU:C:2013:426; Case C 467/08 *Padawan SL v Sociedad General de Autores y Editores de España* [2010] EU:C:2010:620.

93 *ibid* para 108. See also Sganga, *Propertizing European Copyright* (n 80) 142.

94 Case C-245/00 *Stichting ter Exploitatie van Naburige Rechten (SENA) v Nederlandse Omroep Stichting* [2003] EU:C:2003:68 (hereinafter *SENA*).

95 *ibid* paras 23-24. See also Case C-245/00 *Stichting ter Exploitatie van Naburige Rechten v Nederlandse Omroep Stichting* [2002] EU:C:2002:543, Opinion of AG Tizzano (hereinafter *SENA* AG opinion), para 32.

throughout the territory of the Community to the concept of equitable remuneration (...)” for the benefit of performers and producers.⁹⁶ Interestingly, the Court does not refrain from expressing the need to have *both* categories of right holders benefiting from such remunerations, thus reminding that:

*[...] the manner in which that remuneration is shared between performing artists and producers of phonograms is normally to be determined by agreement between them. It is only if their negotiations do not produce agreement as to how to distribute the remuneration that the Member State must intervene to lay down the conditions.*⁹⁷

- 26 In *Fundacion Gala-Salvador Dalí*, opposing are the rights of Salvador Dalí’s heirs, on the one side, and the rights of the legatees and successors in title of his intellectual property rights, on the other.⁹⁸ The core of the controversy lies in the payment of resale royalties to the sole heirs of the artists, and not to the legatee, i.e. the Foundation that holds and administers Dalí’s copyrights. In the absence of specific indications of these two distinct categories

in the Resale Right Directive, the Court offers a teleological interpretation.⁹⁹ The emphasis on the intention to protect the artist is set at its peak, and, as a result, the CJEU ultimately asserts that national laws of succession, regardless of whether they entitle either the heirs or the testamentary successors to enjoy the resale right do not clash with the intention of “ensur[ing] a certain level of remuneration for artists”. Indeed, the Court explains, the transfer of such right after the death of the artist is merely ancillary to that objective.¹⁰⁰

- 27 Looking at the vast CJEU copyright jurisprudence the Court seems to tend towards a protective approach towards the appropriate remuneration of creators by way of a purposive and broad interpretation of copyright exclusive rights.¹⁰¹ The term “appropriate” acquires a twofold meaning. On the one hand, the Court aims to ensure a revenue to the copyright holder, which is proportionate to the occurred uses of her work and capable of preventing unjust enrichment by the unauthorized user.¹⁰² On the other

96 *SENA*, paras 34-36, 38. See also *SENA AG* opinion, para 37. Similarly in Case C-271/10 *Vereniging van Educatieve en Wetenschappelijke Auteurs v Belgische Staat* [2011] EU:C:2011:442, the CJEU left Member States to determine the remuneration (*rectius*: compensation) due to authors for public lending. See *ibid* para 36. In *SENA*, para 37, however, the Court throws a hint of guidance to national legislators by stating that “whether the remuneration, which represents the consideration for the use of a commercial phonogram, in particular for broadcasting purposes, is equitable is to be assessed, in particular, in the light of the value of that use in trade.” See on the point Hilty and Moscon, ‘Modernisation of the EU Copyright Rules’ (n 12) 18.

97 *SENA*, para 33. Interestingly, Advocate General Tizzano in his opinion highlights how “[...] the remuneration cannot be considered to be equitable if it is likely to prejudice the outcome sought by the [Rental] Directive, and particularly Article 8(2) thereof. Indeed, since that provision is designed to guarantee rightholders ‘remuneration’ for the use to which it refers, it seems plain to me that, in so far as it is to be ‘equitable’, that remuneration must in any event be effective and substantial, to avoid the risk of depriving performers or producers of the right accorded them. [...] [A]ssessment of the circumstances of the individual case cannot result in the determination of merely token compensation, which, in the final analysis, amounts to a denial of the right to remuneration. [...] Consequently, the remuneration mentioned in Article 8(2) of the Directive must be such as to make an *effective contribution to securing the profitability of artistic activity and production.*” *SENA AG* opinion, paras 46-47 (emphasis added).

98 Case C-518/08 *Fundacion Gala-Salvador Dalí and Visual Entidad de Gestion de Artistas Plasticos v Société des auteurs dans les arts graphiques et plastiques et al* [2010] EU:C:2010:191 (hereinafter *Fundacion Gala-Salvador Dalí*).

99 *ibid* paras 25-30.

100 *ibid* paras 28-29, 32-33.

101 E.g. Case C-5/08 *Infopaq International A/S v Danske Dagblades Forening* [2009] ECR-6569 (hereinafter *Infopaq*) para 40 (“[I]t follows from recitals 9 to 11 in the preamble to Directive 2001/29 that its main objective is to introduce a high level of protection, in particular for authors to enable them to receive an appropriate reward for the use of their works [...] in order to be able to pursue their creative and artistic work.”); Case C-200/96, *Metronome Musik GmbH v Music Point Hokamp GmbH* [1998] ECR I-1953 (hereinafter *Metronome*) para 22; Case C-70/10, *Scarlet Extended SA v Société Belge des Auteurs, Compositeurs et Editeurs SCRL* [2011] ECR I-11959 (hereinafter *Scarlet Extended*), para 14; Case C-306/05, *Sociedad General de Autores y Editores de España v Rafael Hoteles SA* [2006] ECR I-11519 (hereinafter *SGAE*) para 36; Case C-516/13, *Dimensione Direct Sales Srt, Michele Labianca v Knoll International SpA*, EU:C:2015:315, para 34; Case C-275/15 *ITV Broadcasting Limited and Others v TVCatchup Limited and Others* [2017] EU:C:2017:144, para 22; Joined Cases C-403/08 *Football Association Premier League Ltd and Others v QC Leisure and Others* and C-429/08 *Karen Murphy v Media Protection Services Ltd* [2011] ECR I-09083 (hereinafter *FAPL*) paras 107-108, 186; Joined Cases C-92/92 and C-326/92, *Phil Collins v Imtrat Handelsgesellschaft mbH and Patricia Im-und Export Verwaltungsgesellschaft mbH and Leif Emanuel Kraul v EMI Electrola GmbH* [1993] ECR I-5145 paras 12, 21; Case C-62/79, *Coditel SA and others v Ciné Vog Films and others* [1980] ECR 881 para 14.

102 This emerges, for instance, in *SGAE* and *FAPL*, where the Court argued that the enhanced financial results of hotels and public houses providing access to protected content was violating the right to equitable remuneration of the copyright holder. See *SGAE*, para 44; *FAPL*, para 108, 205 (“[T

hand, confirming what illustrated in the foregoing, the notion of fair (or equitable) remuneration stands for the specific protection of authors and performers in having a proper share of the revenues deriving from their works, thus confirming the presence of, among others, a distributive *ratio* underlying the EU copyright legal framework.

2011 Amendment to the Term Directive. Awaiting the national implementations of the CDSM Directive and focusing on the evolution of EU copyright law as a whole, it emerges that the need to set good examples of modernization by adapting the existing legal framework and making it fit its own expressed purposes may ultimately be met.

F. Conclusion: The distributive and the digital

- 28 In its opening, the article has recalled the main driver of the Digital Single Market strategy pursued by the EU legislator, that is the intent to promote the expansion of digital markets while protecting right holders. Within the copyright scenario, this goal has translated into a high level of protection for the copyright holder and, most recently, a shift of the burden of costs towards digital businesses, generating heated debates.
- 29 An aspect often left in the penumbra is that part of the EU legislator's picture of a modernized copyright marketplace consists of an enhancement of its fairness, not only between right holders and users, but also and equally importantly, between creators and publishers. The analysis of the CDSM Directive has unveiled a significant role played by this distributive rationale, which tackles the weaker contractual position of authors and performers and tries to fix it. Such rationale has proved to be no new entry in the EU copyright scene, but rather to be scattered across the EU copyright legislation as well as the CJEU jurisprudence. In this vein, the provisions inspired by the distributive logic turn out to be the silver lining of a highly controversial Directive. Giving a systematic and mandatory structure to the intention of fairly remunerating authors and performers, the CDSM Directive promises to overcome the sectorial and deficient harmonization of the right to a fair remuneration, which so far had encompassed only the case of performers *vis-à-vis* phonogram producers, authors of original artworks *vis-à-vis* sellers and authors, and performers of songs and movies *vis-à-vis* their producers only with regards to the transfer of their rental rights.
- 30 Unsettled questions remain on the quantification of the fair remuneration, which could have been overcome by a more precise definition of the criteria of measurement, as it has been done by the EU legislator already in the Resale Directive and the

he specific subject-matter of the intellectual property does not guarantee the right holders concerned the opportunity to demand the highest possible remuneration [...] only appropriate remuneration *for each use of the protected subject-matter*") (emphasis added).