

Introduction

1. THE BACKGROUND

Among the criticisms of the EU harmonization of copyright, one of the recurring, but least scrutinized is that of being affected by a marked property logic.¹ Its signs are identifiable in the broad interpretation of exclusive rights; the strict approach to exceptions, compressed within stricter and stricter borders; the extension of the term of protection to the economic equivalent of perpetuity; the unpredictable and restrictive regulation of new uses of protected works to the detriment of access and the public domain, now facing a seemingly unstoppable enclosure movement; the vanishing of moral rights in favour of the chief protection of investments; and the predominance of the consideration of industrial right-holders over authors.

While all these processes are indeed occurring, courts and legislators do not show awareness of, or belief in, their cause-effect link with copyright proprietization, nor do scholars agree on the existence of the phenomenon. On the contrary, after the first wave of progressive theorists in the 1960s, advocating a return to a more regulatory and less proprietary copyright,² several contributors have challenged the validity of their argument, noting the presence of proprietary concepts and definitions since the birth of the discipline, both in the copyright and in the *droit d'auteur* models.³

Albeit intense, the debate has never really gained ground in continental Europe. The reasons are manifold, the most determining one being the traditional aversion of the civil law tradition to an extension of property rights to cover intangible goods, and thus the radical doctrinal and judicial denial – with the exception of France – of the dogmatic qualification of copyright as property.⁴ It is not by accident that the scholarly contributions discussing the proprietary nature of copyright

¹ In these terms Peukert 2011, 68.

² See, *inter alia*, Patterson 1968, 223.

³ See, e.g., Hughes 2006; Mossoff 2013, xi and related bibliography.

⁴ As we will see in Chapter 1, 32 ff.

from a philosophical, historical, economic or conceptual perspective come predominantly from the common law environment, where the broad subject matter of property law naturally includes intellectual property (IP). Civil lawyers have considered the issue as part of the debate on the nature of copyright but – due to the above-mentioned doctrinal resistance – its coverage has generally been marginal and deprived of any real importance. Many have objected that the proprietary qualification of copyright would be pointless anyway because of the high heterogeneity of the two bodies of law and the scarce compatibility of tangible property rules with the characteristics and object of authors' rights.⁵ The debate has never substantially changed, not even after the beginning of the process of EU copyright harmonization.

Why, then, a book on copyright propertization in Europe, and why now?

For more than 20 years, the development of EU copyright law has favoured the provision of high levels of protection for right-holders, and neglected, when not expressly created, the imbalance between authors' rights and other rights, interests and goals that have always characterized the discipline, and required a careful readjustment in the digital environment.⁶ In several instances, as in Recital 9 InfoSoc, this maximalist approach has been supported, or even justified, by the proprietary nature of copyright. To tackle the policy frictions created by the asymmetry, scholars and stakeholders have advocated targeted reforms, proposed avenues to exploit the flexibilities offered by the current legislative framework, or supported the creation of model private agreements as tools to leverage natural market mechanisms.⁷ Interestingly, none of them have identified the latent propertization of copyright as one of the possible causes of the trend, nor have they considered the phenomenon as worth a systematic study. Those taking stock of its existence define it as a mere rhetorical argument, used to empower right-holders against the loss of control and enforceability they have experienced with the digital revolution, and exclude the usefulness of a legal analysis in light of its non-technical nature.⁸

While only bits and pieces of the doctrinal proposals have found their way to the EU legislator, the EU harmonization process has kept evolving along patchworked interventions, without any real attempt to build a

⁵ Dreier 2013, 128.

⁶ For a comprehensive overview see the work of van Eechoud et al. 2009, and IVIR 2007.

⁷ On the flexibilities offered by the system see Hugenholtz-Senftleben 2012.

⁸ Dreier 2013, 128–9.

consistent system. This unsystematic approach grew EU copyright rules outside a unitary framework of principles, concepts and dogmas that could coherently guide their development, avoid internal inconsistencies and tackle eventual distortions caused by their interplay with existing national norms. As a further complication, EU copyright law departed in many instances from the inspiring rationales and common core of Member State laws and merged elements of the copyright and the *droit d'auteur* models in a puzzling hybrid system, increasing the complexity of the discipline and the risk of interpretative short-circuits.

Unsurprisingly, this silent revolution has led to a series of questionable results. Examples can be found in the definitions of content and structure of the three core economic rights (reproduction, communication to the public and distribution); in the parallel delineation of the scope and flexibility of exceptions and limitations, and the reading of the three-step test; in the definition of the borders between protected works and the public domain, and in the related adaptation of the concepts of originality and creativity; in the treatment of informational and technical works against more traditional copyright objects, to name but a few. Tellingly, these phenomena correspond to the negative effects that scholars have attributed to the advent of copyright propertization.

Little or no help has come from the Court of Justice of the European Union (CJEU), whose strong activism in broadening the scope of the *acquis communautaire* has increased the degree of systematic fragmentation of the subject. In fact, its teleological method of interpretation and its functional approach, often hiding implicit policy options, are unfit to tackle the pitfalls of legislative harmonization, which would require broader dogmatic *dicta* and solid rules of thumb to systematize the discipline. It comes as no surprise that, when facing such a chaotic patchwork, the atomistic *modus operandi* of traditional copyright studies and case law reveals all its weaknesses and is not of any help in untying the numerous interpretative knots.

To complete the framework, Article 17 of the Charter of Fundamental Rights of the European Union (CFREU), dedicated to the right to property, has crystallized the qualification of copyright in proprietary terms by proclaiming in its second paragraph that 'intellectual property shall be protected'. The cryptic statement has raised several questions as to the implications of this new clause for the degree of protection conferred to IP compared with other property rights. Without a formalized EU constitutional property notion, the extreme conciseness of the provision does not offer any systematic clarification.

The CJEU's contribution to the understanding of Article 17 CFREU is also quite disappointing. Its references to the provision are generally

cursory and often in the form of a cosmetic statement, with very sporadic indications on the rank attributed to IP. This eloquent silence has reinforced the negative impact of the proprietary rhetoric, as testified, *inter alia*, by the number of *travaux préparatoires* that mention Article 17 as the main grounds for the high level of protection granted to copyright.⁹ In fact, although the CJEU had the opportunity to reiterate that there is nothing in the wording of the provision to suggest that intellectual property rights (IPRs) are inviolable and absolute,¹⁰ the scant heed paid to systematic precision has left the general interest limitations permitted by Article 17(1) in the shade, transforming the provision into another justification for the idiosyncratic defence of copyright.

Against this systemic chaos and patchworked background, the EU harmonization process has weak chances of developing consistent patterns and tools to facilitate a stable and predictable balance between copyright, conflicting fundamental rights, and social and cultural goals dependent on the creation, dissemination and access of protected works. In fact, no such goals can be achieved until the pieces composing the EU copyright puzzle are properly conceptualized and understood, and their interactions analysed in a contextual fashion. Several scholars have engaged in the analysis of the pitfalls of EU copyright harmonization using a broad range of methodologies and approaches. Quite startlingly for the nature of the dilemma, however, there is no trace of multi-level and multi-source analyses conducted with the most traditional interpretative tool used to reorder a confused legal context: the systematic method. This study fills this gap, and starts from the assumption that, contrary to the opinion of most scholars, the propertization of copyright may effectively provide the systematic framework necessary to tackle most of the balancing and interpretative problems affecting EU copyright law.

The following chapters will test this intuition and provide a systematic assessment of the feasibility, advantages and disadvantages of the propertization of EU copyright. Nonetheless, beforehand some words are necessary to clarify the semantic choices in this work, in order to avoid foreseeable conceptual misunderstandings.

⁹ See the overview provided by Peukert 2011, 67 ff and further in Chapter 3, at 110 ff.

¹⁰ First in Case C-70/10, *Scarlet Extended SA v Société Belge des Auteurs, Compositeurs et Editeurs SCRL (SABAM)* [2011] ECR I-11959, para 43.

2. SOME TERMINOLOGICAL NOTES

Conceptual and dogmatic imprecisions in the translation of legal terms are the feared bogeyman and almost unavoidable fallacy of any comparative lawyer. Literally translated legal terms often carry diverging meanings and theoretical underpinnings in different legal systems; labels used as synonyms may hide completely heterogeneous regimes, and for institutions with a long history, the same term may present numerous semantic variations throughout the centuries. The slippery effects of this legal polysemy may worsen when the same term is used by other subject-specific vocabularies, usually bearing distinct connotations and definitions. The most recurrent lexemes in this study, ‘property’ and the duo ‘copyright’/‘authors’ rights’, are two paradigmatic cases in point.

2.1 The Diachronic and Synchronic Polysemy of Property

Property is among the most polymorphous words in legal terminology. Due to its importance for the distribution and management of resources, the organization and regulation of social structures and the exercise of sovereignty, ‘property’ carries distinct philosophical, economic, sociological and political meanings.¹¹ Also in everyday language, the term has strong rhetorical connotations. To shed light on this semantic polymorphism and the interplay between the various notions, scholars engaged in analytical jurisprudence or comparative law have proposed several approaches. One of the most used categorizations distinguishes between property as an idea, concept and institution, the first being the social, cultural and political meaning given to the notion in a certain historical period, the second representing its general theory or jurisprudence, and the last grouping the provisions that compose a property regime.¹² The ideas of property do not belong to legal discourse, but they determine the tenets of contemporary property jurisprudence, which, as either conceptual or systematic theories, permeate treaties, commentaries and textbooks, moulding the mindset of national jurists, and so determining how legislators and judges define and regulate property as a legal institution.

This intertwined semantic pluralism also characterizes the legal notions of property. In fact, comparatists find the term to be one of the most

¹¹ Broadly, from the different perspectives, Cohen 1927, 8 ff, and Mattei 2000, 13 ff.

¹² Mattei 2000, 9, and related bibliography.

difficult to translate due to the substantial differences among contemporary systems, deeply rooted in legal history, where the definition has also been subject to numerous revolutionary changes through the ages. History explains the roots of the civil code myth of tangible absolute property that still dominates contemporary discourse, and helps dispel the fallacious belief in its immutability and incontestability.

Romanist scholars like Bartolus conveyed an image of Roman law property as absolute dominion over a tangible asset. They grounded their interpretation on the basic distinction that Gaius, and later Iustinianus, made between *res corporales* and *res incorporales* to classify the assets of a private patrimony, and on the misunderstanding that the dichotomy has generated.¹³ *Res incorporales* were all the entitlements, minor real rights and credits vested in an individual, apart from property. Not absolute rights, their value estimation could not correspond to the value of their object. *Res corporales* were all the tangible assets owned by a person, and ownership itself. In fact, the latter was a heterogeneous category, including both rights and their subject matters. Ownership was part of it since, as an absolute right, its value overlapped with that of its object.¹⁴ It took little for medieval glossators to translate this classification in a limitation of property to tangible goods, and to defend the construction as the inheritance of the pure structures of Roman law, which in their opinion should have prevailed over the fragmentation created by Germanic customs.

In the Middle Ages, feudalism brought drastic changes to the social structure, with the exercise of sovereignty through a net of overlapping property interests over the same estates. The lord held the absolute ownership over the land (*dominium directum*), while his subordinates obtained time-limited minor rights whose object was not the estate itself, but virtual utilities deriving from it, from the use of natural resources to taxation and exercise of justice (*dominium utile*).¹⁵ Instead of a direct, absolute and perpetual relationship between a subject and a material object, medieval property was a broad category of rights sharing only a remote connection to a real estate and representing, rather, a status with related powers linked to a territory. The distinction between corporeal and incorporeal goods ceased to matter and was substituted by the dichotomy between immovable and movable goods, the first being

¹³ Bartolus on D 41, 2, 17(4).

¹⁴ For a doctrinal overview on the point see Sganga 2015, 16.

¹⁵ See, extensively, Kleyn 1989, 213 ff.

subject to feudal rights, the second a freely alienable, unimportant *res vilis*, subject to a Roman law-based absolute *dominium*.¹⁶

Common law property is the direct heir of the Germanic system of customary property rights. Brought to England by William the Conqueror in 1066, it never left the English legal system, not when the feudal system was dismantled, and not even when the land ownership system was completely reformed in 1925.¹⁷ For a common lawyer, ‘property’ is a broad category covering a range of rights, differently limited in time and scope, having either a corporeal or incorporeal object. Real property comprehends the full range of real rights, the closest correspondence to civil law full-blooded ownership being the estate in fee simple, and the farthest being the notion of licence, which entails only the limited right to use someone else’s property. Its object is not the good itself, but the interest and utility descending from it. Personal property includes not only tangible movables, but also intangibles and rights such as credits and claims. Arguably, the proprietary label carries little semantic power, and does not imply the presence of characterizing features.

The history of civil law property is quite different, as are its end results. Faced with the fragmentation of feudal property models, medieval glossators tried to systematize local customs and the double domain with the use of Roman law concepts.¹⁸ Resorting to an adapted interpretation of Gaius, the French *école bartoliste* linked property to materiality and attributed the proprietary label only to the *dominium utile*, as the only entitlement granting the right to enjoy and dispose of a *res corporalis*. Pothier merged Germanic customs and Roman law by erasing the Gaian dichotomy between *res corporales* and *incorporales* in favour of the customary classification of movable and immovable goods, and the only ‘propriété’ became the *dominium utile* over immovables, and the full-blooded ownership over tangible movables.¹⁹

When the French Revolution dismantled the *Ancien Régime*, one of its first targets was the feudal order and its customary property schemes. Property had to be emancipated from personal constraints in order to perform its role as the foundation of new social order and the material manifestation of the newly acquired individual freedom of every citizen. The best candidate to achieve this goal was the Roman law model of absolute, monolithic property depicted by Pothier, which indeed found its

¹⁶ The classic text on the feudal classification of goods is De Beaumanoir 1974.

¹⁷ For an historical analysis see Digby-Harrison 2005, 6.

¹⁸ A thorough reconstruction is offered by Ourliac-Gazzanica 1985, 136 ff.

¹⁹ Pothier 1825, and particularly the fifth volume.

place in Article 544 of the *Code Napoléon*.²⁰ However, the mix of the Roman and Germanic models left vivid imprints on the French property system. The movables–immovables dichotomy was kept, and the term ‘bien’ was preferred to ‘choses’ in order to include rights and not only tangible objects in the subject matter of real rights. The French model accepted the concept of *propriété des créances* and had no aversion to the notion of *propriété incorporelle*, displaying a much higher flexibility than any other continental property system, as a bridge between the common law and the civil law property traditions.²¹ These were not its only characterizing features though. The French property also presented marked personalist traits, directly descending from its Revolution-based link with individual freedom and self-realization.²²

The German story is different in many respects. Natural law influenced the Austrian, Prussian and Bavarian Civil Codes, which all presented hybrid traits similar to those of the French model, such as the ambivalent use of the terms *Ding* and *Sache* (‘good’ and ‘thing’).²³ In the absence of a revolution, these elements probably would have flowed into the Bürgerliches Gesetzbuch (BGB – German Civil Code), had it not been for the intervention of the Historical School and von Savigny’s seminal work on possession, which rejected the post-classical definition of *possessio* as a legal relationship covering both things and rights, to return to the Roman law concept of possession as a fact generating legal consequences and covering only material things. Property could also be material-only, since if material-only objects can be possessed, material-only objects can be owned.²⁴ The theory influenced the German legislator so much that the property system delineated by the BGB, (*Sachenrecht*) abandoned the dichotomy *Sache–Ding* and restricted the notion of *Sachen* to tangible objects only (§90 BGB) in a historic paradigm change.

National legal systems that went through the codification process during the 20th century bore the influence of one or the other model, or elaborated a particular mix of the two, as happened with the Italian Civil Code of 1942. The drafters of national civil codes shared the goal of building a monolithic legal institution with very specific traits, which could stand the challenge of time. However, after a few years it became

²⁰ On the process, in detail, see Rodotà 1981, 93 ff.

²¹ See, *inter alia*, the study of Ginossar 1960, and Zenati 1994, 305 ff.

²² See, more extensively, Chapter 1, 22–23, and Chapter 2, 70–71.

²³ For an exhaustive analysis see Wieaker 1995, 257 ff.

²⁴ On the influence of von Savigny’s work see Gordley-Mattei 1996, esp. 295 ff.

clear that the plan would never have materialized. From the introduction of administrative constraints to the advent of constitutional property clauses and doctrines, and the regulation of numerous sector-specific property regimes drawing a different balance of rights and obligations, the monolith cracked, and scholars started pointing to the crisis of property.²⁵ Such parcellation has increased the degree of polysemy of the term ‘property’ not only between, but also within, national legal systems.

In the last decades, supranational sources have introduced new property models sharing hybrid, very general features.²⁶ Together with the European Convention on Human Rights (ECHR), and in spite of Article 345 Treaty on European Union (TEU), which requires the Union not to interfere with national systems of property ownership, secondary EU laws and the CJEU’s application of primary law have also made repeated incursions into national property systems, introducing a polymorphous language that merges civil and common law traditions and often departs from classic dogmas in favour of economic notions. The EU notion of property is broad and flexible, covers both tangible and intangible assets, and stretches as far as identifying tradable, quasi-proprietary assets in administrative concessions such as airport slots, milk quotas and emission quotas.²⁷ The paradigm shift cannot be minimized as a theoretical imprecision of an EU legislator not mastering Mitteleuropean dogmatic rigour. In fact, the abandonment of the 19th-century civil code model is also confirmed by a purely doctrinal product such as the Draft Common Frame of Reference (DCFR), which states that “‘property’ means anything which can be owned; it may be movable or immovable, corporeal or incorporeal’.²⁸

With a recent acceleration, history shows that the idea, concept and legal institution of property are not set in stone, but rather subject to a constant diachronic evolution, much more than other areas of law. The process that has been taking place in the last decades does not differ, in fact, from the twists and turns that property has gone through from Roman law and the Middle Ages, until the modern codifications. While the basic tenets tend to remain, the model may even transform radically, and the more radical the changes, the longer it takes for legal operators to realize and internalize them.

²⁵ See Carbonnier 2001, 352; see also Weber 1972, 316.

²⁶ I have referred to them as cosmopolitan property models in Sganga 2014, 770 ff (see also the bibliography therein).

²⁷ See the ample analysis of Colangelo 2012, esp. 105 ff.

²⁸ The definition is in Von Bar et al. 2009, 563.

Today, with the civil code property myth long dead and several specialized regimes subsumed under a unitary proprietary label, property has become a genus of which tangible ownership is only one possible species. Despite its broadness, the genus still retains characterizing traits that distinguish it from other legal institutions at a private law level and justify the application of specific principles, concepts and ground rules to all the rights subsumed under its category. This trend has steadily consolidated in several civil law countries in the past decades and has characterized EU sources and case law since the very early days. For traditional property scholars, the assimilation still constitutes a blatant dogmatic mistake and an improper, unjustified use of the proprietary label over the mere application, by analogy, of property rules. However, from a diachronic perspective, this assumption equals a voluntary surrender to the fallacies of path dependence. Insisting on a limitation of the proprietary qualification only for rights that perfectly fit the civil code model and rules means denying the importance of the historical process that has led to the irreversible loss of centrality of civil codes, particularly in sectors where the socio-economic and technological evolutions have rendered their focus on land ownership anachronistic and of little use as a regulatory paradigm. If this resistance was already contestable a few years after their enactment, it makes little or no sense in the age of dematerialization and digitization, where wealth has largely moved from immovable goods to intangibles.

Comparatists have extensively conceptualized and illustrated the process, clarifying the polysemy and distinguishing the broad and less distinctive notion of property from the narrower notion of ownership used to identify the old civil code property *sensu stricto*.²⁹ Their studies explain how modern legal systems are converging towards the attribution of the property label to rights featuring characteristics that distinguish the proprietary macro-institution from any other basic legal form. These traits justify the operation of certain proprietary ground rules³⁰, the application by analogy of civil code property provisions that are compatible with the subject matter of the right at stake, and its submission to the guarantees and limits provided by constitutional property clauses. This is the background against which the terms 'property' and 'propertization' will be used, where the institution 'property' is intended as a genus and intellectual property as one of its species.

²⁹ E.g. Mattei 2000, 12, and related bibliography.

³⁰ On the ground rules shared by property systems, see Van Erp 2009, 1020–22.

2.2 Propertization

'Propertization' is a term that has been used and may be intended in two different ways. On one level, it refers to the contamination of a field with a multi-source proprietary rhetoric, built on economic, political, philosophical or merely layman's arguments. In the field of copyright this is its most widespread usage and the object of the doctrinal critiques. On another level, 'propertization' implies the process of technical qualification of an institution as a property right for the purpose of its systematization and submission to private law and constitutional property rules. This study uses the term in both senses, criticizing the propertization of copyright as a non-technical, dangerous phenomenon, and proposing instead a process of propertization based on solid systematic ground.

2.3 Copyright vs Authors' Right(s)

As will emerge clearly from the historical analysis in Chapter 2, 'copyright' and 'authors' rights' cannot be properly understood as synonyms. Despite its use in everyday language as a universal label, the term 'copyright' refers technically to the Anglo-Saxon institution, with its historical emphasis on the publishers' right to copy and the limited role played by moral rights. 'Authors' rights', instead, belong to the civil law tradition, where the term emphasizes the historical focus on the author and her personality, and the compresence of economic and moral rights. At the EU level the distinction has lost its relevance since the official translations of EU sources equate copyright to the various labels used at a national level for authors' rights (e.g. *droit d'auteur*, *Urheberrecht*, *diritto d'autore*). Since this study naturally refers to the English version of EU materials, it opts for the label 'EU copyright law'. More generally, it uses 'authors' rights' and 'copyright' interchangeably, unless the particular matter at stake requires their technical distinction.

3. STRUCTURE OF THE WORK AND JURISDICTIONAL FOCUS

The work is articulated in six chapters. Chapter 1 provides an overview of the theories that have influenced the development of the *droit d'auteur* and the copyright models, grouped as normative and conceptual. Normative theories, rooted in philosophy and economics, justify the protection of creative works and inspire the drafting and teleological interpretations of copyright rules, while conceptual theories guide their readings by

systematizing existing regulations through abstract doctrines, either analytical or positive-systematic. Rather than offering a repetitive account of their content, the chapter searches for and underlines their contribution or opposition to the qualification of copyright as property. The results of this survey lay the groundwork for the historical analysis conducted in Chapter 2, which aims at uncovering the roots and implications of the immersion of proprietary concepts in the two originating systems of the *droit d'auteur* (France) and copyright (England) model, using Germany and Italy as additional testing grounds, selected for their derivative, second-generation nature, the originality of their developments, and the distinct traits of their property models. Through its deconstructions, Chapter 2 highlights the connections between normative theories, legal doctrines, institutional dynamics and socio-economic factors in the adoption of specific legal solutions, explaining the reasons why the apparently similar propertization of copyright (or its rejection) could produce diverging regulatory results in different systems. This comparative exercise proves to be useful to dispel the oversimplification and generalization that characterize several doctrinal critiques, and to distinguish between rhetorical arguments and technical qualifications when assessing the impact of propertization on the drafting and interpretation of copyright rules.

Using these analytical tools, Chapter 3 identifies and analyses the rationales inspiring the EU legislation and their interplay, sheds light on the cryptic IP clause of the CFREU (Article 17(2)), its origins, doctrinal reception, and actual and potential impact on EU copyright law, and underlines the main features of the CJEU's activism, from the first cases applying EU primary law on national copyright systems in the early 1970s, to the massive number of decisions that have stretched the boundaries of harmonization from 2006 on. The goals of this three-pronged overview are to sketch the hybrid traits of the model, highlight the unintended consequences of its chaotic development without systematic guidance, trace the rhetorical propertization heavily criticized by scholars, and extract, to the extent possible, indications as to the categorization of the right(s).

Against a background where both the legislation and the case law feature the emergence of a rhetorical property logic, but no systematic mention nor use of property principles, concepts and rules, and no role played by Article 17(2) CFREU, the main question that opened the analysis returns: would taking the propertization of copyright seriously, and drawing specific systematic consequences from the proprietary qualification, dispel the negative effects of such rhetoric and even help

ensure a more consistent, predictable and balanced development of EU copyright law?

To test this proposition, Chapter 4 compares the emergence of the property rhetoric in the construction of the EU model to selected examples of property concepts and rules used in national copyright statutes and case law, and of the application of constitutional property doctrines on copyright matters. On the basis of these results, and particularly of the effects of the national constitutional propertization of copyright, Chapter 5 attempts to define the main traits of the EU constitutional property model under which EU copyright law would be subsumed, comparing and merging the common constitutional traditions of Member States with the indications from the CJEU and the European Court of Human Rights (ECtHR). This helps define the platform – a common social function doctrine – on which the holistic reading of these sources, in line with the interpretative rules of EU primary law, may take place. After an overview of the most relevant effects that the vertical and horizontal application of the social function clause may have on property systems, the chapter outlines the social functions of copyright as described by EU sources, laying the groundwork for the four-dimensional experiment of systematization to which Chapter 6 is devoted.

Building on the path trodden by national courts and on the choice for a proprietary qualification of copyright made explicit in Article 17(2) CFREU and Recital 9 InfoSoc, Chapter 6 uses property as a systematic framework and provides selected examples of the positive effects that its use may have on the internal consistency and balance of EU copyright. Its focus is on four ‘victims’ of the pitfalls of the EU harmonization, linked to four corresponding elements of property law: (i) ownership (subject); (ii) works (object); (iii) economic rights (content); (iv) exceptions, fair balance, three-step test and abuse of right (structure). Areas where property concepts and rules have found application at a national level, but which are not subject to EU harmonization, have naturally been excluded from the scope of the analysis.

Before moving ahead, three last specifications are necessary.

The first is mostly methodological. Although the core subject of this book, as its title may suggest, is EU copyright law, the arguments it develops rely heavily on the historical and contemporary characteristics of the traditions of EU Member States’ copyright/authors’ rights. However, although they may present remarkable similarities at times, a comparative study of 28 jurisdictions would go beyond the scope, aim and acceptable length of this monographic work. For this reason, the study adopts a model of variable geometry for its geographical focus. The four systems analysed in Chapter 2 are the same in Chapter 4, while

the overview of constitutional property doctrines in Chapter 5 is limited to Germany, Italy and France, since the different institutional and constitutional settings of the United Kingdom make a proper comparison unreasonable. A similar limitation occurs in the analysis of conceptual/systematic copyright theories conducted in Chapter 1, since the presence of doctrinal arguments opposing the qualification of copyright as property is a dominant characteristic of civil law systems, while almost completely absent in the common law environment.

The second specification concerns the frame of reference. Property is one of the areas least influenced by EU law due to the exclusion made by Article 345 TEU.³¹ At the same time, national property laws are complex nets of interrelated rules, which are difficult to compare and are characterized by the highest rigidity and number of mandatory rules. However, as will become clear in Chapter 5, EU countries share common constitutional property doctrines, recognized and elaborated on by the CJEU. Due to the same Roman law origin and the subsequent circulation of legal solutions, scholars have also identified basic principles, concepts and rules constituting the common core of European property law, some of them now crystallized in the DCFR.³² Arguably, this is the background the Court will refer to if called to attribute autonomous meaning to a property term or notion embedded in a directive, or to fill lacunae or interpret general rules through the lenses of the property framework. Due to its particular focus, this analysis will use, as a frame of reference, the EU constitutional property model delineated in Chapter 5 and the common core of EU property law identified by the majoritarian doctrine. For the sake of conciseness, it will refer to the second sources only cursorily, to the extent necessary to describe the property principle or rule used as an interpretative framework.

The third note is a disclaimer made necessary in response to the frequent doctrinal objections leveraging this argument to confute the utility of the proprietary classification.³³ Advocating the propertization of EU copyright to offer a systematic framework for the consistent development of the discipline does not assume that this will solve all the pitfalls of the harmonization, much as it has not been the case at a national level either. Property law, like any other private law institution, is incapable of covering all the particularities of the subject, while copyright is a hybrid creature that does not fit perfectly with any of the contemporary private

³¹ But see Akkermans-Ramaekers 2010, 292, arguing that the provision does not hinder the development of EU property law.

³² See Van Erp 2009, 1517 ff and Von Bar et al. 2009, 257.

³³ Most recently Dreier 2013, 128, 130.

law institutions. This circumstance does not, however, justify the outright doctrinal rejection of the theoretical reconstruction, especially in light of the evolution of modern property rights and the qualification used by EU sources. Property remains the closest private law pillar to copyright, its consolidated constitutional ‘shelter’, and a rhetorical puzzle to be solved with technical means. This is already reason enough to take copyright propertization seriously, and to try to unfold some of its immediate systematic consequences.

