

1. The theoretical framework of copyright propertization

While the phenomenon of propertization of copyright has only recently been labelled as such, the debate on the nature of authors' rights traces back to the beginning of copyright history.

Civil and common lawyers show a largely different approach to the subject. For a civil lawyer, the question of the qualification of copyright as property is purely dogmatic and based on the exegesis of positive norms. Her common law counterpart, instead, tackles the problem from a much broader range of perspectives, from historical reconstructions to philosophical or economic analyses, looking only secondarily at positive law.¹ Yet, each of these disciplines has had a significant influence on the development of both the *droit d'auteur* and the copyright regimes, with recurrent and often indistinguishable overlaps. Although some contributions have already attempted to shed light on the matter,² the awareness and consideration of such similarities by those who operate inside the systems continue to be minimal. Local jurists tend to remain anchored to their interpretative schemes, ignoring the complexity and effects of past and present influences. Naturally, such an attitude hinders them from gaining a more objective comprehension of the genetic traits of their own copyright models.

This scenario does not only characterize copyright law. Comparative law scholars have long emphasized the distortive effects of path dependence on the development of legal systems.³ What makes the phenomenon particularly visible in IP law is the systematic chaos engendered by its supranational standardization, where alien concepts and rationales are often imposed over national models without performing a preventive compatibility check. The lack of a proper understanding of the patterns of

¹ For a similar distinction see Strowel 1993, 73–75.

² Apart from Strowel 1993, see, e.g., Francon 1991; Ginsburg 1991, 125; Davies 1995, 964; Edelman 2004.

³ Particularly in the case of legal transplants. See, e.g., Watson 1974, esp. Chapter 3.

a legal system by those who belong to it represents a clear obstacle to the bottom-up solution to the clash between transplanted provisions and preexisting local principles and rules.

The following pages provide a concise overview of the theories that have influenced the development of the *droit d'auteur* and copyright models. They are classified into two groups – normative and conceptual – to emphasize their diverse inspirations and goals.⁴ Normative theories point to the philosophical or economic reasons that compel legal systems to protect authors, set the objectives of copyright, and provide the rationales to guide legislative drafting and orient the application of existing rules, defining the direction and priorities of a given regime.⁵ Conceptual and systematic theories describe and reorder the status quo, and are used as interpretative frameworks to tackle doubtful or unregulated issues.

Hundreds of pages have been written to describe and reinterpret the broad range of theories developed throughout centuries of copyright history. Rather than offering a comprehensive account of their content, the more limited aim of this chapter is to trace back their contribution or opposition to the conceptualization of copyright in proprietary terms.

1. COPYRIGHT AND NORMATIVE PROPERTY THEORIES

For centuries, publishers and authors, philosophers and economists, politicians and jurists have debated the advisability of protecting creative works through the granting of exclusive rights. They supported their beliefs with sound normative theories, which now represent the backbone of every copyright system, influence their provisions, and have a hidden but fundamental impact on their implementation. Tracing the rationales that inspire a national or regional copyright model means being able to understand its internal mechanisms and foresee its future developments.

Scholars identify two main normative theories: the natural law (or Lockean) argument, usually associated with the *droit d'auteur* continental model, and the utilitarian argument, underlying the Anglo-Saxon copyright system.⁶ The Lockean theory is often intertwined with the

⁴ The same classification can be found in Mossoff 2013, ix–x.

⁵ As emphasized by Guibault 2002, 6–7.

⁶ But see Grosheide, cited by Guibault 2002, 8, who identifies seven rationales for the foundations and objectives of the copyright system.

personalist nuances of Kantian and Hegelian arguments,⁷ while the utilitarian justification has recently evolved into more sophisticated economic theories.⁸ Natural law gives an ethical justification to authors' rights, for it requires legislators to recognize, as a matter of justice, a property right over creative works, automatically derived from the author's labour. On the contrary, utilitarianism has an instrumental, or consequentialist, approach⁹ and advocates the legislative grant of exclusive rights to authors – generally in the form of property – as a tool to incentivize the production of intellectual works, conceptualized as a social welfare goal.

Both theories converge towards the propertization of authors' rights, yet with very different implications. Lockean arguments are individualistic and demand an idiosyncratic, absolute protection of the author's prerogatives.¹⁰ The strong personal focus, later accentuated by Kantian and Hegelian influences, contaminates the property paradigm with personality-right nuances. The property right described by the utilitarian theory, instead, is granted in pursuance of social goals, thus its content is far from being absolute and is subject to limitations every time it is required by the public interest, which represents its ultimate source of legitimation. Its subsequent development by the neoclassical economic theory turns the instrumentalism over to the market, justifying the creation of property rights for intellectual products as a necessary evil to solve market failures.

None of the current legislative models are influenced by a single normative theory, but rather show the signs of their prismatic interplay. Even if it is true that the *droit d'auteur* model bears more natural law traits, while utilitarianism emerges more in the copyright system, the two regimes are in fact converging, particularly due to their supranational standardization.¹¹ More recent models, such as the one created by EU harmonization, have a hybrid nature, with mixed characteristics and inspirations, which make it difficult to classify them and foresee their interpretative developments. Against such an uncertain and twisted background, identifying the meanings carried by the term 'property' in the

⁷ While some authors connect moral rights to Kant (Edelman 2004, 52–54), others refer them to Hegel (Hughes 1988, 330–335).

⁸ As in Radin 1982, 958, who defines the economic theory as a rigorous version of Benthamism.

⁹ For the distinction between deontological and consequentialist approaches, see Spector 1989, 270 ff.

¹⁰ Explicitly Grosheide 1994, 207.

¹¹ *Inter alia*, see Gordon 1989, 1391, and also Strowel 1993, 44 ff.

various normative theories is fundamental to understanding the implications of the propertization of copyright in different regimes.¹²

1.1 Philosophical Justifications

1.1.1 The Lockean argument

Chapter V of Locke's *Second Treatise of Government* is commonly considered the source of the natural law definition of *droit d'auteur* and copyright as property.¹³

The notion of property in Locke is broad, to the extent of being a synonym for entitlement.¹⁴ A man is the owner of himself, and this ownership extends to his reputation, honour, other aspects of his personality, and most importantly to his freedom,¹⁵ but not to his life. This circumstance excludes the possibility of slavery and contributes to reinforcing the link between property, personality and liberty, which represents the most distinguishing trait of Locke's philosophy.¹⁶ Locke imagines the prehistory of civilization as a state of nature where God entrusted abundant bounties to men, who had the freedom to use them as they wished, but needed to put additional effort into extracting them from their natural raw status and transforming them into usable and enjoyable goods.¹⁷ It is the labour that legitimates the individual appropriation of the resource, in the form of a property right rooted in natural law. The argument stems from a concept of derivative acquisition of ownership:¹⁸ if a man is the owner of his own person, and therefore of the labour performed by his body, whatever it produces becomes his property, for the labour is more valuable than the natural thing in raw state to which it is applied.¹⁹ Locke's natural law justification for property is based on individual merit, which happens to incidentally create common good, while the protection it offers is motivated by a sense of justice and the

¹² On the need to resort to the philosophy of copyright in case of uncertainty, see Strowel 1994, 235 ff.

¹³ To mention a few, Hughes 1988; Litman 1990; Gordon 1993; Epstein 2005 and related bibliographies.

¹⁴ The equivalence is made by Olivecrona 1974, 214.

¹⁵ Gordon 1989, 1388–1389 explains how for Locke self-ownership and the 'ownership' over one's action amounted to a right to personal liberty.

¹⁶ Hughes 1988, 388.

¹⁷ See Strowel 1993, 184; Gordon 1993, 1553; Weinreb 1998, 1123.

¹⁸ The definition is also in Rahmatian 2011, 71.

¹⁹ *Ibid.*, 72.

need to ensure a space of liberty and autonomy for individuals, and not by any public goal.²⁰

This fully individualistic perspective is made possible by the abundant supply of resources, which avoids problems of competitive allocation, potential inequalities and negative effects on social welfare.²¹ To avoid these risks, Locke subordinates his acquisition mechanism to the ‘enough and as good’ condition, which allows an individual to appropriate resources only if this still leaves a sufficient quantity of similar goods to those who will follow, and the ‘non-waste’ condition, which forbids the acquisition of goods that would not be consumed by their owner, thus allowing the creation of a market over the surplus.²²

Locke’s theory of property has been easily transposed to the world of intangibles and used to justify the propertization of creative products by means of copyright, where the labour is the creative process through which an abstract idea is transformed into a concrete expression that can be enjoyed by anyone. The latter represents the mix of raw material and labour, over which the author acquires a natural law property arising from the mere act of creation.²³ In fact, the non-rival and inexhaustible nature of ideas makes them fit much more than tangible goods – scarce and rival by nature – with the world of abundant common resources characterizing the Lockean state of nature, for they remain available to later authors even when their expressions are privatized.²⁴ Moreover, since creative works do not exist before their expression, once generated they enrich the public domain instead of impoverishing it, hence their appropriation is always compliant with the ‘enough and as good’ condition. In addition, copyright systems may be adjusted to exclude over-propertization through the provision of limited terms of protection and free uses.²⁵

Later in history, the Lockean theory has been developed along two lines. The first reading, called the ‘avoidance view of property’,²⁶ has emphasized the need to provide a reward for labour as an inherently

²⁰ This is the reason why it is called the ‘desert’ theory. See Michelman 1967, 1168.

²¹ As in Senftleben 2004, 12.

²² More extensively see Hughes 1988, 297–298; Strowel 1993, 185 ff.

²³ Desbois 1978, 538; Ricketson 1987; Hughes 1988, 313; more recently Senftleben 2004, 11–13.

²⁴ Drahos 1996, 44; Weinreb 1998, 1124; Rahmatian 2011, 75.

²⁵ Similarly Spector 1989, 270 and Gordon 1993, 1609.

²⁶ Judge Easterbrook has called it the ‘ex ante perspective on intellectual property’: Easterbrook 1984, 21.

unpleasant activity that requires an incentive to be undertaken. Protecting property is not only an ethical obligation, but also an instrumental policy decision to encourage the production of public goods. Albeit often implicitly, the two arguments intertwine in the history of copyright, creating a bridge between natural law and utilitarian models. The second interpretation, labelled the ‘value-added’ or desert theory, looks at labour as an activity that increases the social value of existing resources, for which the worker needs to be rewarded and further incentivized.²⁷ What justifies the granting of property rights is not the labour per se but its results, again on instrumental grounds.²⁸ Applied to copyright, the value-added labour theory often emerges between the lines of legislative reports, doctrinal pamphlets and court decisions, even if always tainted by the natural law approach, which obliges one not to distinguish between socially valuable and valueless works when granting copyright protection, and requires the protection of the right also in case of non-use of creative works.²⁹

Under both approaches, the natural law justification of copyright depicts a *sui generis* proprietary entitlement that embeds both a personality (moral) and a reward (economic) nuance, due to the close connection between the author and the product of her labour seen as the expression of her inner self and freedom.³⁰ The markedly individualistic character of the theory makes it fully author-centric, while the natural law influence renders authors’ rights absolute and their limitations rigid and exceptional, although the intergenerational equity required by the ‘enough and as good’ condition would support a more effective balance between past and future creators, and therefore a richer public domain and broader-ranging limitations in case of productive and transformative uses.³¹ The property depicted by Locke is an absolute entitlement, which the state does not grant but recognizes as an innate natural right. Its characteristics make it the most perfect philosophical basis for the possessive individualism that emerges in different forms, in the liberal England of the 18th century and during the American and French

²⁷ Becker 1977, 187–220. According to Rahmatian 2011, 73, this is also the basis for limitations arising from the ‘enough and as good’ condition’.

²⁸ Becker 1977, 190–191.

²⁹ This effect is less visible in other IP areas. See the cases and comments reported by Hughes 1988, 307–310.

³⁰ See Seignette 1994, 20; Desbois 1978, 16.

³¹ On the balance required by intergenerational equity see Gordon 1993, 1562–1568 and Weinreb 1998, 1224, in favour of a higher consideration of transformative uses, as Landes-Posner 1989, 332.

Revolutions, as the strongest affirmation of individual liberty against the old regimes, and for authors' rights, when in the same period, as will see in Chapter 2, they strive to achieve an autonomous recognition vis-à-vis publishers' privileges.

1.1.2 The Kantian and Hegelian arguments

In his pamphlet on the unlawfulness of piracy in book reprinting in 1785,³² Kant distinguishes between material support (*corpus mechanicum*) and intellectual content to argue that while the owner of a book may at any time burn the copy she bought, the author never loses the possibility to claim his innate and inalienable paternity right (*angeborene Rechte*) over the work.³³ The core of his theory lies in the negation of the proprietary nature of authors' rights in favour of their conceptualization as a personality right. Kant contests the Lockean approach, noting that the mechanism through which a man's will occupies external resources and acquires their property shares nothing with the production of a creative work, which consists of the external expression of one's own personality in a material and perceivable form.³⁴ Since personality rights are inalienable, the author allows the publisher to print and distribute her work through a *locatio operis*, keeping the right over her expression and transferring only the exclusivity over the printed copies of the work.³⁵

Despite his attempts to provide a legalistic analysis, however, Kant had much less impact on copyright models than Hegel, whose personality theory of property made it particularly fitting to describe and justify copyright.³⁶ Hegel's property has its root in free will.³⁷ In its process of evolution, the will is in a permanent struggle for self-realization, which can be achieved only if the subjective freedom turns objective and becomes personality. To this end, the will has to appropriate material portions of the world, transforming them into external manifestations of the self by seizing, shaping or marking ownership of them.³⁸ More property entails more room for the will to dominate the external world; once secured, it grants a solid basis for the individual to pursue other free

³² Kant 1785; see also Rahmatian 2011, 85.

³³ Kant 1785, 371–373.

³⁴ Ibid.

³⁵ Rahmatian 2011, 88.

³⁶ Ibid., 87 and Hughes 1988, 330.

³⁷ Hegel 1821, 35–58.

³⁸ Ibid., 81. In a personhood perspective, Radin 1982, 957.

actions, directed to achieve the desired self-development.³⁹ The difference with the Lockean theory is evident: there, labour is the ultimate justification for property; here, it is only an act of externalization of the will, justified as existence of one's personality.⁴⁰

Like Locke, Hegel does not focus on intellectual property but for a cursory reference to the need to protect inventions and creative works for the progress of arts and sciences.⁴¹ Yet, scholars have widely used his theory as a paradigm to overcome the problems raised by the natural law approach. The Hegelian link between property and personality well supports the definition of authors' rights in proprietary terms, while justifying the *sui generis* nature of the continental *droit d'auteur*, both in its German monistic interpretation as personality right and in the French dualistic structure of independent economic and moral rights.⁴² Only one conceptual obstacle, raised by the stronger personality nuances, remains, that is the question of alienability of intellectual works. In fact, according to the Hegelian theory, a person may at any time withdraw her free will from the objects she owns and decide to alienate them,⁴³ except for the elements of one's self-consciousness. Once a creative product is considered a manifestation of the author's personality, its alienability is excluded, and this is indeed an argument heavily used by the 19th-century continental doctrine to confute the proprietary nature of authors' rights.⁴⁴ To solve the paradox, Hegel distinguishes between the copy of the work (the product), the communicated thoughts (the creative expression), and the author's means of expressing herself (including the reproduction of the work). While copy and expression are products of the author's skills, the reproduction is an inalienable manifestation of her personality. When the author sells a copy of her work, she alienates the product and the possibility to use and enjoy the thoughts it contains, but retains the right to reproduce it, that is, to externalize her own personality through the same creative expression.⁴⁵

In Hegel's theory, property is a function of the protection of personality. When applied to authors' rights, the unavoidable distinction between alienable and inalienable elements generates a dichotomy that separates

³⁹ Hegel 1821, 81–84.

⁴⁰ *Ibid.*, 75–81.

⁴¹ *Ibid.*, 35.

⁴² Hughes 1988, 330; Rahmatian 2011, 83 ff.

⁴³ On the paradox see Hughes 1988, 345–346.

⁴⁴ As we will see in 39 ff.

⁴⁵ Hegel 1821, 98. For a parallel with the notion of *dominium directum* and *utile* see Rahmatian 2011, 85.

the ownership of the material support from the entitlement over the creative expression, and obliges a consideration of the latter as an inalienable personality right. The Hegelian influence on the German doctrine will lead to the development of the personality theory of copyright and the monist model of copyright as personality right. When the theory reaches French courts, it will leverage the personalist nuances of the French property model, generate moral rights, and trigger the creation of the dualistic model of *droit d'auteur*, adding another layer of complexity to their already confused propertization.

1.1.3 The utilitarian argument

While Locke, Kant and Hegel are identified as the philosophical fathers of the natural law and personality-right approach characterizing the *droit d'auteur* model, Bentham and Stuart Mill are the ultimate references of the utilitarian argument that inspires the Anglo-Saxon copyright regime.⁴⁶

According to utilitarianism, individuals tend to maximize their utility, that is to direct their actions towards the achievement of pleasure and the minimization of pain. Common (or social) utility is the sum of individual utilities in a community, so that the utility of an action is measured by its capability to provide the greatest pleasure (or good) for the largest number of people possible. Governments are called to achieve social utility through direct interventions, or by creating incentives for people to refrain from detrimental activities and engage in useful ones.⁴⁷

Another common utilitarian tenet is that people derive pleasure from the stability of possession and the peaceful enjoyment of their own wealth, and that the successful functioning of a community is based on the mutual refraining from interference with others' land or belongings.⁴⁸ Any government that strives to maintain order and increase social utility should then crystallize the customary respect for one another's possessions in objective and enforceable property rules.⁴⁹ Since social utility is also dependent on the steady generation and offer of products and services, it is in the interest of the community – and thus necessary for the state – to grant everyone ownership of at least part of the output of their work.⁵⁰ Both utilitarianism and natural law theories recognize the need for the government to reward individual labour, but the difference in focus is evident: while the first grants property rights as an incentive for

⁴⁶ See Michelman 1967, 1209–1210.

⁴⁷ Ibid., 1211 ff.

⁴⁸ Ibid., 1208, who draws it from the works of Hume and Bentham.

⁴⁹ Ibid., 1210.

⁵⁰ Ibid., 1211.

valuable activities that increase the common good, the second conceptualizes the reward in connection to the individual effort, regardless of whether or not the labour produces socially valuable results.⁵¹

The divergences between the two approaches become even clearer when applied to copyright. From a utilitarian perspective, exclusive rights act as an *ex ante* stimulus for the generation of intellectual works, increasing social utility by encouraging the generation and dissemination of knowledge. In addition, copyright performs the role of an 'engine of free expression',⁵² offering authors the possibility to earn a living and free them from patronage.⁵³ For the legislator, rewarding authors is not an ethical obligation, as with Locke, but the most effective means to reach a higher social utility goal. The exclusivity is justified only if it is beneficial to the entire society. This implies that legislators should curtail the level of protection every time it is necessary to avoid the author's monopoly frustrating social objectives by exercising an excessive control over the work that limits the dissemination of knowledge. Similarly, no copyright should be secured if social utility is better achieved through a stronger public domain, rather than by incentivizing more knowledge production with the grant of property rights.⁵⁴

This does not imply that utilitarian-based systems grant a lower level of protection to authors than systems inspired by the Lockean paradigm, which also admits of the need for a balance between authors' (property) rights and conflicting interests. However, the fact that authors' rights require an additional, socially oriented justification does have an impact on the characteristics and structure of the model.

Since social welfare goals may vary, the system must guarantee enough adaptability. Exclusive rights should then be well defined in scope, and limitations worded as ample flexible clauses, in clear opposition to the Lockean model, which supports overarching, open-ended rights and allows only exhaustive lists of exceptions.⁵⁵ Similarly, while the natural law approach requires a restrictive reading of limitations and barely tolerates statutory licences, the utilitarian approach welcomes their

⁵¹ The same conclusion is reached by Guibault 2002, 11–12, who distinguishes between reward and incentive arguments and analyses their frequent confusion.

⁵² The definition was used in *Harper & Row Publisher v Nation Enterprises*, 471 US 539, 559 (1985).

⁵³ In a historical perspective, see Netanel 1996, 299, 353.

⁵⁴ As in Hugenholtz 2000a, 483.

⁵⁵ In this sense Strowel 1993, 114; Guibault 2002, 17; Senftleben 2004, 38–39.

creative interpretation and allows unauthorized uses upon the payment of fair compensation.⁵⁶ The consideration of social goals as the ultimate justification for copyright protection also facilitates the implementation of cultural policies within the tangles of copyright law, ranging from the encouragement and promotion of research, teaching and learning to broader objectives such as empowering, promoting and preserving cultural identities, diversity and heritage.⁵⁷

The utilitarian approach is not without challenges, though. The flexibility of the notion of social utility makes it particularly hard to identify a universally accepted measure to assess the efficiency of copyright. This explains the ongoing debate as to the optimal level of protection, the balance of exclusive rights with other societal goals, and consequent behaviours to be incentivized or deterred.⁵⁸ Also, the definition of copyright in proprietary terms has recently been contested in favour of its economic qualification as a monopoly, which is deemed to suit the utilitarian paradigm better, for it justifies authors' exclusive rights as a regulatory intervention to solve market failures and implement policies whose social benefits are higher than their social costs.⁵⁹ From even more extreme positions, some commentators have questioned the very utilitarian foundations of IP, pointing at the non-rivalrous and non-exhaustive nature of ideas, which would radically exclude the applicability of normative arguments used to justify tangible property.⁶⁰ These critiques originated from the immediate by-product of utilitarian arguments that are the economic theories of IPRs. Among them, neoclassical economic doctrines represent today, ironically, the strongest justification supporting the high level of protection of copyright, together with its propertization.

1.2 Economic Justifications

Born and developed in the United States along the path of utilitarianism,⁶¹ in a few years the economic analysis of law crossed the Atlantic Ocean to become one of the key instruments of impact assessment of the EU legislator. After the initial scepticism on the part of legal scholars, its

⁵⁶ Guibault 2002, 17–19, with Dutch and French examples; along the same lines Strowel 1993, 635.

⁵⁷ See Gieseke 1957, 139; Ginsburg 1991, 996; Senftleben 2004, 16.

⁵⁸ The debate is extensively analysed by Mossoff 2013, xv–xvi, with a particular focus on patents.

⁵⁹ As Bell 2008, 523.

⁶⁰ Palmer 1990, 857.

⁶¹ Similarly Strowel 1993, 224–229.

influential grip conquered the field of IP, where the neoclassical economic theory of the Chicago School of Economics has consistently dominated, mostly thanks to the key role played therein by property rights.⁶² According to the Chicagoans, in conditions of perfect market economy, property is the most efficient tool to allocate scarce resources and guarantee their most effective use.⁶³ It regulates rights and duties between individuals in respect to a definite good, by entrusting its exclusive use, enjoyment and disposition to one or more legal subjects and obliging everyone else to refrain from perturbing the peaceful exercise of such prerogatives.⁶⁴ Through its well-defined link between the owner and the resource, property allows the internalization of both negative and positive externalities generated by the object, and conveys all the necessary information for an efficient bargain and allocation.⁶⁵

The theory assumes that individuals are rational market players who aim at realizing their self-interests. While the law cannot shape their preferences, it can still provide economic incentives that leverage this tendency to pursue social goals. The incentivizing effects of property depend on its nature of exclusive, easily enforceable and transferable entitlement.⁶⁶ Full exclusivity ensures a safe return on investment, since the owner has a monopoly over the profits and fruits derived from the good, which shields her from opportunistic free-riding. Enforceability strengthens the safety of the entitlement, while free transferability makes it possible for the market – provided there are no *ex ante* or *ex post* transaction costs – to direct the good to the person who values it the most and who will be able to maximize its value,⁶⁷ thus causing an increase in social welfare.

In the case of tangible goods, scarcity and rivalry for possession are natural characteristics of the resource. A legal system therefore needs only to formally recognize and protect the exclusivity of the entitlement, while the market will be able to set the right price for its exchange and ensure an optimal level of production and its allocation to the most appropriate economic actors. On the contrary, intangible goods are public goods, for they are non-excludable and non-rivalrous, and this automatically generates a market failure. Non-rivalry implies that many users can

⁶² See, with regard to the US, Mackaay 1990, 894. On the role played by property see Lehmann 1985, 530.

⁶³ Strowel 1993, 196 ff and related ample bibliography.

⁶⁴ Furubotn-Pejovich 1972, 1157 ff.

⁶⁵ As in Demsetz 1967.

⁶⁶ Strowel 1993, 197.

⁶⁷ Similarly Guibault 2002.

contemporarily enjoy the good without impacting on the consumption power of others. In economic terms, this translates into a marginal cost of consumption of additional units that tends to zero. Since the optimal price of a good corresponds to its marginal cost of consumption, the price of a non-rivalrous good will be very low or zero as well, making it unprofitable and frustrating its production. At the same time, users are not compelled and, consequently, not willing to pay for a resource the access to which is free, and the lack of a structured market demand for value also engenders the absent or suboptimal production of the goods.⁶⁸

To compensate for the inability of the market to self-regulate, the intervention of the public regulator is needed. Here lies the main argument supporting the legislative introduction of copyright and patents as intangible goods prone to similar market failures. In order to incentivize their production, law should grant inventors and authors the possibility to set a price for their work and appropriate the fruits of their efforts and investments, by fencing off unpaid access and preventing any unauthorized use that may create competition. In simpler terms, law should make ideas and expression artificially scarce, rivalrous and excludable in their use and enjoyment, so as to ensure their socially optimal production and regulated access.⁶⁹ This solution is generally preferred to the direct involvement of the public authority in financing creative activities, which might cause indirect forms of control and undue influences from the central power.⁷⁰

The theory stems from the utilitarian assumption that inventions and creative works have a relevant social value, and it is in the public interest to stimulate their production to increase the aggregate social utility. The economic argument takes a step forward, for it identifies in the market the necessary tool to achieve the goal. Strong proprietary entitlements are not only an incentive for the creation of intellectual works, but a prerequisite for the market to allocate them via contractual arrangements to the economic actors that will exploit them more efficiently. The task of the legislator is to create the conditions for the copyright market – both actual and potential – to function properly, mostly by facilitating private agreements through the reduction of transaction costs.⁷¹ Well-defined

⁶⁸ Landes-Posner 1989, 325.

⁶⁹ Ibid.

⁷⁰ Gordon 1982, 1612.

⁷¹ The coverage of both actual and potential markets is typical of the neoclassical theory. See Netanel 1996, 313; Merges 1997, 131; Bell 1998, 567.

property rights are considered the primary tool to achieve the goal, since they increase certainty and reduce the information asymmetry between the creator and those interested in using and exploiting her work.⁷²

Similar economic reasons support the legislative provision of exceptions and limitations every time the normal operation of exclusive rights leads to market failures. This may happen, for instance, when difficult and/or high-cost enforcement or high transaction costs hinder the stipulation of efficient copyright licence agreements.⁷³ Tools such as the fair use doctrine, statutory licences or mandatory collective management schemes, operate a legislative transfer of the right to use the work to another individual or entity, with or without compensation, facilitating the most socially optimal allocation of the resource, or reducing or eliminating transaction costs.⁷⁴ This approach justifies exceptions only to the extent necessary to solve market failures, and requires a constraint on their implementation every time they impact the actual or potential market of the work. In this sense, the neoclassical economic theory and the natural law argument both favour ample exclusive rights and narrowly defined limitations.⁷⁵ In addition, any technological change that causes a creative expression to turn into a private good (rivalrous and excludable) supports the adoption of different rules to pursue the same market efficiency goals.⁷⁶ An extreme consequence of this approach is the almost complete exclusion of exceptions in the digital environment, where market failures are reduced, since copyright owners can easily reach a much broader public, engage in mass licensing, operate price discriminations on the basis of type and number of allowed uses, and prevent unauthorized uses through technological locks.⁷⁷

Non-Chicagoan economic theories propose alternative readings where, for instance, copyright exceptions serve to avoid the over-protection of creative works and the under-consumption generated by prices that are higher than the marginal cost of production, which in the case of non-rival goods is zero.⁷⁸ These views admit that the maximization of individual profit achieved through a strong propertization does not automatically imply a maximization of social welfare, but may also result

⁷² See the comments of Smith 2007, 1799 ff.

⁷³ As in Aldenstein-Peretz 1985, 211.

⁷⁴ Gordon 1982, 1600.

⁷⁵ Senftleben 2004, 39.

⁷⁶ Extensively in Bell 1998, 557.

⁷⁷ Gordon 1982, 1602; Merges 1997, 132; Bell 1998, 583.

⁷⁸ Benkler 1999, 408.

in access problems, damaging market actors who have weaker bargaining power.⁷⁹ More generally, those who adopt a social utility-laden interpretation of the incentive theory believe that authors should receive no more than what is necessary for them to produce works, and always by ensuring an adequate balance with the public interest.⁸⁰ Those who adhere to an orthodox neoclassical approach, instead, look only at the private incentive function, and direct their attentions also to industrial right-holders, maintaining, *inter alia*, that only the possibility to earn supra-competitive profits helps publishers finance with successful best-sellers the commercialization of riskier, niche works.⁸¹

In fact, commentators have contested the validity of the incentive theory with regard to authors by noting that many works are produced for passion, honour, vocation and several other motivating factors, and no empirical evidence proves the existence of a causal link between stronger proprietary rights and the production of creative works.⁸² To the contrary, copyright performs best as an incentive for intermediaries, whose first driving force is represented by economic rewards.⁸³ Since the most direct beneficiary of the incentives proposed by neoclassical economists is the copyright industry, it is no wonder that this normative theory has worked optimally in contexts where copyright is linked to industrial policy objectives, as in the case of EU harmonization, where copyright protection is seen as the backbone of the development of the information and creative industry, whose growth and competitiveness promote social welfare by generating new knowledge and innovation and by creating new jobs.⁸⁴

The role played by economic theories in the process of propretization of copyright is very recent and therefore less historically evident than that played by natural law and utilitarian arguments. Yet, the economic analysis of copyright represents today the strongest normative justification used to support the protection of creative works by means of property rights, particularly in recent hybrid models such as EU copyright law. Clarity about its implications is a necessary precondition to understanding the consequences of its interplay with other, older

⁷⁹ Ibid.

⁸⁰ Sterk 1996, 1197, with a focus on the 1976 US copyright law.

⁸¹ Landes-Posner 1989, 355–357.

⁸² Already emphasized by Breyer 1970, 351.

⁸³ Already Ljungman 1976, 65.

⁸⁴ Netanel 1996, 333; Benkler 1999, 400. Senftleben 2004, 15 defines it as the social dimension of growth of the copyright industry. See also Sterk 1996, 1244.

normative theories that support the definition of copyright in proprietary terms, and its impact on the characterization of the property model that was followed in shaping and implementing copyright law.

2. COPYRIGHT AND CONCEPTUAL (PROPERTY) THEORIES

While normative theories intervene *ex ante* to justify the protection of authors' rights, conceptual and systematic theories come into play *ex post*, when scholars attempt to classify these entitlements under the dogmatic categories of their legal tradition. Whereas the first group converges towards a proprietary definition of copyright or *droit d'auteur*, the second instead shows a wider range of positions. Civil lawyers tend to reject the assimilation of authors' rights to the tangible property depicted by their civil codes, whereas common lawyers do not find any theoretical obstacle to the proprietary qualification of copyright, for their 'property' encompasses credits, claims and expectations, and its scope is so wide that propertization carries few systematic implications. The dichotomy is not a perfect one, though. Among civil lawyers, the rigidity of the German doctrine is counterbalanced by the more flexible positions of French scholars, whose property model is open to intangibles and even bears some resemblance to its common law counterpart, while Italy witnesses influences of these two traditions in an interesting hybrid. The following pages will offer an exemplificative overview of these three doctrinal debates, emphasizing how the different conceptual readings offered by national scholars have had an inevitable impact on the way normative theories have moulded statutes and case law, and how their interplay has been fundamental in determining the directions taken by national copyright laws.

2.1 The French Debate

As will emerge clearly in Chapter 2, the definition of authors' rights as property represented the immediate rhetorical reaction against a system that was based on the conferral of privileges completely dependent on the royal wish. During and after the French Revolution, property embodied the external manifestation of individual liberty, a guarantee for self-development, and the ultimate defence of the individual against the

public power.⁸⁵ It soon became the main pillar of the new order, created upon the ruins of the *Ancien Régime*, so much so that qualifying an entitlement as property meant investing it with the highest rank in the legal system.⁸⁶ The close link between property and the individual, inspired by the Enlightenment, stretched the concept of ownership to cover several aspects of personality.⁸⁷ This characteristic, coupled with its sacredness, made the choice of property for the nascent *droit d'auteur* an obvious one for its advocates, for its potential inclusion of both the economic and the personal aspects of the right.⁸⁸

After the Revolution, scholars showed a strong aversion to the concept of immaterial property, seen as a remainder of the feudal past.⁸⁹ Yet, the pressure exerted by the revolutionary rhetoric on a very young legislator defeated any dogmatic resistance, allowing the introduction of the *propriété littéraire et artistique* into the French legal system. The anchorage of the choice to rhetoric proclamations and natural law, rather than solid legal theories, appears evident in the reports on the first two copyright statutes⁹⁰ and in the words of contemporary commentators, who defined literary property as the most sacred property, pre-existent to any statutory recognition, based on a reward rationale, and the main guarantee of individual liberty, to be considered as its perpetual as traditional tangible counterpart.⁹¹

When the enthusiasm decreased and it became clear that the political declarations were not backed up by a strong dogmatic basis, the debate on the nature of authors' rights heated up. The almost plain acceptance of the notion of literary property faded away during the 19th century, with scholars progressively splitting into several groups, each of them advocating for a different qualification.⁹²

In the period between the first copyright statutes and 1880, Renouard was known as one of the strongest opponents of the use of the term 'property' for the *droit d'auteur*. In his utilitarian view, authors' rights corresponded to the fair and just remuneration that society paid to

⁸⁵ *Inter alia*, see Carbonnier 1992, 63; MacPherson 1971, 13; Strowel 1993, 92–93.

⁸⁶ The process is well described by Zenati 1981, 173.

⁸⁷ Carbonnier 1992, 64.

⁸⁸ Strowel 1993, 93–94.

⁸⁹ Zenati 1981, 174.

⁹⁰ See Chapter 2, 69–70.

⁹¹ Laboulaye-Guiffrey 1859, XXVIII; Desbois 1978, 28.

⁹² See the overview and classifications of Kase 1967, 5–15.

creators for the social utility they generated with their service.⁹³ Echoing Kantian theories, he contested the idea that the products of the author's personality could be appropriated, pointing at the necessary distinction between creative expression and its material support.⁹⁴ Together with other authors, he noted that the cumulative nature of knowledge generation excluded that creative expressions could qualify as *res nullius* and be acquired by occupation.⁹⁵ Similarly, he challenged the missing features of perpetuity and materiality of the object in the *propriété littéraire*, and considered the notion of literary property useless, observing that the act of publication entailed an abandonment of the work, and hence the loss of a *dominium* over it, with the result that a fully-fledged property was possible only before the commercial exploitation of the work.⁹⁶

Renouard's solution was to conceptualize authors' rights as a monopoly, as opposed to property, the first being an exceptional setting where the rights attributed are limited and specific, so that unauthorized conducts are automatically forbidden, while the second is a subjective right, and its faculties are expressed with a generic and concise formula, so the owner can act freely within the borders set by law.⁹⁷ He based his definition on the content of authors' rights, represented by an economic exclusivity, and their structure, limited in time and scope as opposed to traditional property rights.

Against Renouard, scholars like Laboulaye, Gastambide and Blanc⁹⁸ defended the propertization of authors' rights, pointing to proprietary traits like the automatic recognition of the right from creation and the exhaustive and closed list of exceptions. The strongest advocate of *propriété littéraire* remained Pouillet, who justified the proprietary label in light of its derivation from individual labour.⁹⁹ This position was later backed by other scholars and legislative *rapporteurs*, who emphasized the 'caractères spéciaux'¹⁰⁰ and 'exigences propres'¹⁰¹ of literary property to justify its departure from the traditional tangible property model. With more dogmatic arguments, they attributed the reason for the differences to the incorporeal objects of authors' rights, and the necessary

⁹³ Renouard 1838, 435.

⁹⁴ *Ibid.*, 449–454.

⁹⁵ Renouard 1838, 448; Calmels 1856, 33; recently Pfister 1999, 525.

⁹⁶ *Ibid.*

⁹⁷ Laboulaye-Guiffrey 1859, 410 ff.

⁹⁸ Gastambide 1837; Blanc 1854, Laboulaye 1858.

⁹⁹ Pouillet 1908, 16–20.

¹⁰⁰ Gastambide 1837, 78.

¹⁰¹ Blanc 1854, III.

limitations in time and scope imposed to balance authorial interests with the need to ensure access to knowledge and the development of a competitive market over intellectual works.¹⁰² In their view, however, these divergences did not exclude that copyright owners still enjoyed a great part of the prerogatives linked to property, proving that the *droit d'auteur* differed in structure and content, but not in nature, from traditional property rights.¹⁰³

Following the majoritarian approach, the French legislator used the term 'propriété' in its 1866 intervention,¹⁰⁴ although parliamentary proceedings and legislative reports testify to the voluntary avoidance of any debate on the nature of the right.¹⁰⁵ The divergence between the concept of property used during the Revolution, rooted in philosophy and jurisprudence, and the property model advanced by scholars educated under Roman law dogmas created a set of ambiguities and exegetic problems which gave rise, as we will see in Chapter 2, to a string of contradictory definitions in the 19th-century case law of the Cassation.

The inconsistencies created by the attempts to classify authors' rights under traditional private law categories led other scholars to propose their qualification as *sui generis* rights. Picard introduced the new category of intellectual rights, emphasizing the dogmatic incompatibility of patent and copyright with the three traditional Roman law groups of real rights, obligations and personality rights.¹⁰⁶ He proposed to substitute the proprietary label with 'monopole' or 'droit d'invention', and went as far as formulating legislative amendments, yet without engaging in a more detailed dogmatic analysis. Roubier preferred the qualification as *droit de clientèle*, described as a third type of patrimonial right after property and obligations,¹⁰⁷ and rejected the notion of *propriété littéraire*, arguing that authors' rights shared with property only the rights to abuse and to enjoy the fruits of the work, but not its exclusive use, which was made impossible by its nature of public good. The label 'right to the clientele' emphasized the choice for a monopolistic qualification, since the clientele is 'fortune in the making, ... not ... acquired fortune',¹⁰⁸ and so is the object of the *droit d'auteur*, which depends on the economic success

¹⁰² For a similar conclusion see Moyse 1998, 511.

¹⁰³ Ibid.

¹⁰⁴ See the critique of Calmels 1856, 22.

¹⁰⁵ Gastambide 1837, 55–67.

¹⁰⁶ In Picard 1899, 67, 91–92.

¹⁰⁷ Roubier 1935, 251 ff.

¹⁰⁸ Ibid., 304.

of the work, while property and obligations have objects characterized by a definite, stable value.¹⁰⁹

While such innovative approaches could not find their way into the system, the ‘graft’ of the German personality theory on the personalist nuances of the *propriété littéraire* led to the judicial development of moral rights, challenging once again the proprietary qualification of authors’ rights. Inspired by German scholars, Morillot – later followed by Escarra, Hepp and Rault¹¹⁰ – argued that the most appropriate civil code category for the *droit d’auteur* was that of personality rights, that publication was an exercise of individual liberty more than a form of exploitation, and that counterfeiting was not an attack on the patrimony of the author, but on his personality and liberty.¹¹¹ The exclusivity over the commercialization of the work was only a consequence of the dominium exercised over the manifestation of individual personality, a by-product that did not qualify as an independent entitlement, but only as the economic implication of the main personality right.

The result of the introduction of the personality theory in France was not as fundamental as in Germany, yet it added a new analytical perspective to the debate, which contributed to the development of the French dualist model. The contemporary and independent presence of moral and economic rights created a ‘mixed legal situation’,¹¹² where the independence of the personality right helped the supporters of the notion of literary property gain back more grip over the legislator and courts, and exercise a decisive influence on the drafting of the 1957 law, whose Article 1 (now Article L.111-1 CPI) names the *droit d’auteur* as the ‘right to incorporeal property, exclusive and opposable to everyone’. However, although some scholars judged this choice as the final act of the *querelle* on the dogmatic classification of authors’ rights,¹¹³ the parliamentary report on the new law suggests otherwise, for it defines the *droit d’auteur* as a right ‘of ambiguous nature’, which ‘does not fully belong to the category of personal rights, nor to that of real rights’.¹¹⁴ Its qualification as a hybrid right is also maintained by authors such as

¹⁰⁹ Ibid.

¹¹⁰ Escarra-Rault-Hepp 1937, 31 ff.

¹¹¹ Morillot 1878, 108 ff.

¹¹² See Lucas-Lucas-Lucas Schloetter 2012, 22.

¹¹³ Such as Hepp 1958, 161, and before Roubier 1935, 251.

¹¹⁴ Assemblée Nationale, II législature 1954, session of 9 June, n.8.612, reproduced in 5 RIDA 151 (1954) [my translation].

Bertrand and Colombet,¹¹⁵ who find any attempt to make authors' rights fit into classic private law categories destined to fail.

More recent contributions go back to the concept of literary property, and try to overcome some of the most relevant dogmatic critiques that have been made in the last century and a half. Pierre Recht,¹¹⁶ for example, introduced the concept of *propriété-creation* as a new form of property, and advocated for a consideration of copyright as salary, upon the example of Article 6 of Italian copyright act, which states that 'copyright arises from the act of creation, as particular expression of intellectual work'.¹¹⁷ Despite his efforts in adapting property law theories to copyright, his theory remained weak, for it overlapped natural law and systematic arguments. Meanwhile, the rampant return of copyright propertization, tainted with rhetorical emptiness, has prompted a large part of the doctrine to offer a more serious systematic definition of the characteristics of the *propriété littéraire*, mostly in comparison with the features of the property model defined by the *Code Napoléon*.

Such contributions clarify, for example, that the subject matter of the exclusivity is not the creative expression, but rather the commercial value of the work; that the general right to dispose should be interpreted as a bundle of rights and not as an overly comprehensive property right; and that the *jus excludendi* should not be read as strictly as in the case of tangible property, since non-owners may enjoy the work without impacting on the owner's capability to extract value from it through reproduction and commercial exploitation.¹¹⁸ Other important and emphasized distinctions are the non-applicability of the French Civil Code rules on possession, alone and as a mode of acquisition of property rights, the different regulation of co-ownership rights, and the distinction between rights over material support and immaterial expression.¹¹⁹ As we will see in Chapter 4, these and other systematic considerations contributed to partially controlling – albeit not without flaws – the distortive effects of the proprietary rhetoric, by ensuring the cohabitation of normative and conceptual theories, while assisting the development of copyright law

¹¹⁵ Bertrand 1991, 49; Colombet 1992, 1920.

¹¹⁶ Recht 1969.

¹¹⁷ Legge 22 Aprile 1941, no. 633, Protezione del diritto d'autore e di altri diritti connessi al suo esercizio, GU 16.4.1941, no. 166 [Protection of authors' right and other related rights].

¹¹⁸ Hepp 1958, 161; Recht 1969; Francon 1998, 121 ff; Vivant 2007, 193 ff. See the review of Gaudrat 2007, 43.

¹¹⁹ Included also in the Code de la Propriété Intellectuelle (CPI) (Article L.111-3). See Gaudrat 2007, 11.

through the application of adapted property concepts and rules. The approach was made possible by the greater flexibility of the institution of property in France, and the relative openness of scholars and legislators towards the propertization of authors' rights.

2.2 The German Debate

Germany is the country that most strongly opposed the concept of IP and the definition of authors' rights in proprietary terms. When compared to France, the differences in the approach are striking, and mostly motivated by the features of the German Civil Code and its property model, the interpretative scheme followed by the German doctrine, and the ultimate predominance of a monist approach to copyright, defining it as a unitary personality right.

Historically, the first propertization attempt was made by holders of local privileges, weakened in their monopolies due to the German territorial fragmentation.¹²⁰ To justify the protection of authors' rights beyond the scope of local concessions, their theory distinguished the creative expression from its material support, anchoring the protection of the former to natural law theories, and defining as property the exclusivity granted to the printer upon the acquisition of the manuscript as property (*Verlagseigentums*).¹²¹ Then, at the beginning of the 19th century, the German theory of literary property developed under the influence of the French decrees and found several advocates who further justified the definition of authors' rights as Hegelian *quasi-dominium*,¹²² to be recognized by law independent of the whimsical decisions of the monarch.¹²³ Most of its supporters were conscious of the fact that the concept was more of a theoretical model than a dogmatically accurate qualification of the entitlement, and even made accurate disclaimers.¹²⁴ Yet, this did not save them from harsh critiques, prevalently from scholars following the personality theory.¹²⁵

Based on the joint elaboration of Kantian arguments with Romanist dogmas, the theory classified authors' rights as personality (or individual) rights, considering the notion of literary property as nonsense, since

¹²⁰ See the work of Pütter 1774, and the overview of Schricker-Loewenheim 2017, 99 ff.

¹²¹ Schricker-Loewenheim 2017, 100.

¹²² Especially Schmid 1823, Krug 1823, Kramer 1827.

¹²³ Explicitly Gieseke 1957, 23.

¹²⁴ Vogel 1978, 148.

¹²⁵ Mostly Gareis 1877, 185 and Bluntschli 1853, 184 ff.

creative works represented elements of the author's personality, and property could not insist on individuals nor on any of their parts.¹²⁶ Authors' rights were justified by the need to protect the intellectual activity, and not the material effort put into it.¹²⁷ The opposition to the proprietary conceptualization could not have been stronger: the object of the right was the author's personality, which could not be owned; the right-holder could not be anyone but the author, while the property owner could always vary; the nature of the right could not be economic, while property is the economic right *par excellence*.

The personalist approach soon became dominant, thanks to the influence of the contemporary doctrinal debate that preceded the codification. During the 19th century, in fact, the Historical School of Jurisprudence and its axiological return to Roman law concepts slowly built up a notion of property grounded in possession, and thus limited to tangible goods.¹²⁸ The approach of von Savigny won over Germanic customs and was crystallized in §90 and §903 BGB, the first specifying that 'only corporeal objects are things as defined by law', the second limiting the object of property to things. The categorical exclusion of intangibles from the definition of *Sachen* (things) offered by the BGB did not leave any space for an extension of the notion of property to cover exclusive rights on immaterial entities.¹²⁹ Scholars were also convinced that the mere use of the proprietary label on intangibles would have blurred the contours of property, with detrimental systematic effects.¹³⁰

In the same span of years, however, the personality theory abandoned its most extreme traits. It accepted the joint presence of economic and moral aspects in the right conferred to authors, but still defining them as two faces of the same prismatic right, where economic prerogatives were only a consequence of the personality right and could therefore never be defined as proprietary. The approach, called monistic and originated by von Gierke's theory of the *Urheberpersönlichkeitsrecht*,¹³¹ emerged in the various statutes enacted from the mid-1800s onwards. Courts

¹²⁶ Gareis 1877, 185–210, elaborated on by Strömholm 1967, 313 and Vogel 1978, 198.

¹²⁷ Lange 1852, 169.

¹²⁸ For a broader overview see Rufner 2011, 33 ff.

¹²⁹ Defined as useless or unimaginable for this reason by Bluntschli 1853, 184, and Wächter 1875, 12.

¹³⁰ See, e.g., von Gierke 1889, 103 ff; Kohler 1907, 78; Vogel 1978, 148. For an overview see Pahlow 2006, 715–716.

¹³¹ von Gierke 1889.

remained silent on the nature of the right, with few exceptions, the most relevant being the upfront denial of the overarching character of authors' rights, which would have made them closely resemble a property right.¹³²

For more than a century, the concept of *geistiges Eigentum* could not find its way into the German system. Yet the notion of literary property did not disappear during the 19th century. The most famous example is the work of Klostermann,¹³³ the first author to attempt a unitary analysis of IPRs, distinguishing them from tangible property, and excluding their natural law foundation, arguing that IP did not answer to ideals of justice but to industrial and societal needs. In his opinion, the term *Eigentum* was not used to expand authors' prerogatives, but to perform more effectively the balancing exercise, since property allowed more limitations than personality rights did.¹³⁴ On more moderate positions, Kohler tried to overcome the monist theory, introducing the notion of immaterial goods (*Immaterialgüter*) and unifying patents, copyright and trademarks under the label of *Immaterialgüterrecht*, without any intention to challenge the dogma of tangible property enshrined in the BGB. In his theory, immaterial goods are generated from the act of creation; rights over them descend from natural law and are recognized by the legislator in light of their social utility.¹³⁵ While the personality link remains strong, the reference to Lockean arguments 'contaminates' the traditional German paradigm, and emancipates authors' rights from the rigid personality-right qualification, by shifting the focus to their economic use and the socio-economic justification for their limited temporal duration.

Despite the great influence Kohler had on the doctrinal debate, the monistic theory remained dominant. After a brief parenthesis where natural law elements penetrated a governmental bill to amend the copyright statute in 1954,¹³⁶ and a hybrid notion of literary and IP found its way into scholarly contributions¹³⁷ and judicial decisions,¹³⁸ the law enacted in 1965 reiterated the validity of the traditional model, stating that the author's right 'protects the author in her spiritual and personal relation with her work, and in its exploitation. It equally allows to

¹³² Strömholm 1967, 332, and the cases reported by von Gamm 1982, 75.

¹³³ Klostermann 1871.

¹³⁴ *Ibid.*, 116.

¹³⁵ Kohler 1907, 89 ff; Dreier 2013, 119.

¹³⁶ Reported in Hubmann 1954, 5 and Strömholm 1967, 462.

¹³⁷ As in Hubmann 1954 and Lehmann 1985.

¹³⁸ Such as BGH 18 May 1955, *Tonband/Grundig-Reporter*, 20 UFITA 1955, 314.

guarantee an adequate remuneration for the exploitation.’¹³⁹ The satisfaction of the author’s economic interests is clearly a by-product of the protection of her personality interests.¹⁴⁰

Resistance against the notion of IP started decreasing in the second half of the 1980s, with the shift in the qualification of trademark law from a personality right protecting the name of the producer to a freely transferable property right. This trend could be seen in the titles and texts of several laws enacted after the 1990s, which freely use the lexeme ‘geistiges Eigentum’, also influenced by the harmonizing language used by the EU and international sources.¹⁴¹ The process has also been facilitated by the Bundesverfassungsgericht’s extension of the constitutional notion of property (Article 14 GG (Grundgesetz – Basic Law)) to cover several intangible assets, with a central role played by IP, and especially by copyright.¹⁴² Although the subject matter of property in the BGB and in the federal Constitution inevitably diverges due to the different functions the two acts perform – the former defining the borders of and regulating a private law institution, the latter providing a guarantee for private wealth against illegitimate public actions – the Bundesverfassungsgericht’s protection of copyright as property contributed to softening the doctrinal aversion to their equalization.¹⁴³

Despite these openings, scholars stood firm in emphasizing the unbridgeable differences between tangible and intellectual property, ranging from modes of acquisition to duration, possibility of possession, exceptions, remedies and object of the exclusivity.¹⁴⁴ However, recent contributions have underlined how these distinctions are wrongly based on features that do not characterize property in reality. It has been noted, *inter alia*, that use limitations are also imposed on several categories of tangible goods. Similarly, the deterioration of a material object creates a *de facto* time limit on tangible property, although the right would theoretically be perpetual.¹⁴⁵ More generally, the definitions used by the BGB have been criticized as outdated, and contradicted by the statutory

¹³⁹ UrhG, §11.

¹⁴⁰ Similarly in Fechner 1999, 63.

¹⁴¹ See the overview and comments of Dreier 2013, 133–135.

¹⁴² As we will see in Chapter 5, 181 ff.

¹⁴³ Dreier 2013, 123–124.

¹⁴⁴ *Ibid.* General and recent contributions to the debate can be found in Peukert 2008 and Goldhammer 2012.

¹⁴⁵ Among the most exhaustive analysis, see Jänich 2001, 35 ff.

fragmentation of property law in multiple regimes, each carrying different characteristics.¹⁴⁶ In this sense, IP may be considered a species of a broader genus, where the term ‘intellectual’ emphasizes the particularities of these rights compared to material property, while maintaining its general dogmatic meaning.¹⁴⁷

The distance between legal formants remains broad, though. As will be analysed in more detail in Chapter 4, statutes regulating the field avoid the proprietary label; general laws employ the notion of IP as concise, empty expression without any conceptual pretension; constitutional judges define copyright as property without any hesitation. So, while the phenomenon of copyright propertization is still broadly rejected as dogmatically impossible, fragmented traces of it emerge in different sources, facing denial and minimization, and therefore maintaining the gap between the framework portrayed by normative theories and the rigid conceptual answers offered by private law dogmas.

2.3 The Italian Debate

The doctrinal debate that took place in Italy is particularly interesting due to the second-generation nature of the Italian legal system, where French and German influences intertwine. In fact, after a short span of less than four decades, when, following the unification in 1865, French sources were almost slavishly reproduced and implemented, Italian scholars started manifesting more sympathy for German constructs, judging them more sophisticated, precise and scientific than the French doctrines. The source most affected by the shift was the Civil Code, which was largely rewritten in 1942, with authors’ rights moved from the book devoted to property to the book on labour to emphasize their different qualification.¹⁴⁸ Among other substantial modifications, a new, more rigid conceptualization of property rights, limited to tangible objects, became mainstream. This did not mean, however, an abandonment of the French heritage, but rather an interesting mishmash of two quite diverging traditions, both in the formulation of the rules and in their doctrinal interpretations.¹⁴⁹ In copyright, the double contamination emerges, for instance, in the combination of the French dualist model with the

¹⁴⁶ Götting 2006, 358.

¹⁴⁷ Along the same lines Pahlow 2006, 717 ff.

¹⁴⁸ As dealt with in more detail in Chapter 4, 172–173.

¹⁴⁹ For an overview of the historical evolution of doctrinal, judicial and legislative constructions of the notion of ‘good’ and property in Italy, see Sganga 2015, 31 ff, and the large bibliography contained therein.

elimination of any trace of proprietary language and definitions, inspired by the German example.

Doctrinal debates reflected the same dichotomic inspiration. From the early days, Italian scholars oscillated between the complete rejection of the concept of immaterial goods¹⁵⁰ and their possible classification as object of property when they are subject to exclusive economic rights.¹⁵¹ The first approach adhered to the personalist theory, defining authors' rights as personality rights and excluding the entification of their object.¹⁵² The second thesis admitted the different features of incorporeal goods compared to tangible goods, the former being reproducible, freely circulating, imperishable, non-rivalrous and non-exclusive; it underlined, however, their common nature, arguing that once the creation is objectified by expression and embedded in an external support, it becomes independent from its human source, and consequently capable of being subject to property rights.¹⁵³ Considering these differences – the thesis argued – the law only needs to tailor the regulation of the right to the features of the good, from its acquisition to its content, structure and duration.¹⁵⁴ In this sense, for instance, the duration of the right should be limited to counterbalancing the imperishability of the object, while exclusive rights should be different from those granted in the case of tangible property, since the value of an intellectual good cannot be enjoyed directly, but only through its exclusive commercial exploitation.¹⁵⁵ The third, intermediate theory merged elements of the previous two solutions, recognizing the juridical existence of intangible goods as entities independent from the right-holder, but still rejecting their classification as a potential object of property rights.¹⁵⁶ The debate was closely linked to the doctrinal *querelle* as to the nature of authors' rights, which also revolved around three main positions.

The first theory, based on the German monist model, defined the *diritto d'autore* as a personality right.¹⁵⁷ A second group of scholars opted for a qualification of copyright as a 'mixed' right in light of the contextual and equal presence of economic and moral rights, yet without attempting a

¹⁵⁰ As Carnelutti 1951, 129, who defines intellectual products as supranatural entities, and Franceschelli 1959, 421 ff.

¹⁵¹ Are 1962, 244.

¹⁵² Carnelutti 1951, 121.

¹⁵³ Are 1962, 252.

¹⁵⁴ Ibid., 253–254.

¹⁵⁵ Ibid.

¹⁵⁶ As Santoro-Passarelli 1945, 257, emphasizing their hybrid nature.

¹⁵⁷ Carnelutti 1951, 130; Candian 1953; Franceschelli 1959, 421 ff.

classification of the former,¹⁵⁸ or defining it as salary for the intellectual effort.¹⁵⁹ The third approach defined authors' rights as economic rights over intangibles, classifiable as proprietary in light of their *erga omnes* nature and their scope, covering all the potential economic utilities of the work without distinguishing between different forms of enjoyment or disposition.¹⁶⁰ The theory purposely ignored the differences created by the intangible nature of the object and did it, significantly, by using the key argument of the German monist theory, which bases the qualification of the right on its content and not on its object.

The third theory was heavily criticized as dogmatically superficial and incorrect. Scholars contested the qualification of the entitlement as a real right, arguing that the most proper label was that of a monopoly, for the object of the economic rights was not the creation, but only the right to exclude others from using it, while the economic value of the intellectual work consisted only of the profit descending from its indirect enjoyment.¹⁶¹ Along the same lines, several authors pointed out that all the dogmatic features of property were missing from copyright, such as physical exclusivity, absolute nature, perpetuity, elasticity of the domain – that is the capability to automatically expand again once other concurrent real rights cease to exist – and immediate relationship between owner and thing.¹⁶² The conclusive argument underlined how all the property rules linked to the materiality of the object could not be applied to intangibles, from modes of acquisition to possession, types of enjoyment and disposition, and remedies, which were mostly possessory and vindicatory for tangible goods, while mainly compensatory and inhibitory for intangibles.¹⁶³

Other scholars rebutted these objections with similarly sophisticated arguments, emphasizing, for instance, that authors' rights are absolute and only limited by law, as happens for every other property right. Elasticity – they said¹⁶⁴ – is also present, since the alienation or licensing of part of the prerogatives does not prevent the author from exercising the remainder, and the transferred rights automatically return to the author once third parties' rights expire. And while perpetuity does not constitute

¹⁵⁸ De Cupis 1950, 259 and Pugliatti 1965, 317.

¹⁵⁹ As Piola Caselli 1941 and Giannini 1943.

¹⁶⁰ Ghiron 1932, 276; Messina 1942, 481; Ascarelli 1960, 245 ff; Are 1962, 252 ff.

¹⁶¹ *Inter alia* Franceschelli 1959, 144.

¹⁶² Ascoli 1905, 148; Ferrara 1921, 372; Pugliatti 1965, 250.

¹⁶³ Pugliatti 1965, 248.

¹⁶⁴ Are 1962, 259–262.

an indispensable feature of property, the modes of acquisition are different only because the nature of the good and the impossibility of possession require legislators to intervene in order to define its borders.¹⁶⁵ This theory aimed to define authors' rights as a special form of property, whose different features were justified by the nature of its object and the need for a more careful balance between access and exclusivity in view of the public interests involved.¹⁶⁶ Property was conceptualized as a genus, with species sharing similar common features but also presenting diverging characteristics, due to their various objects and functions. The view was in line with the contemporary criticism of the traditional view of property as an immutable monolith, accused of being anachronistic, blind to its process of fragmentation, and incapable of answering to changing socio-economic needs and the advent of new forms of wealth.

Overall, the majoritarian doctrine has always shown a strong aversion to the systematic classification of authors' rights within the property paradigm, basing its objections on classic Roman law dogmas, Pandectist influences and a strict deference to the text of the Italian Civil Code, which does not contain a clause similar to §90 BGB but draws a property model that is almost unanimously intended as limited to tangible objects.¹⁶⁷ Because of such a rigid dogmatic rejection, there is no sign of reflection on the functional implications of constructing copyright as a property right. At the same time, the dry doctrinal clash between progressive and conservative approaches has not brought conceptual clarity, but rather added another layer of complexity to challenge the legislator and courts.

As victim of this haziness, the legislator never uses the lexeme 'property' to refer to copyright, even in areas where the recent influence of foreign and international concepts might have justified it; then, it makes direct references to civil code property rules in the Copyright Act, while parliamentary reports use, with ease, terms like 'immaterial property'¹⁶⁸ to define the legal nature of IPRs. And all this in a legal system where the influence of normative theories is often blurred and confused due to their indirect penetration through the readings offered by French and German formants.

¹⁶⁵ Ibid.

¹⁶⁶ Ibid.

¹⁶⁷ See the discussion and bibliography in Sganga 2015, 49 ff.

¹⁶⁸ The text of the legislative report can be consulted at http://documenti.camera.it/apps/nuovosito/attigoverno/Schedalavori/getTesto.aspx?file=0228_F001.pdf&leg=XVI.

3. INTERMEZZO: THE ROLE OF COPYRIGHT HISTORY

With the development of comparative legal studies during the 20th century, scholars have slowly changed their approach to the assessment of similarities and differences between national rules and institutions. Alongside the widespread adoption of the functional method, comparative lawyers have pointed to the importance of legal history for a better understanding of current rules and the forces influencing their interpretation.¹⁶⁹ History sheds light on the reasons underlying the adoption of a legal solution, and the use of a specific term or language; it illustrates the degrees of influence exercised by legal theories, philosophical suggestions and political forces; last, it shows how and why legal concepts and solutions crossed borders, changing in nature and effect when adopted in another jurisdiction.¹⁷⁰ Read together, these elements help to overcome the fallacies that a flat dogmatic reading of a legal institution may generate. They reveal the hidden interpretative patterns that determine the evolution of a doctrine or concept and explain why apparently similar definitions may produce radically diverging results in different systems.

Historical analysis is of paramount importance also in the field of copyright, especially when attempting to analyse the feasibility, correctness and effects of its contemporary propertization.

The development of authors' rights is relatively recent. As with other IPRs, they arose centuries after the formation of the main private law institutions. Their normative justifications have been the most varied and overlapping, and have used legal terms and concepts in a non-technical manner, with the result that the same proprietary definition of copyright has not necessarily had similar implications. When these concepts were translated into law, they penetrated legal systems characterized by well-defined, often different technical notions and doctrinal constructions – a circumstance that caused different responses from legal formants when interpreting and implementing copyright rules. The national pieces of legislation developed earlier in time served as model laws that circulated across boundaries, sometimes merging in second-generation

¹⁶⁹ See the general overview of Gordley 2008, 753. On the Trento Theses, emphasizing the qualification of comparative law as historical science, see Gambaro 2004, 1.

¹⁷⁰ Gordley 2008, 762 ff.

mixed statutes, other times being slavishly transplanted, and then producing different results when read through the lenses of another legal system.

Because its development took place outside the traditional categories of modern private law, copyright became the object of a range of different classifications. The rhetorical power of the proprietary label made it one of the most used and at the same time most contested choices. But while patents and trademarks presented less classificatory challenges due to their almost purely economic and industrial nature, authors' rights carried the additional difficulty of being linked with the spirit and dignity of the creator, and thus having nuances typical of personality rights.

Over the past couple of decades, the modernization of copyright laws in response to the digital revolution and its supranational standardization have followed new, hybrid normative inspirations, altered the balance between exclusivity and access, and strongly revived the propertization debate. Recent contributions have emphasized how international and EU copyright law have 'reached a stage of development which makes it difficult to rely only on one single line of reasoning' and a single normative theory.¹⁷¹ Then, as if authors' rights had never been qualified as property rights in legal history, several scholars have attributed to the new (hidden or explicit) proprietary qualification responsibility for the expansion in scope and duration of exclusive rights, their broad reading, and the parallel compression of fair uses.¹⁷²

Both the focus of the scholarly criticism and the reaction of the judiciary suggest two considerations. On one side, and despite the long doctrinal debate, contemporary copyright law is missing a real systematic analysis of the effects that the proprietary qualification of authors' rights may and should entail. It is reasonable to believe this to be the consequence of the dichotomic reaction of continental national systems, which either resolutely rejected or plainly accepted the definition, in both cases with a very poor reflection on the expected consequences of copyright propertization. On the other side, and with few remarkable exceptions, national legal formants seem to lack the capability to deconstruct and contextualize in a diachronic perspective the dominant characters of their copyright laws, and understand the direction taken by its evolution and supranational harmonization. This obviously causes them serious difficulties in handling the complexity of new models that

¹⁷¹ Senftleben 2004, 7.

¹⁷² As seen in the Introduction, 1–2.

cannot be so easily understood through traditional conceptual lenses, especially when the latter are based on dogmas deep-seated through centuries of doctrinal contributions.¹⁷³ When rules and concepts carry hidden implications, their plain interpretation can never be enough to grasp their real meaning and direct their implementation in a manner that avoids distortive or unintended effects.

Faced with this Babel, the comparative historical analysis of the evolution of modern copyright models is, methodologically, a necessitated step. Its results will help to assess the soundness of the propertization critiques and understand the real implications of the phenomenon, distinguishing between rhetorical and systematic effects. In addition, they will provide the analytical tools to deconstruct and understand the features of the EU copyright model, its hidden mechanisms, and the nature of its propertization.

4. CONCLUSIONS

The inspirations and approaches of the normative theories supporting copyright and its conceptualization in proprietary terms are the most varied. Property rights, according to Locke, are entitlements that should be recognized and protected on the basis of justice and ethics; utilitarianism and economics look at social utility and efficiency in the allocation of the use of creative works; the Lockean theory grounds the attribution of proprietary entitlement in the natural law origin of the rights, while utilitarian arguments justify it in light of the desirability of its effects. Far from being mere theoretical nuances, these traits determine the teleological arguments supporting the granting of exclusive rights, and thus – ultimately – the copyright balance. Even more important to our ends, they give different meanings to the notion of property as applied to copyright and, as such, are responsible for the different consequences that the apparently similar propertization of copyright has in different legal systems. However, no regime carries the imprint of a single normative theory, but rather the signs of a prismatic interplay, which is one of the main reasons for the complexity of contemporary copyright law. Another cause resides in the conflictual cross-breed between philosophical inspirations and systematic theories dominating a given legal system.

¹⁷³ Comparative lawyers have defined this phenomenon as one of path dependence, particularly visible in the case of legal transplants, on which see Watson 1974, especially Chapter 3.

In fact, with the remarkable exception of France, civil law systems show a strong doctrinal resistance to the propertization of authors' rights. The reasons for such opposition are many, all grounded in the impossibility of finding in copyright the dogmatic traits of the traditional, tangible property model depicted by modern civil codes. This radical opposition starkly contrasts with the proprietary definition offered by the normative theories supporting the protection of authors' rights. The clash is not a merely theoretical one. In fact, the inspirations and rationales of a given copyright model may possess property concepts that have hidden effects on the interpretation of copyright rules. By drastically rejecting the idea of copyright propertization, scholars – and courts and legislators influenced by them – have decided to voluntarily deny, ignore or minimize the phenomenon, giving up the control of its implications. The choice has not been without consequences. As this overview showed, and as will be complemented by the analysis in Chapter 4, it is not rare to find contributions where the analysis of the nature of authors' rights, for the purpose of interpreting copyright rules, is based on considerations related to its functions and justifications. In fact, the entire range of critiques on the recent propertization of copyright originates from this void, and the inability of legal formants to recognize it and tackle it with an adequate systematic response.

Against such complex backgrounds, where the first step needed to assess causes and effects of copyright propertization is that of deconstructing and understanding the genetic components of copyright in a given legal system, the analysis of its historical development represents an unavoidable starting point. Chapter 2 will be devoted to this task.