Index

abandonment rules 241–2, 243–5
abuse and misuse of copyright 35, 114, 118–19, 222, 223, 248, 254–60
acquisition of ownership 20–21, 37, 45, 53, 166, 177, 241, 262–3
Akkermans, B 14, 90, 117
Aldestein, R 30
Alexander, G 182, 183, 196
Allen, T 210, 211, 213, 214
Ammendola, M 174, 177
Anderson, M 162
Angelopoulos, C 252
Anglo-Saxon utilitarian approach 91–2, 93, 96–7, 98–9, 101, 102, 106, 107, 109
Antinori, M 193, 210
Are, M 44
Armstrong, E 63, 64
Ascarelli, T 44
Ascoli, V 44
Auteri, P 174, 175, 176
authors’ rights
authorship and CJEU 125–6
authorship and ownership issues, and harmonization 236–7, 246–7
copyright as defence tool for authors 242–3
copyright versus 11 as economic rights 44–5 and heirs 255
Intellectual creation 123–5
Lockean theory (natural law) 18–19, 20–23, 24, 26, 30, 32–7, 57–8, 60, 81, 156
natural law model 91–2, 94, 97, 98–9, 108, 109
propertization 17, 19, 23, 27, 33–5, 38–45, 46–8
propertization history see copyright, droit d’auteur and propertization history
reproduction rights, national copyright systems 171
see also books; ownership; publication rights
‘avoidance view of property’ 21–2
Bapper, W 81
Bartocci, U 52, 53
Becker, L 22
Belgium, copyright abuse 256
Bell, T 27, 29, 30
Bénabou, V 179, 180, 200
Benkler, Y 30, 31
Bennett, H 55
Bentham, J 19, 25
Bently, L 59, 148, 237, 239
Bertrand, J 37
Bilancia, F 218
Blagden, C 57
Blanc, E 34, 73
books ‘battle of the booksellers’ 59–60
digitization of out-of-commerce books 180–81
dissolution of association of Paris booksellers 69
e-books and e-lending 137
public libraries 140
see also authors’ rights
Borghi, M 75, 88
Boyle, J 53
Breyer, S 31
Propertizing European copyright

Burrell, R 242, 244
Busnelli, F 260
Buydens, M 256
Calabresi, G 156
Calmels, E 34, 35, 73
Candian, A 43
Carbonnier, J 9, 33, 194, 200
Carnelutti, F 43
Caron, C 255, 256
Carre, S 255
Caso, R 255
censorship 54–5, 64–6, 67–8, 70–72, 75–6, 78–9
Charter of Fundamental Rights (CFREU)
EU copyright model 3–4, 12–13, 89, 98, 110–15, 125, 130, 131, 144, 146, 147–8
and fair balance 252, 260
and social function of copyright 192, 193, 209, 218, 219–20, 223, 224, 231
civil law 7, 10, 17
national copyright systems see France; Germany; Italy
CJEU see Court of Justice of the European Union (CJEU)
co-authorship 161, 165–7
see also authors’ rights
copyright, droit d’auteur and propertization history, English
model, common law to statutory copyright 55–63
Conflicting interests hierarchy 26, 138, 184, 205, 251, 258–9
authorship rhetoric 58–63
battle of the booksellers’ 59–60
common law literary property 60–63
common law and perpetual, proprietary copyright 57
Copyright Act 63
Habeas Corpus Act 56–7
Indemnity and Oblivion Act 57
Monopolies Act and letters patent 56
Printing Act 57–8, 59
Stationers’ Company and Charter 55–7, 58–9, 60, 62
Statute of Anne 59–60, 62–3, 70, 72
copyright, droit d’auteur and propertization history, French
model, and property rhetoric 63–74
Arrêtés réglementaires 67–8, 71
authors’ rights 66–73
censorship activities and privileges 64–6, 67–8, 70–72
Code de la Libraire 65–6
Conseil du Roi 65–6, 67–8
copyright as social contract 67
Décret relatif aux spectacles and
disposal of works 69–70
dissolution of association of Paris
booksellers 69
dualist model 24, 25, 36, 42–3,
73–4, 76, 84, 165, 167–8, 174,
183
free competition effects 66–7
letters patent 63–4, 65–6
Mémoire de d’Héricourt and
literary property 66–7, 68–9,
73
monopoly concerns 64–6, 67, 73
moral rights 73
natural law approach 69–72
Parliament of Paris 63–4, 65
personality right 72, 73–4
physiocrats’ influence 67–8
proof of publication and seizure of
bad-quality prints 66
property and authors’ rights 66–7,
68–9, 70–71, 72–3
Roman law reworking 71
transferable economic rights of
reproduction and distribution
73
utilitarian and functionalist rationale
69–70, 71–3
copyright, droit d’auteur and
propertization history, German
model and Urheberrecht
harmonization 74–5, 81–6
authors’ rights 83–6
Civil Code 85
civil law property 81
Copyright Act 84–5, 86
Federal Act 81–2
freedom of the press 82
literary property 81–2, 84
Locke’s labour theory 81
moral rights 85
natural law 82, 86
personality theory 84, 85
protection of authors and publishers
against reprinting 82
Prussian Act 83–4, 85
traditional privileges 83
utilitarianism 82
copyright, droit d’auteur and
propertization history, Italian
model and diritto d’autore 74–80
censorship and royal privileges
75–6, 78–9
Civil Code 76–7, 80
dualist model 76
exclusive rights and fair
compensation 79–80
Kingdom of Sardinia legislation 75
literary property 77–9
moral rights 76
naturalism and legal positivism
76–7
paternity right 75–6, 77
Royal Patents 75–6
copyright law within the property
framework, building and
harmonizing 233–66, 271–2
abandonment rules 241–2, 243–5
abuse and misuse of copyright 35,
114, 118–19, 222, 223, 248,
254–60
authorship and ownership issues
236–7, 246–7
collaborative ownership provisions 236
collaborative ownership 235, 238
collective management 101–2,
107–8, 186, 242
constitutional propertization of
copyright 193, 240–41, 244,
248–9
contractual overridability of
exceptions 260–62
copyright and competition law 248
copyright as defence tool for
authors 242–3
Database Directive 236–7, 238,
240, 261
digital Single Market Directive
proposal 108, 229, 243–4
economic rights 245–50, 255–6
End User License Agreement
(EULA) clauses 260, 261–2
exclusive rights 242, 246–9
extended licensing schemes 242, 243–4
fair balance of interests 138, 155–6, 252, 260, 261
‘harmonization-by-stealth’ 237
informational and technical works 239
joint ownership of exclusive rights 236–7
‘legitimate interest’ focus 253, 254, 257
mandatory licensing schemes 242
modernization proposal 233–4
moral rights 236, 242, 255–7
and national courts 237, 238, 243, 256–7, 261, see also individual countries
‘new public’ concept 127–32, 245–6, 247, 250
numerus clausus principle 246–7, 264
object of the right, definition and regulation 238–45
patents and trademarks comparison 241
proportionality test 244–5, 252, 260–61
protection levels 249
remuneration levels 238, 242, 248–9
rental and lending 238
secondary markets and exhaustion of licence 247–8
social function doctrine 240, 244, 247, 248–9, 251–2, 253–4, 259, 260–61
sports events 124, 130, 156, 239
subject definitions 235–8
three-step test 253–4, 257, 260
copyright law within the property framework, building and harmonizing, and CJEU
authorship decisions, scarcity of 237–8, 240–41
distribution rights 54, 63, 73, 85, 116–17, 132–7, 155, 168, 245–6
proportionization of copyright and interpretation of exceptions 250–62
public interest goals 247–8
reproduction rights 249–50
right-holders’ dysfunctional conduct 257–8
three-step test 253–4
copyright model, EU see EU copyright model
copyright as property right 152–8, 163–4
Court of Justice of the European Union (CJEU)
activism in copyright harmonization see EU copyright model, CJEU activism in copyright harmonization
intellectual property protection 3–4, 113–14
and property framework see copyright law within the property framework, building and harmonizing, and CJEU
social function of copyright as property right 214–18, 223, 230–31
Court of Justice of the European Union (CJEU), cases
ACI Adam 139, 155
Airfield 128
Alliance for Natural Health 216
Art & Allposters 136–7
BestWater 130
Bonnier Audio 144, 155, 157–8
British Horseracing Board (BHB) 118, 121, 122, 124
BSA 124
Butterfly 118
C-More Entertainment 130
Circul Globus Bucuresti 128
Index

Coditel I and Coditel II 116–17, 136, 248
Commission v Belgium 217
Commission v France 217
Commission v Germany 217
Commission v Portugal 217
Commission v United Kingdom 217
Copydan Bankdopi 142
Coty Germany 154
Deckmyn 139–40, 225
Deutsche Grammophon 115–16
Dimensione Direct Sales 134, 155, 245
Donner 134, 245
DR and TV2 Danmark 138
EGEDA 118, 141
EMI Electrola 117
ERSA 216
Eugénie-les-Bains 260
FAPL 124, 137–8, 247, 248, 252, 253, 254
Filmspeler 131
Fixtures Marketing 118, 121
Football Dataco 124, 156
Foreningen 118, 157
Germany v Council 216
Golden Shares 217
GS Media 130–31, 154–5, 246, 247, 249
Hauer 215, 216
IMS Health 118, 119
Infopaq 123, 126, 137, 155, 238
Kokopelli 217
Lagardère 118, 127
Land Hessen 118, 119
Laserdisken 113, 154
Luksan 125–6, 142, 155–6, 192, 237
Magill 118, 119, 120
McFadden 145–6, 155
Megakini 139
Meltwater 139, 155
Metronome Musik 118, 120–21, 155, 187, 247, 248
Montis Design 157–8
Murphy v Media Protection Services 247
Musik-Vertrieb Membran 116, 153, 248
Neptune Distribution 217
Netlog 144–5, 154–5, 192
Nold 215–16
OSA 131–2, 139, 155
Oscar Bronner 118
Padawan 140–41
Paimer 124, 138
Patricia 117
Peek & Cloppenburg 132–4, 136, 154, 155, 245, 250
Phil Collins 118, 119, 248
Promusicae 143–4, 145, 154, 155, 192, 223, 252, 253
Radio Telefis Eirean (RTE) 118
Reha Training 132
Reprobel 141
Rioglass and Transreimar 248
SABAM 144, 155
SAS Institute 125
Scarlet Extended 4, 144–5, 154–5, 157, 192, 247
SCF 128–9, 131–2, 156, 158
SENA 118
SGAE 127–8, 246
Sky Österreich 155, 157, 260
Soulier and Doke 180, 243, 245
Stitching de Thuiskopie 141
Svensson 129–30, 249
Tod’s 118, 119
TVCatchup 129, 246
Ulmer 140, 251–2
Unitymark 217
UPC Telekabel 145–6
Uradex 118, 157
UsedSoft 134–5, 137, 158, 247, 248, 258
UTECA 248
Van den Bergh Foods 216
VG Wort 141
VOB 137, 251–2
Wachauf 216–17
Warners Brothers 117, 153, 248
Craig, P 219
creative works 76–7, 80, 92, 102, 123–5, 228–9
‘crisis’ of property 194–5, 200
cultural heritage 93–4, 97, 99, 102, 105, 107, 108–9, 180–81

Database Directive 95, 118, 121, 123, 156–7, 168, 236–7, 238, 240, 261

Davies, G 17, 161, 162
Davison, M 121
De Beaumanoir, P 7
De Burca, G 219
De Cupis, A 44
Deazley, R 57
Degli Alberti, M 77, 78
Demsetz, H 219
Derclaye, E 119, 125, 126, 152, 156, 168, 240
Desbois, H 22, 33
Diderot, D 66–7
Dietz, A 277
Digby, K 7
digital exhaustion questions 134–7
digitization e-books and e-lending 137
E-Commerce Directive 145
hyperlink access to protected work 130–31
out-of-commerce books 180–81
public library collections 140
distribution rights 54, 63, 73, 85, 116–17, 132–7, 155, 168, 245–6
Dock, M 64, 65, 67
dominant position abuse 118–19
see also abuse and misuse of copyright
Drago, G 202
Drahos, P 21
Dreier, T 2, 14, 40, 41, 89, 114, 133, 150, 237, 256
droit d'auteur see authors' rights
dualist model 24, 25, 36, 42–3, 73–4, 76, 84, 165, 167–8, 174, 183
Duguit, L 221
dysfunctional behaviour 222, 225, 257–8

E-Commerce Directive 145
Easterbrook, F 21
economic crisis effects 105
economic justifications 27–32
economic rights
copyright law within the property framework 245–50, 255–6
exclusive 126–37, 153–4, 156
incentivizing effects of property 28, 313
market-oriented approach 89, 91–110
passim 117, 120–21, 127–9, 131–2
similar but conflicting economic interests 198
social function of copyright 205
Eisenstein, E 52
End User License Agreement (EULA) 260, 261–2
see also licensing
Enforcement Directive 96–7, 98, 113, 152–3, 172
Epstein, R 20
Escarra, J 36, 70
EU copyright model 88–149, 268–9
Anglo-Saxon utilitarian approach 91–2, 93, 96–7, 98–9, 101, 102, 106, 107, 109
Charter of Fundamental Rights see Charter of Fundamental Rights
collective management organizations (CMOs) 101–2, 107–8, 186, 242
‘Copyright and the Challenge of Technology’ Green Paper 91–2
‘Copyright in the Knowledge Economy’ Green Paper 101–2
‘Copyright and Related Rights in the Information Society’ Green Paper 93–4
‘Creative content online in the single market’ 100
cultural heritage 93–4, 97, 99, 102, 105, 107, 108–9, 180–81
Index

Database Directive 95, 118, 121, 123, 156–7, 168, 236–7, 238, 240, 261

‘Digital single market strategy for Europe’ 103

E-Commerce Directive 145
economic crisis effects 105

Enforcement Directive (IPRED) 96–7, 98, 113
‘European agenda for culture in a globalizing world’ 100
exclusive rights 92, 115, 121, 134
freedom of contract and stakeholders’ agreements 104
freedom to receive information 113
fundamental rights 110, 113–14, 120–21, 133–4, 137, 140, 143, 145–6
harmonization issues 89–96
horizontal phase of evolution (2001–2008) 95–100

Internet Service Providers (ISPs) monitoring 108

innovation stimulation 93, 96, 101, 102–3, 107
intellectual property as property right 98
legislative history and evolution 90–110
licensing agreements 105, 134–5
market-oriented approach 89, 91–110
moral rights 91, 97, 119–20
multi-level phase of evolution (2008–today) 99, 100–110
natural law model and droit d’auteur 91–2, 94, 97, 98–9, 108, 109
patents, trademarks and copyright inclusion 111–12
personality rights 95, 98, 106, 124
privacy protection 97
regulation of exceptions and limitations 99, 103–4, 105, 108, 109
remuneration rights 99–100, 106, 107, 108–9, 118, 120–21, 125–6, 128
Rental I Directive 94, 118, 120, 128, 132, 168, 175, 187
Satellite and Cable Directive 118, 128
‘Single market for intellectual property rights’ 102
Software I Directive 94, 95, 123
sui generis right 95, 121–2
Term Directive 94–5, 118
Term III Directive 106
‘Towards a modern, more European copyright framework’ 103
‘Trade growth and IP’ 102–3
see also individual countries
EU copyright model, CJEU activism in copyright harmonization 89, 115–46
‘author’s own intellectual creation’ and conditions of protection 123–5
authorship 125–6
communication to the public 127–32
digital exhaustion questions 134–7
digitizing public library collections 140
distribution and exhaustion 132–7
e-books and e-lending 137
exclusive economic rights 126–37
existence–exercise dichotomy 115–16
fair balance of interests 138, 155–6, 252, 260, 261
fair remuneration 137–42
freedom to do business and right to property 120–21
idea–expression dichotomy 119–20
internet hyperlink access to protected work 130–31
ISP liability and enforcement 142–6
non-discrimination and abuse of dominant position 118–19
parallel imports 116
parody as autonomous concept of EU law 139–40
private copying and fair compensation 140–41
proportionality test 121
reproduction rights 126
right-holder’s attempt to segment internal market 116–17
secondary EC law 120–21
software and graphic user interface (GUI) protection 124
three-step test 138–9
EU and national constitutional property models relationship 209–18
EU vs Member States 150–90, 269–70
Charter of Fundamental Rights see Charter of Fundamental Rights
copyright as property right 152–8
Database Directive 95, 118, 121, 123, 156–7, 168, 236–7, 238, 240, 261
distribution rights 54, 63, 73, 85, 116–17, 132–7, 155, 168, 245–6
Enforcement Directive 96–7, 98, 113, 152–3, 172
exclusive economic rights 153–4, 156
fair balance definition 155–6
investment protection 156–7
moral rights 153
national copyright systems and ‘legal irritants’ 158–9
post-modernism and EU copyright model 151–9
preventive rights 100, 121, 132, 156
protection levels 154, 156, 158
Rental I Directive 94, 118, 120, 128, 132, 168, 175, 187
sui generis right on databases 156–7
three-step test 155, 180
Wittem Code 152
see also individual countries
EU vs Member States, copyright within framework of constitutional property, France 178–81
authors’ rights as special form of property 181
digitization of out-of-commerce books 180–81
national cultural heritage access 180–81
right-holder’s power to prevent private copying of protected work 179–80
trademarks and tobacco products 179
EU vs Member States, copyright within framework of constitutional property, Germany 181–5
artistic freedom and right to property 185
Civil Code 182–3
intellectual property 181–2
patrimonial rights 183
property as fundamental right 182
public interest and social role issues 184–5
quotation exception interpretation 184–5
reprints of excerpts of literary and musical works 183–4
Weimar Constitution 181–2
Index

EU vs Member States, copyright within framework of constitutional property, Italy 186–9
Civil Code 186
collective management and enforcement of authors’ rights 186
Copyright Act 187
copyright as intellectual property 188
personality rights 188
protection of authors’ rights as matter of public interest and social utility 186, 188–9
publication of protected pictures and freedom of expression 186–7
rental rights 187–8
right of publicity 186
trademarks 189
EU vs Member States, national copyright systems and property concepts, French propriété littéraire as bridge between civil and common law experiences 162–9
coauthorship and exploitation rights 166–7
Code de la Propriété Intellectuelle (CPI) 163–4, 165, 166–7
Copyright Act 163–4
copyright ownership in case of marriage 166–7
copyright as property 163–4 droit d’auteur 164’droit de destination’ 167–9, 171, 172, 187
dualist model adoption 167–8
joint authorship works 165–6’possession equals title’ rule 164–5
EU vs Member States, national copyright systems and property concepts, Germany and anti-proprietary resistance 169–73
author’s exclusive rights 172
EU vs Member States, national copyright systems and property concepts, Italian diritto d’autore as hybrid, second-generation model 173–8
authors’ exploitation rights 174
authors’ right of first publication 175–6
authors’ rights as property 174–7
Civil Code 173, 174, 175, 177
copyright as property 163–4
droit d’auteur 164
dualist model adoption 167–8
joint authorship works 165–6
’repossession equals title’ rule 164–5
EU vs Member States, national copyright systems and property concepts, UK, copyright as common law property 160–62
authors’ rights 160, 161
Copyright Act 160
Copyright, Design and Patents Act (CDPA) 160, 161, 162
joint authorship and co-authorship distinction 161
Stationers’ Company 160
European Court of Human Rights (ECHR) Anheuser-Busch. v Portugal 111
author’s reproduction rights 171
copyright 170, 172
intellectual property, use of term 172–3
moral rights 170
personalist theory 169, 170, 171
transfer of exploitation rights 169
EU vs Member States, national copyright systems and property concepts, Italian diritto d’autore as hybrid, second-generation model 173–8
authors’ exploitation rights 174
authors’ right of first publication 175–6
authors’ rights as property 174–7
Civil Code 173, 174, 175, 177
copyright as property 163–4
droit d’auteur 164
dualist model adoption 167–8
joint authorship works 165–6
’repossession equals title’ rule 164–5
EU vs Member States, national copyright systems and property concepts, UK, copyright as common law property 160–62
authors’ rights 160, 161
Copyright Act 160
Copyright, Design and Patents Act (CDPA) 160, 161, 162
joint authorship and co-authorship distinction 161
Stationers’ Company 160
European Court of Human Rights (ECHR) Anheuser-Busch. v Portugal 111
author’s reproduction rights 171
copyright 170, 172
intellectual property, use of term 172–3
moral rights 170
personalist theory 169, 170, 171
transfer of exploitation rights 169
EU vs Member States, national copyright systems and property concepts, Italian diritto d’autore as hybrid, second-generation model 173–8
authors’ exploitation rights 174
authors’ right of first publication 175–6
authors’ rights as property 174–7
Civil Code 173, 174, 175, 177
copyright as property 163–4
droit d’auteur 164
dualist model adoption 167–8
joint authorship works 165–6
’repossession equals title’ rule 164–5
EU vs Member States, national copyright systems and property concepts, UK, copyright as common law property 160–62
authors’ rights 160, 161
Copyright Act 160
Copyright, Design and Patents Act (CDPA) 160, 161, 162
joint authorship and co-authorship distinction 161
Stationers’ Company 160
European Court of Human Rights (ECHR) Anheuser-Busch. v Portugal 111
author’s reproduction rights 171
copyright 170, 172
intellectual property, use of term 172–3
moral rights 170
personalist theory 169, 170, 171
transfer of exploitation rights 169
Propertizing European copyright

Appleby v United Kingdom 209, 213
Aral v Turkey 111
Belvedere Alberghiera v Italy 207, 213
Beyeler v Italia 211
Binotti v Italy 207
Bramelid and Malmstrom v Sweden 211
Carbonara e Ventura v Italy 207, 213
Chassagnou v France 214
Dima v Romania 111
Erkner and Hofauer v Austria 211
Gasus Dosier-Und Fordertechnik v Netherlands 212, 214
Handyside v United Kingdom 210
Hentrich v France 212
Iatridis v Greece 211
Immobiliare Saffi v Italy 206
James v United Kingdom 211, 212, 213
Lallement v France 214
Lenzing v United Kingdom 111
Loizidou v Turkey 211
Lunari v Italy 206
Mellacher v Austria 212
Melnyczuk v Ukraine 111
Neij and Kolmisoppi 225
Öneryıldız v Turkey 211
Picone v Italia 211
Pressos Compania Naviera SA v Belgium 211
Pye v United Kingdom 211
Scollo v Italy 206
Scordino v Italy 207
Scozzari and Giunta v Italy 207
Serrilli v Italy 207
Smith Kline & French Lab. Ltd. v Netherlands 111
social function of copyright as property right 210–14, 215, 218, 230
Sporrong 210–11, 212
Stran Greek Refineries v Greece 211
Tanganelli v Italy 206
Tre Traktorer Aktiebolag v Sweden 212
Venditelli v Italy 214
exclusive rights
copyright law within the property framework 242, 246–9
creative sector 228
EU copyright model 92, 115, 121, 126–37
EU vs Member States 153–4, 156, 172
and fair compensation 79–80
joint ownership 236–7
exploitation rights 166–7, 169, 174, 177
expropriation cases 176, 195–6, 198, 200, 201–2, 203, 205–6, 207, 209–10, 211
extended licensing schemes 242, 243–4
see also licensing

Fabiani, M 52
fair balance of interests 138, 155–6, 252, 260, 261
Falk, H 65, 66, 67
Favale, M 122, 152, 223
Favoreu, L 204
Feather, J 59
Fechner, F 41, 170, 172, 181
Ferrajoli, L 205
Ferrara, F 44
France
abuse of economic and moral rights by authors’ heirs 255
Code Civil 200
Code de la Libraire 65–6
Code de la Propriété Intellectuelle (CPI) 163–4, 165, 166–7
Code Napoléon 200
Conseil du Roi 65–6, 67–8
constitutional property see social function of copyright as property right, French constitutional property jurisprudence without constitutional property clause
Index

constitutional property framework  
see EU vs Member States, 
copyright within framework of constitutional property, France 
copyright abuse and misuse 256–7 
Copyright Act 163–4 
copyright and conceptual property theories, French debate 32–8 
Décret relatif aux spectacles and disposal of works 69–70 
HADOPI Act 203 
Mémoire de d'Héricourt and literary property 66–7, 68–9, 73 
Parliament of Paris 63–4, 65 
property concepts see EU vs Member States, national 
copyright systems and property concepts, French propriété littéraire as bridge between civil and common law experiences 
property rhetoric see copyright, droit d’auteur and 
propertization history, French model, and property rhetoric 
property system history 8–9 
France, cases 
Chiavarino 256 
Delprat 73 
Edition Montparnasse 256 
HADOPI 180 
Lacordaire 73 
Lecocq 74 
Masson 73 
Vergne 73 
Whistler 74 
Franceschelli, R 43, 44 
Franchi, L 77 
Francon, A 17, 37 
Frantzou, E 192 
freedom of contract 104, 206, 260 
freedom of expression 186–7, 203, 209, 213 
freedom of the press 82 
freedom to do business 120–21 
freedom to receive information 113 
functionalism, and property rhetoric 69–70, 71–3 
fundamental rights protection 
EU copyright model 110, 113–14, 120–21, 133–4, 137, 140, 143, 145–6 
fair balance 252, 261 
property as 182 
social function of copyright as property right 191–2, 193, 196, 199, 201, 202–3, 204, 208–9, 218, 219–20, 223, 226 
Furubotn, E 28 
Gambaro, A 46 
Garben, S 105 
Gastambide, A 34, 35, 73 
Gaudrat, P 37 
Gautier, P 163 
Gazzanica, K 7 
Geiger, C 6, 70, 71, 111, 112, 113, 114, 191, 222, 224, 251, 252, 253 
Germany 
artistic freedom 185 
Civil Code 85, 182–3 
co-ownership 236 
common law property and 
Germanic customary property rights 7 
constitutional property see social function of copyright as property right, German 
constitutional property model and internal social obligation 
constitutional property framework see EU vs Member States, 
copyright within framework of constitutional property, Germany 
Copyright Act 84–5, 86 
Federal Act 81–2 
property concepts see EU vs Member States, national 
copyright systems and property concepts, Germany and 
anti-proprietary resistance 
property system history 9
Prussian Act 83–4, 85
social bounds of private law 222
trademark law as transferable
property right 41
unitary personality right 36,
38–42
_Urheberrecht_ harmonization see
copyright, _droit d’auteur_ and
propertization history, German
model and _Urheberrecht_
harmonization
Weimar Constitution 181–2,
195–6
Germany, cases
_Besitzrecht des Mieters_ 197
_Bibliotheksgroschen_ 184
_Boxberg_ 198
_Feldmühle_ 198
_Germania_ 3 184–5
_Hamburg Flood Control_ 196–7
_Kirchenmusik_ 184
_Kleingartenentscheidung_ 197–8
_Mauer-Bilder_ 243
_Metall auf Metall_ 185
_Microcensus_ 196
_Mitbestimmungsentscheidung_ 197
_Schulbuchprivileg_ 183–4
_Vergleichsmiete_ I 197
_Gervais, F_ 242, 253
_Ghidini, G_ 119, 239
_Ghiron, M_ 44
_Giannini, A_ 44
_Gieseke, L_ 27, 38, 81, 82, 83
_Ginossar, S_ 8
_Ginsburg, J_ 17, 27, 68, 70, 72, 152
_Gott, C_ 115
_Goldstein, P_ 235
_Gomez-Arostegui, H_ 56, 59
_Gordley, J_ 8, 46
_Gordon, W_ 19, 20, 21, 22, 29, 30
_Götting, H_ 42, 173, 181
_Gotzen, M_ 167
_Greco, P_ 174, 175, 176, 177
_Griffiths, J_ 111, 113, 114, 123, 192, 252
_Grosheide, F_ 18, 19

Guibault, L 18, 26, 27, 28, 99, 104,
256, 259, 261
Guiffrey, G 33, 34, 64, 65, 66, 68

harmonization
_CJEU_ activism in copyright
harmonization see EU
copyright model, _CJEU_
activism in copyright
harmonization
and copyright law see copyright law
within the property framework,
building and harmonizing
EU copyright model 89–96
Harrison, W 7
Hegel, G 19, 23–5, 34, 38–9
Helfer, L 112
Hepp, F 36, 37, 163
Herrmann, C 203
Hesse, C. 51, 52, 68, 69
Hesselin, M 151
Hilty, R 255, 256
housing, ‘right to decent housing’
203
Hubmann, H 40, 170, 181
Hudson, E 242, 244
Hugenholtz, P 2, 26, 121, 133, 138,
152, 235, 237, 238, 246, 251, 253
Hughes, J 1, 19, 20, 21, 22, 24, 57,
58, 70, 150
human dignity principle 196, 203
Husovec, M 138
hybrid models 3, 9, 19–20, 36–7,
47, 76–7, 84–5, 93–6, 99,
100–101, 105, 107–8, 130–31,
173–8

information
communication to the public
127–32
freedom to receive 113
informational and technical works
239
pre-modern societies and
transmission of knowledge
51–3
Index

information society Service Providers (ISPs) monitoring 108
InfoSoc Directive
copyright law within the property framework 237–8, 245, 247, 250–51, 252, 253, 255, 260, 261
EU copyright model 96–8, 99, 101, 104, 118, 122, 123, 126–40
EU vs Member States 152–3, 154, 157
innovation stimulation 93, 96, 101, 102–3, 107
intellectual property
Chicago School 28, 30
cultural heritage protection 93–4, 97, 99, 102, 105, 107, 108–9
EU vs Member States 181–2, 188
as property right 98
protection, Court of Justice of the European Union (CJEU) 3–4, 113–14
use of term 172–3, 177–8
World Intellectual Property Organization (WIPO) 96, 127, 133, 134, 135
International Covenant on Economic, Social and Cultural Rights (ICESCR) 110–11, 226
investment protection 156–7, 228–9
ISP liability and enforcement 142–6
Italy
Austro-Sardinian Convention and literary property 77–9
Civil Code 8, 76–7, 80, 173, 174, 175, 177, 186
constitutional property see social function of copyright as property right, Italy, social function of constitutional property
constitutional property framework see EU vs Member States, copyright within framework of constitutional property, Italy
Copyright Act 177, 187
copyright law 37
diritto d’autore see copyright, droit d’auteur and propertization history, Italian model and diritto d’autore
Kingdom of Sardinia legislation 75
property concepts see EU vs Member States, national copyright systems and property concepts, Italian diritto d’autore as hybrid, second-generation model
Royal Patents 75–6
theoretical debate 42–5
Izzo, U 54, 55
Jänich, V 41, 173
Jaszi, P 58
Joerges, C 192
joint authorship 161, 165–7
see also authors’ rights
joint ownership 170, 172, 175, 235–8
see also ownership
Josserand, L 221, 222
Kant, I 19, 23–5, 34, 38–9
Kase, F 33
Kawohl, F 82
Keeling, D 90
Kempees, P 214
Kenyon, F. 51
Kerever, A 70, 239
Kley, D 56
Klostermann, R 40
Koelman, K 253
Kohler, J 39, 40, 169, 222, 224
Kommers, D 182, 183, 196, 198
Kramer, W 38, 81
Krug, W 38, 81
Laboulaye, E 33, 34, 51, 64, 65, 66, 68
 Laligant, O 70
Landes, W 22, 29, 31
Lange, M 39
Leczykiewicz, D 192, 223
legal irritants 158–9
legal positivism 76–7

Caterina Sganga - 9781786430410
Downloaded from Elgar Online at 02/13/2019 01:40:18AM
via free access
‘legitimate interest’ focus 253, 254, 257
Lehmann, H 28, 40, 170
Leistner, M 117, 118, 121, 122, 126, 128, 129, 133, 140, 143, 223
Lemley, M 150
letters patent 63–4, 65–6
Libchaber, R 200
licensing 105, 134–5, 242, 243–4, 247–8, 260, 261–2
Liivak, O 241
literary property 33, 34, 36, 37, 38–9, 40, 77–9, 81–2, 84, 183–4
Litman, J 20
Ljungman, S 31
Llewelyn, D 63, 162
Locke, J. 18–19, 20–23, 24, 26, 30, 32–7, 57–8, 60, 81, 156
Locré, J 69, 70
Loewenheim, U 38, 125, 170, 172
Lowenstein, J 58, 59
Lucas, A 36, 125, 162, 163, 164, 165, 167, 168, 239, 253
Mackaay, E 28
Macpherson, C 33
Madero, M 53
Maduro, M 192
majoritarian doctrine 35, 45, 80, 169, 174, 222
Mak, C 198, 221
Margoni, T 235
market failures 19, 27, 28, 30–31, 109, 242
market-oriented approach 89, 91–110
marriage, copyright ownership in case of 166–7
Mattei, U 5, 8, 10, 241
May, C 54
Mazzotti, G 90
McDonagh, L 111, 113, 114, 252
Melamed, A 156
Member States see EU vs Member States
Merges, R 29, 30
Merland, G 201
Michelman, F 21, 25
Micklitz, H 192
Miller, R 182, 183, 196, 198
Milly, T 114
monopoly concerns 64–6, 67, 73
Montagnani, M 88
moral rights
copyright law within the property framework 236, 242, 255–7
EU copyright model 91, 97, 119–20
national copyright systems 170, 175
and propertization history 73, 76, 85
Morillot, A 36, 73–4
Mortati, C 205
Moscati, L 58, 79
Mossoff, A 1, 18, 27, 150
Moyse, P 35
music, reprints of excerpts of literary and musical works 183–4
national systems
codification process 8–9
courts and property framework 237, 238, 243, 256–7, 261
Member States see EU vs Member States
social function of copyright as property right 209–18
see also individual countries
Natoli, U 205, 222–3
natural law model
EU copyright model 91–2, 94, 97, 98–9, 108, 109
Lockean theory 18–19, 20–23, 24, 26, 30, 32–7, 57–8, 60, 81, 156
and propertization history 69–72, 76–7, 82, 86
Nérisson, S 255
Netanel, N 26, 29, 31
‘new public’ concept 127–32, 245–6, 247, 250
Nordemann, W 170
normative property theories 18–32
North, D 54, 56
numerus clausus principle 246–7, 264
Index

Ohly, A 126, 173
Olivecrona, K 20
Ourliac, P 7
ownership
in case of marriage 166–7
co-ownership 170, 172, 175, 236–7
copyright law within the property framework 255, 236–7, 238, 246–7
see also authors’ rights
Pahlow, L 39, 42, 173
Palmer, T 27
Palombella, G 192
Pardessus, J 73
Parent, A 64
parody 139–40
patents 63–4, 65–6, 75–6, 111–12, 241
paternity right 75–6, 77, 183, 201
Patterson, L 1, 55, 56, 57, 59, 62, 63
Pawlowski, H 196
Peeler, C 70, 72
Pejovich, S 28
Penalver, E 241
Peretz, S 30
Perfumi, C 203
Perry, M 235
personality rights
EU copyright model 95, 98, 106, 124
EU vs Member States 169, 170, 171, 188
and propertization history 72, 73–4, 84, 85
social function of copyright as property right 208, 225
theoretical framework 23–5, 33, 34, 36–7, 38–42, 43
unitary 36, 38–42
Perzanowski, A 134
Peukert, A 1, 4, 89, 98, 113, 114, 126, 191, 210, 225, 250
Pfister, L 34, 66, 67
Philip, L 204
Picard, E 35
Piola Caselli, E 44, 76, 174
Pollaud-Dulian, F 167
Portugal, abuse of economic and moral rights by authors’ heirs 255
Posner, R 22, 29, 31
‘possession equals title’ rule 164–5
post-modernism and EU copyright model 151–9
Pothier, R 7–8
Pottage, A 53
Pouillet, E 34, 71
Prescott, P 60
preventive rights 100, 121, 132, 156
printing press introduction 53–4
privacy protection 97, 208–9
private copying 140–41, 179–80, 238, 242
see also reproduction rights
privileges 64–6, 67–8, 70–72, 75–6, 78–9, 83
property
and copyright law see copyright law within the property framework, building and harmonizing copyright as property right 152–8, 163–4
and droit d’auteur see copyright, droit d’auteur and propertization history
EU copyright model 89, 114, 120–21, 126
and social function see social function of copyright as property right
terminology concerns 5–6, 11
theoretical framework 20–21, 24–5
proportionality test 121, 211–12, 244–5, 252, 260–61
protection levels
copyright law within the property framework 249
EU vs Member States 154, 156, 158, 186, 186–7, 188–9
social function of copyright as property right 197, 203–4, 225, 228
and social utility 26–7, 29–31
public, ‘new public’ concept 127–32, 245–6, 247, 250
public interest 184–5, 186, 188–9, 205, 247–8
publication rights 66, 81, 82, 175–6, 186–7
see also authors’ rights
Pugliatti, S 44, 222
quotation exception interpretation 184–5
Radin, M 19, 23
Rahmatian, A 20, 21, 22, 23, 24, 239, 241
Ramaekers, E 14, 90, 117
Rasmussen, H 223
Recht, P 37, 68
regulation of exceptions and limitations 99, 103–4, 105, 108, 109
Rehbinder, M 83
remuneration
copyright law within the property framework 238, 242, 248–9, 258
EU copyright model 99–100, 106, 107, 108–9, 118, 120–21, 125–6, 128, 137–42
and propertization history 79–80
tools, social function of copyright as property right 227–8
Renouard, A 33–4, 52, 64, 65, 67, 69, 70, 73
Rental I Directive 94, 118, 120, 128, 132, 168, 175, 187
rental rights 175, 187–8, 206–7, 238
reproduction rights 82, 126, 171, 183–4, 249–50
copying, private 140–41, 179–80, 238, 242
res corporales and res incorporales, distinction between 6, 7, 53
Rescigno, P 176
Revet, T 179
Rideau, F 64, 65, 66, 67
Ripert, G 221
Rodoîa, S 8, 193, 194, 218
Roman law 52–3, 71
Rose, M. 51, 56, 58, 60, 62
Roubier, P 35–6
Rufner, T 39
Samuelson, P 54
Sandulli, A 205
Santoro-Passarelli, F 43
Satellite and Cable Directive 118, 128
Scalzini, S 228, 254, 260
Schabas, W 211
Schmid, K 38, 81
Schönherr, F 253
Schovsbo, J 134
Schricker, G 38, 125, 170, 172
Schroff, S 243
Schubert, W 169
Schultz, J 134
Schutte, C 214
Scioloja, A 79
Seifert, F 173
Seignette, J 22
Senftleben, M 2, 21, 26, 27, 30, 31, 47, 99, 138, 139, 251, 253
Sfetaa, J 73
Sherman, B 53, 239
Smith, H 30
social contract, copyright as 67
social function of copyright as property right 191–232, 270–71
and Charter of Fundamental Rights
see Charter of Fundamental Rights
common social function for EU property law 218–20
constitutional property model 193
Court of Justice of the European Union 214–18, 223, 230–31
creative production and investment sustainability 228–9
Index

EU and national constitutional property models relationship 209–18
European Court of Human Rights 210–14, 215, 218, 230
freedom of expression 213
functions of EU copyright law 227–9
fundamental rights protection 191–2, 193, 218, 219–20, 223, 226
horizontal application of constitutional clauses 191–2, 222
personality rights 225
private law, social bounds of 222–3
proportionality test 211–12
protection levels 225, 228
remuneration tools 227–8
resource-specific properties 221, 222–3
right-holder’s dysfunctional behaviour 222, 225, 257–8
solidarist approach 225–6
vertical and horizontal effects 220–27, 231–2
social function of copyright as property right, French constitutional property jurisprudence without constitutional property clause 199–204
Code Civil 200
Code Napoléon 200
‘crisis’ of property 194–5, 200
expropriation cases 176, 195–6, 198, 200, 201–2, 203, 205–6, 207, 209–10, 211
freedom of expression 203
fundamental rights 199, 201, 202–3, 204
general interest concept 201–2, 203
human dignity principle 203
‘objectives of constitutional value’ 202–3
patrimonial rights 201
protection levels 203–4
‘right to decent housing’ 203
social function of copyright as property right, German constitutional property model and internal social obligation 195–9
definition of role of property 196–7
fundamental rights 196
historical evolution of the social obligation 197–8
human dignity principle 196
private relations, horizontal application 198–9
protection levels 197
similar but conflicting economic interests, balancing 198
Weimar Constitution 195–6
social function of copyright as property right, Italy, social function of constitutional property 205–9
conflicting interests hierarchy 26, 138, 184, 205, 251, 258–9
economic focus 205
freedom of expression 209
fundamental rights 208–9
future expropriation and time-limited restrictions 206
personality rights 208
privacy and property, balance between 208–9
‘private goods of public interest’ 205
public authorities and constructive expropriation 207–8
rental issues 206–7
social function doctrine 240, 244, 247, 248–9, 251–2, 253–4, 259, 260–61
social utility 26–7, 29–31, 186, 188–9
software and graphic user interface (GUI) protection 124
Software I Directive 94, 95, 123
Spain
abuse of economic and moral rights
by authors' heirs 255, 257
Megakini 257
Specht, I 256
'special cases' 253–4
Spector, H 19, 21
sports events 118, 121, 122, 124, 130, 156, 239
Sterk, S 31
Stolfi, N 80
Strömholm, S 39, 40, 52, 59, 70, 71, 73, 74, 167, 169
Strowel, A 17, 19, 20, 21, 26, 27, 28, 33, 62, 63, 66, 71, 86, 99, 168, 200, 256, 259
Suchman, M, 51
sui generis rights 22, 24, 35, 95, 121–2, 156–7
Tafforeau, P 163
Term Directive 94–5, 118
Term III Directive 106
terminology concerns 5–11
theoretical framework 17–49, 267–8
acquisition of ownership 20–21, 37, 45, 53, 166, 177, 241, 262–3
authors' rights see authors' rights
'avoidance view of property' 21–2
Chicago School and intellectual property 28, 30
civil and common law approaches see civil law; common law
copyright and conceptual property 32–45
copyright history role 46–8
economic justifications 27–32
free will effects 23–4
individual merit and justification for property 20–23, 33
individuals as rational market players 28
Kantian and Hegelian arguments 19, 23–5, 34, 38–9
labour activities 21–2, 25–6
literary property 33, 34, 36, 37, 38–9, 40, 77–9, 81–2, 84, 183–4
Lockean theory 18–19, 20–23, 24, 26, 30, 32–7, 57–8, 60, 81, 156
majoritarian doctrine 35, 45, 80, 169, 174, 222
market failures, legislative provision of exceptions and limitations 19, 27, 28, 30–31, 109, 242
normative property theories 18–32
path dependency, distortive effects 17–18
personality rights see personality rights
philosophical justifications 20–27
property, understanding of 20–21, 24–5
and social utility 26–7, 29–31
social welfare goals 26–7
sui generis rights 22, 24, 35, 95, 121–2, 156–7
supranational standardization 19–20, 47
trademark law as transferable property right 41
utilitarianism 19, 25–7, 29–30
Thomas, R 54, 56
three-step test 138–9, 155, 180, 253–4, 257, 260
Torremans, P 237
trademarks 41, 111–12, 179, 189, 241
Travis, H 57
Ubertazzi, L 75, 77, 79, 174, 175, 176, 177
UK
Anglo-Saxon utilitarian approach 91–2, 93, 96–7, 98–9, 101, 102, 106, 107, 109
common law to statutory copyright see copyright, droit d'auteur
and propertization history, English model, common law to statutory copyright
Copyright Act 63, 160
Copyright, Design and Patents Act (CDPA) 160, 161, 162
Habeas Corpus Act 56–7
Indemnity and Oblivion Act 57
Index

Monopolies Act and letters patent 56

property concepts see EU vs Member States, national copyright systems and property concepts, UK, copyright as common law property

Stationers’ Company 160

Stationers’ Company and Charter 55–7, 58–9, 60, 62

Statute of Anne 59–60, 62–3, 70, 72

UK, cases

Donaldson v Becket 62–3, 68

Fisher v Brooker 162

Jeffreys v Boosey 63

Millar v Kinkaid 60

Millar v Taylor 61–2, 68

Tonson v Collins 60–61

Universal Declaration of Human Rights (UDHR) 110–11, 226

US

fair use doctrine 139

Harper & Row Publisher v Nation Enterprises 26


Van Den Broek, P 210

Van der Walt, A 197

Van Eechoud, M 2, 88, 91, 152, 223, 236, 237

Van Erp, S 14, 160

Van Gompel, S 241

Van Velze, S 246

Vanbrabant, B 256

Vassalli, F 221

Vercellone, P 174, 175, 176, 177

Vilbois, J 162

Vivant, M 37, 112, 179, 180, 220, 239

Vogel, M 38, 39, 81, 85

Von Bar, C 9, 14

Von Gamm, O 40, 86, 169, 173

Von Gierke, O 39–40, 222

Von Lewinski, S 235, 238, 245

Wadle, E 84, 173

Walter, M 235, 238

Watson, A 17, 48

Weber, W 9, 194

Weiler, J 192

Weinreb, L 20, 21, 22

Westkamp, G 115, 240

Wieker, F 8

Witcombe, C 54

Wittem Code 152

World Intellectual Property Organization (WIPO) 96, 127, 133, 134, 135

Xalabarder, R 257

Zenati, F 8, 33, 70, 71, 194, 200

Zimmermann, R 151