

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
national copyright systems 160,
161, 164, 165–7, 172, 174–7,
181, 186, 188–9
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, A 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

- 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
 co-ownership 170, 172, 175, 235–8
see also ownership
 Cohen, J 5
 Cohen Jehoram, H 90
 Colangelo, M 9
 collective management 101–2, 107–8,
 186, 242
 collective works 165, 176–7, 235,
 236, 237
 Collins, H 192
 Colombet, C 37
 Comandé, G 192
 common law 7, 17
 national copyright system *see* UK
 compensation *see* remuneration
 competitiveness 29, 66–7, 92–3, 95–6,
 102, 104–5, 107, 121, 186, 220,
 248
- Comporti, M 193
 conflicting interests hierarchy 26, 138,
 184, 205, 251, 258–9
 constitutional propertization of
 copyright 191–2, 193, 222,
 240–41, 244, 248–9
 contractual overridability of
 exceptions 260–62
 Cook, T 134
 Copinger, W 160
 copying, private 140–41, 179–80, 238,
 242
see also reproduction rights
 copyright, *droit d'auteur* and
 propertization history 50–87, 268
 censorship and book market control
 54–5
 printing press introduction 53–4
 Roman law 52–3
 copyright, *droit d'auteur* and
 propertization history, English
 model, common law to statutory
 copyright 55–63
 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
Arrêts réglementaires 67–8, 71
 authors' rights 66–73
 censorship activities and privileges
 64–6, 67–8, 70–72
Code de la Librairie 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
 co-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
- InfoSoc Directive *see* InfoSoc Directive
- 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
- Orphan Works Directive 106–7, 108, 243
- 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
- Software II Directive 135, 136, 236–7, 238, 240, 261
- 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
 - propertization 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
- Cornish, W 63, 162
- Costantino, M 208
- 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

- 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
Painer 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 Televis Eirean (RTE) 118
Reha Training 132
Reprobel 141
Rioglass and Transremar 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
Warner 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 28
- 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
- Digital Single Market Directive proposal 108, 229, 243–4
- 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
- Edelman, B 17, 19, 51, 64, 65, 66, 67
- 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
 - Article 295 EC 90, 115, 116, 117
 - 'Books and reading: a cultural challenge for Europe' 92–3
 - 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

- Database Directive 95, 118, 121, 123, 156–7, 168, 236–7, 238, 240, 261
- Digital Single Market Directive proposal 108, 229, 243–4
- ‘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
- InfoSoc Directive *see* InfoSoc Directive
- 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
- Orphan Works Directive 106–7, 108, 243
- patents, trademarks and copyright inclusion 111–12
- personality rights 95, 98, 106, 124
- privacy protection 97
- protection levels 91–5, 96–8, 99–100, 101, 103, 106–7, 108, 112–14, 123–5
- 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
- Software II Directive 135, 136, 236–7, 238, 240, 261
- 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
- vertical phase of evolution (1988–2001) 91–5
- 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
- harmonization decade (2006–2016) 122–46
- idea–expression dichotomy 119–20
- internet hyperlink access to protected work 130–31
- Interregnum (1991–2006) 117–22
- 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
- primary EC law (1971–1991) 115–17
- 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
 - InfoSoc Directive *see* InfoSoc Directive
 - 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

- 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
- co-authorship 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
- author's reproduction rights 171
- co-ownership 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
- co-ownership 175
- collective works 165, 176–7, 235, 236, 237
- conflicts of acquisition 177
- Copyright Act 177
- intellectual property, use of term 177–8
- moral rights 175
- rental right 175
- transfers of exploitation rights 177
- 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 Convention on Human Rights (ECHR) 9, 111, 113, 193–4, 203–4, 206, 207, 209
- European Court of Human Rights (ECtHR)
- Anheuser-Busch. v Portugal* 111

- 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 Dossier-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
- Melnychuck 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 Librairie* 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

- 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
 proprietization 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
 Frantziou, 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
 Godt, 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
 Hesselink, 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

- 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
- Kleyn, D 6
- 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

- '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
- Loché, 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
- Mazziotti, 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
- Moscatti, 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

- Ohly, A 126, 173
 Olivecrona, K 20
 Orphan Works Directive 106–7, 108, 243
 Ourliac, P 7
 ownership
 in case of marriage 166–7
 co-ownership 170, 172, 175, 236–7
 copyright law within the property framework 235, 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 propretization 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
 propretization 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 copyright model 91–5, 96–8, 99–100, 101, 103, 106–7, 108, 112–14, 123–5, 124, 130–31
 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
- Rodotà, 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
- Scialoja, A 79
- Seifert, F 173
- Seignette, J 22
- Senftleben, M 2, 21, 26, 27, 30, 31, 47, 99, 138, 139, 251, 253
- Sfetea, 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
 - Digital Single Market Directive proposal 108, 229, 243–4

- EU and national constitutional property models relationship 209–18
- European Convention on Human Rights (ECHR) 9, 111, 113, 193–4, 203–4, 206, 207, 209
- 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
- Software II Directive 135, 136, 236–7, 238, 240, 261

- 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

- 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
- utilitarianism 19, 25–7, 29–30, 69–70, 71–3, 82, 91–3, 96–9, 101–2, 106–7, 109
- 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
- Wieaker, 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

