1. Introduction

**Oreste Pollicino, Giovanni Maria Riccio and
Marco Bassini**

What are the sense in and the added value of a book exploring the relationship between copyright and other fundamental rights in the aftermath of the Digital Single Market strategy? The question, if so framed, is not an easy one to answer, as the recent approval of the Digital Single Market Directive (Directive (EU) 2019/790) apparently marked a point of no return while reshaping the most challenging parts of the EU legal framework on copyright. As a result, the EU institutions seem to have achieved, in light also of other reforms (such as the refit of the AMVS Directive), a new legal environment in which a balance between copyright and other rights and freedoms has been drawn. The implementation of the DSM Directive, nevertheless, will take time and effort. Additionally, it is difficult to predict how Member States will react to this step, as some of them voiced harsh criticism concerning, most notably, the provisions on online uses of press publications and the measures applicable to content-sharing service providers. Also, has the ‘battle’ between copyright and freedom of expression in the digital age truly come to an end? Many factors, especially recent stances in the case law of the Court of Justice, suggest that the problem is indeed far from being settled. The challenges that Member States will have to face in the implementation process of the DSM Directive largely derive from the inherently strained relationship between copyright and other competing rights such as freedom of speech, data protection and freedom to conduct business. In this respect, this volume departs from the assumption that the rise of the internet and the spread of digital technologies led to a reshaping of the understanding of this relationship, particularly as far as freedom of expression is concerned. While the internet offers new channels and opportunities for the circulation of copyrighted works, it nevertheless brings about new threats for right holders, to the extent peer-to-peer systems and user-generated-content platforms, among others, can be used also by perpetrators of copyright infringements. For example, remedies available on the internet may also impact third parties, e.g., users other than the perpetrators of the infringements, and interfere with their freedom of expression. Likewise, when illegal pieces of content or information are posted online, internet inter-

mediaries, most notably hosting providers, come into play in the enforcement stage, in accordance with the notice-and-take-down procedure provided for in the E-Commerce Directive, which reflects the Digital Millennium Copyright Act. Internet service providers' liability is perhaps the most sensitive issue within the new paradigm describing the relationship between copyright and other fundamental rights. Liability of internet intermediaries also allows the connection between the two main understandings of freedom of expression that are confronted when it comes to the internet: the American quasi-absolute view enshrined in the First Amendment and the more balanced construction, which is a distinguishing feature of European constitutionalism. It is not by coincidence that the provisions on internet service providers' liability are regarded as free speech rules¹ and that the latest regulatory developments have shed some light on the key role of these actors vis-à-vis content as well as data – even if no reform has taken place in the liability regime provided for in the E-Commerce Directive so far. Some recent stances of the European Court of Human Rights are witness to this understanding, which is reflected in a set of judgments where the Court had to review whether measures imposed by national authorities affecting internet service providers amounted to impermissible limitations of freedom of expression pursuant to Article 10 of the Convention. Also, in view of the difficulties and uncertainties surrounding the liability of service providers, some jurisdictions have implemented public enforcement procedures for copyright online, which have paralleled the already existing 'traditional' private enforcement mechanisms. The introduction of similar procedures, in turn, mirrors the limited effectiveness of the well-established enforcement avenues in the age of the internet. If the latter have not become per se obsolete, they are in any case far from ensuring an effective protection to right holders in case of infringements occurring on the internet. The choice to resort to public enforcement also has brought into the scene administrative authorities such as the Italian Communications Authority (AGCOM) or the French ad hoc-established Haute Autorité pour la diffusion des oeuvres et la protection des droits sur l'internet (HADOPI). The devolution of powers (whether regulatory or sanctioning) to these authorities has nevertheless resulted in further discussions regarding the legitimacy of non-judicial bodies interference, through the respective orders, with the publication of content or information by users. So, again, the focus of the debate centres on the remedies available on the internet and the relevant constitutional permissibility.

¹ See 'Section 230 as First Amendment rule' (2018) 131 *Harvard Law Review* 2027.

Can the above be described as ‘a dog that bites its own tail’? Perhaps it is, but the questions highlighted so far still provide food for thought, in spite of the recent developments marked by the approval of the DSM Directive. The ambition of this book is to try to resolve some of the aforesaid unresolved issues in the relationship between copyright and other rights and freedoms through a comparative and European perspective. As usual, the book is not supposed to provide an answer to the above questions, but rather to constitute an attempt to revisit a critical understanding of some of the underlying legal issues.

In order to fulfil this goal, the book offers an overview including a variety of focus points from the public and private law perspectives.

Fiona Macmillan’s chapter opens the book by providing a thorough investigation of a frequently underestimated point in the debate, i.e., the reach of the constitutional protection granted to freedom of speech. The author, in particular, notes that the traditional understanding of free speech as a principle enforceable only vis-à-vis the state would significantly undermine the importance of this argument in the copyright context. According to Macmillan, ‘if freedom of speech theories do not take private power into account they have failed to keep up with social and economic developments’; accordingly, she argues that ‘freedom of speech principles should restrain not just state attempts to restrict speech using copyright but also such attempts by those holding significant non-state power’. The chapter captures an issue that has recently regained significant attention among scholars, most notably in respect of the role of digital platforms. The understanding of the degree of enforceability of some constitutional protections constitutes in fact a key factor for evaluating the relationship between copyright and other competing rights in light of the specific nature of the former.

The chapter by Alain Strowel explores the added value inherent in Article 17 of the Charter of Fundamental Rights of the European Union, looking at the interpretation of the Court of Justice of this provision in the context of its relevant case law. The focus on Article 17 unveils the importance attached to intellectual property in the context of the post-Lisbon European Union. Even if the Charter did not establish any new right, but only reaffirmed, as stated in its preamble, the rights contained therein (‘as they result from the constitutional traditions and international obligations common to the Member States, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Union and by the Council of Europe and the case-law of the Court of Justice of the European Union and of the European Court of Human Rights’), the entry into force of the Charter marked a new season in European constitutionalism. This new phase is witnessed by the case law of the Court of Justice, most notably by the judgments concerning the enforcement of intellectual property rights in the digital age.

The chapter authored by Tuomas Mylly is then specifically devoted to the balance between copyright and other fundamental rights as framed in the judgments delivered by the Court of Justice. The contribution develops a deep critique of the methodology used by the Court in its latest stances in the context of the ‘European information society law’, and notably of the conceptual framework behind the most important cases based on fair balance and proportionality. According to this critique, the approach of the Court of Justice would not resolve the bias inherent to a conceptualisation of copyright which frequently ends up disregarding other competing values such as freedom of expression (which unlike copyright generally protects the weaker party).

Oleg Soldatov, in his chapter, articulates an analysis of the case law of the other European court, the European Court of Human Rights. The author draws a remarkable distinction between the case law regarding the attitude of the European Court in the bricks-and-mortar world of atoms and that where the playground for balancing copyright and other fundamental rights is the virtual world of bits. According to Soldatov, even if this second branch of case law is still ‘in its infancy’, it shows the attitude of the Court to acknowledging a wider margin of appreciation for national authorities for purposes of intellectual property rights protection.

Evangelia Psychogiopoulou considers the role played by copyright as a mechanism for fostering cultural diversity in the European Union and its implications for the exercise of cultural rights. In her chapter, she explores the sophisticated system of exceptions and limitations and of measures to protect copyright holders enshrined in EU copyright legislation, including the Digital Single Market Directive. The latter’s provisions, if properly implemented, may work as measures to support access to cultural content alongside support for creativity and cultural investments and thus promote cultural diversity.

Giovanni Maria Riccio speculates on the influence of the case law of the Court of Justice on Member States’ authorities in the interpretation of copyright law. Looking at the recent stances concerning the role of digital platforms hosting copyrighted content, the author observes that in spite of the important set of judgments handed down by the Court, its case law still seems to suffer from some vagueness in a variety of respects. The lack of crystal-clear guidelines would prevent national courts from taking advantage of a certain degree of harmonisation and uniformity, a gap that the Digital Single Market Directive seems to be equally unable to fill.

Switching to a horizontal comparison, Maria Lillà Montagnani and Alina Trapova analyse differences and similarities between the US and the European models of balancing copyright with fundamental rights. The authors observe that at first sight and in theory the US and the EU systems are not so far from one another since their general frameworks coincide in that both entail internal and external balancing mechanisms. Nonetheless, the authors argue that when

looking at the cases from the two jurisdictions it emerges that the US clearly places stricter reliance on the internal copyright safeguards. Yet, in both systems the judiciary has employed a certain degree of flexibility when balancing copyright and other constitutional rights. In developing this argument, they focus in particular on the role of exceptions and limitations, fair use and the idea/expression dichotomy as well as that of the interpretative techniques (such as proportionality and the balancing test), questioning whether the use of such categories will further reduce or widen the gap between the two sides of the ocean.

Giorgio Giannone Codiglione and Marco Bassini apply a comparative analysis to explore the differences between private and public enforcement in the digital age. Most notably, they speculate on the reasons behind the emergence of new administrative procedures which paralleled the already existing traditional private enforcement mechanisms. The chapter delves into a comparison between the French HADOPI law and the Italian regulation adopted by AGCOM. The authors highlight that the different outcomes of these procedures may have depended on the remedies available to contrast copyright infringements on the internet and on the different degree of involvement of internet service providers, most likely in light of the uncertainties of the relevant legal regime.

This overview is by no means exhaustive; however, it aims to point out the problems which the recent legislative reforms and developments in case law seem far from having resolved. These problems, accordingly, will likely remain part of the political agenda of the European Union and Member States for some time.