

IS THERE A EU COPYRIGHT JURISPRUDENCE?

An empirical analysis of the workings of the European Court of Justice

Marcella Favale, Martin Kretschmer and Paul C. Torremans*

The Court of Justice of the European Union (CJEU) has been suspected of carrying out a harmonising agenda over and beyond the conventional law-interpreting function of the judiciary. In relation to the development of a EU copyright law, the Court has seen a dramatic increase in activity, with 6 cases filed in the 10 years following the Phil Collins case of 1992, 6 cases filed in the 5 years between 2002 and 2006, and 26 cases in the 5 years between 2007 and 2011. This study aims to investigate empirically two theories in relation to the development of EU copyright law: (i) that the Court has failed to develop a coherent copyright jurisprudence (lacking domain expertise, copyright specific reasoning, and predictability); (ii) that the Court has pursued an activist, harmonising agenda (resorting to teleological interpretation of European law rather than – less discretionary – semantic and systematic legal approaches). The findings of the study confirm the former, and qualify the latter.

Keywords: Court of Justice of the European Union, CJEU, Copyright, European jurisprudence, Advocate General, harmonization, European Union

PLEASE ADDRESS CORRESPONDENCE RELATING TO THIS SUBMISSION TO:

martin.kretschmer@glasgow.ac.uk

* Marcella Favale is Research Fellow, Centre for Intellectual Property Policy and Management (CIPPM),

Bournemouth University; Martin Kretschmer is Professor of Intellectual Property Law, University of Glasgow and

Director of the RCUK Centre for Copyright and New Business Models in the Creative Economy (CREATe); Paul

Torremans is Professor of Intellectual Property Law, University of Nottingham. The research has been supported

by CREATe, AHRC Grant Number AH/K000179/1.

Problematic aspects of the jurisprudence of the European Court

It is almost trite to assert the pervasive influence of the European Court of Justice on all fields of European Law. Whether contained¹ and prudent² or innovative and activist,³ justice dispensed by the European Court 'elicits compliance and bolsters its authority'.⁴ Two integration theories dominate the field of European political science: intergovernmental and neo-functionalist. According to the first, policy-making at

¹ L. Conant, *Justice Contained. Law and Politics in the European Union* (Ithaca, N.Y.: Cornell University Press 2002), 7-10. See C. Carrubba, M. Gabel, and C. Hankla, 'Judicial Behaviour under Political Constraints: Evidence from the European Court of Justice' (2008) 102(4) *American Political Science Review* 435-452, 450.

² U. Everling, 'The Member States of the European Community before their Court of Justice', (1984) 9 ELR 215-241. A. Bredimas, *Methods of interpretation and Community Law* (Oxford: North-Holland 1978), 145. For an examination of ECJ rulings in which the Court adjusts to the will of political institutions see V. Hatzopoulos, 'Actively talking to each other: the Court and the political institutions', in E. Muir, M. Dawson and B. de Witte (eds) *Judicial Activism at the European Court of Justice* (Cheltenham: Edward Elgar 2013), 133.

³ See generally A. Stone Sweet and T. L. Brunell, 'How the European Legal System Works: Override, Non-Compliance, and Majoritarian Activism in International Regimes' (SSRN 8 March 2011) at <http://ssrn.com/abstract=1780902> (last visited 13 March 2014). See also generally the first work suggesting ECJ activism: J .P. Colin, *Le gouvernement des juges dans les Communautés Européennes* (Paris: M. Pinchon et R. Durand-Auzias 1965). Also generally H. Rasmussen, *On Law and Policy in the European Court of Justice* (Copenhagen: Martinus Nijhoff 1986) and H. Rasmussen, 'Between Activism and Self-Restraint: a judicial Policy for the European Court' (1988) 13 ELR 28-39, 34. For a recent work indicating the limits of the teleological approach of the Court see generally G. Conway, *The Limits of Legal Reasoning and the European Court of Justice* (Cambridge: CUP 2014). The author argues that the Court's departure from most common interpretative approaches, eg the three-stage theory by McCormick D.N. and Summers R. in *Interpreting Statutes: a Comparative Study* (Dartmouth: Aldershot 1991) is not justifiable by the originality of the EU scenario, and it suggests methods of adaptation of traditional interpretative techniques to the ECJ case-law. See also E. Stein, 'Lawyers, Judges and the Making of a Transnational Constitution' (1981) 75(1) *American Journal of International Law* 1-27, 25, arguing that the court (namely its judges and AGs) in accord with the Commission create a constitution for Europe.

⁴ Conant n 1 above, 39.

the EU level is the exclusive domain of Member States which elaborate policies at intergovernmental level. Conversely, the latter theory argues that the difficulty in reaching consensus among EU Members prompts a 'judicialization' of the EU governance, whereby the Court sets legal principles that induce policy reforms, which in turn underpin further European jurisprudence, in a virtuous circle.⁵ These arguments are inscribed in the broader debate on the normative function of the Court, instrumental to European integration, discussed already by early commentators of European law.⁶

Member States seem to accept the jurisprudence of the Court, willingly⁷ or unwillingly,⁸ because on the one hand overturning its ruling requires a modification of the Treaties⁹ and on the other hand the Court enjoys support by legal and political mobilization of interested parties.¹⁰ However, it has been suggested that the Court is adopting approaches that contain its potential over-expansion.¹¹

⁵ A. Stone Sweet, 'The European Court of Justice and the judicialization of EU governance', (2010) 5(2) *Living Reviews in European Governance*, 7. However, others argue that the ECJ judges are sensitive to policy constraints from Member States. This thesis has been empirically demonstrated by Carrubba et al. n 1 above.

⁶ R. Dehousse, *La Cour de Justice des Communautés Européennes* (Paris: Montchrestien 1997), 72.

⁷ J. Weiler, 'A Quiet Revolution: The European Court of Justice and its Interlocutors', (1994) *Comparative Political Studies* 510-534, 534. The author argues however that the conditions favouring this 'easy' acceptance of ECJ jurisprudence are changing, and the future might bring less easy compliance with the European judicial norms. See also Stone Sweet n 3 above, 69, arguing that the Court does so by implementing a 'majoritarian activism'.

⁸ Weiler *ibid*, 530. The Court can achieve this result thanks to 'prudent' legal interpretation of EU law, which are not openly in contrast to member states policy and are likely to be accepted by national judiciaries.

⁹ Stone Sweet and Brunell n 3 above, 69.

¹⁰ Conant n 1 above, 38. See also generally R. Cichowski, *The European Court and Civil Society: Litigation, Mobilization and Governance* (Cambridge: CUP 2007).

¹¹ J. Bell, 'The Role of European Judges in an Era of Uncertainty', in P. Birkinshaw and M. Varney (eds) *The European Legal Order after Lisbon* (Austin, Boston, Chicago, New York, The Netherlands: Kluwer Law International 2010), 289. See also F. G. Jacobs, 'The Court of Justice in the Twenty-First Century: Challenges Ahead for the judicial System?', in A. Rosas, A. Levits, E. Bot (eds) *The Court of Justice and the Construction of Europe* (ebook: Asser Press

ECJ commentators are also divided between those claiming that the Court represents the interest of the most powerful EU Member States (the Principal-Agent theory)¹² and others claiming that the Court, as many international courts, is impartial, independent, and conscious of its reputation and mandate (Trustee rather than Agent).¹³ Therefore, although not immune from policy influence and pressure, it often produces outcomes unexpected, and uncontrolled by Member States.¹⁴ It needs to be noted however that throughout history, according to the above literature, the Court alternated bold legal innovation with conservative and cautious interpretation of EU law. This is true both thematically and chronologically.¹⁵ In other words, the degree of innovation introduced by the ECJ judgements varies across time and areas of law.

All these theories, albeit to a different extent, acknowledge that the Court triggers significant changes to EU policies, thanks to innovative legal interpretations.¹⁶ Moreover, the Court's remit witnessed a gradual expansion, including jurisdiction on sometimes highly specialised subject-matters (for example, competition

Springer 2013), 56, advocating the self-restraint of the Court when supporting the 'green light' theory. See also Dehousse n 6 above, 16-17, arguing in essence that the Court uses its 'policy-making' powers with discretion.

¹² See generally G. Garrett, 'The Policy of Legal integration in the European Union' (1995) 49(1) *International Organizations*, 171-181, and G. Garrett, R. D. Kelemen, and generally H. Schulz, 'The European Court of Justice, national governments and Legal Integration in the European Union', (1998) 52(1) *International Organizations* 149-176.

¹³ A. Stone Sweet and T. L. Brunell, 'Trustee Courts and the Judicialization of International Regimes: The Politics of Majoritarian Activism in the European Convention on Human Rights, the European Union, and the World Trade Organization' (2013) 1(1) *Journal of Law and Courts* 61-88, 64.

¹⁴ K. Alter, *The European Court's Political Power* (Oxford: OUP 2009), 237.

¹⁵ Commentators suggest that while the Court was innovative in areas where it could count on larger mobilization of juridical and political activism, it was more cautious on delicate areas where countries strongly claim their national supremacy. See Dehousse n 6 above, 144, arguing that the Court adopted a lower profile since the end of the '80s, due to a strain on integration impulses. See also Conant n 1 above, 38 for the role of activist mobilization; and on the same topic Alter, n 14 above, 63.

¹⁶ Alter *ibid*, 47. The author cites the liberalization of the telecommunications as an example.

law, constitutional law, labour law, etc.) without a corresponding specialization of the Court's chambers or judges, hence raising concerns about its credibility.¹⁷ In the field of copyright, for example, some suggest that the rulings of the Court step in where European law leaves gaps and loopholes, and that they appear to be motivated by a harmonising agenda which overshadow rigorous subject-specific reasoning.¹⁸ It has also been argued that the Court builds up its own concepts of copyright law (for example the concept of 'new public' in relation to the right to communication to the public)¹⁹ in order to push forward their harmonising or political agenda.²⁰

In sum, thanks to the indeterminacy of European law, the instrument of legal interpretation in the hands of the European judiciary transcends its traditional function. Unlike in most legal system, European law does not provide in its texts the criteria to interpret its own legislation and norms. Directions on how the *acquis communautaire* has to be construed will be drawn therefore from the jurisprudence of the Court, both from its express guidance on interpretation and from its most current practice. An example of specific guidelines issued by the Court is provided by the landmark case *CILIFT*²¹, where the Court stated several principles: First, that Community legislation is drafted in several languages, all of which are authentic and which have to be compared; Second, that Community law has its peculiar terminology; Third, that

¹⁷ J. Weiler, 'Epilogue: The Judicial Après Nice', in G. De Búrca and J.H.H. Weiler (eds) *The European Court of Justice* (Oxford: OUP 2001), 221.

¹⁸ Griffith for example argues that the Court does so by repeatedly referring in its rulings to the right to property based on human rights law. See J. Griffiths, 'Constitutionalising or harmonising? The Court of Justice, the right to property and European copyright law, (2013) 38(1) ELR 65-78, 66. See also M. van Eechoud, 'Along the Road to Uniformity —Diverse Readings of the Court of Justice Judgments on Copyright Work' (2012) JIPITEC 1, 76. On the same point related to general EU Law see Stone Sweet and Brunell n 3 above, 68.

See also M. Leistner, 'Europe's copyright law decade: Recent case law of the European Court of Justice and policy perspectives' (2014) 51 Common Market Law Review 2, 559–600.

²⁰ C. Kaupa, 'Maybe not activist enough? On the court's alleged neoliberal bias in its recent labour cases', in Muir, Dawson and de Witte (eds) *Judicial Activism at the European Court of Justice* (Cheltenham: Edward Elgar 2013), 74.

²¹ Case 283/81 *CILIFT* [1982] ECR 3415 (17-20).

provisions of European law need to be put in context and interpreted according to the purpose of community law as a whole.²²

Common interpretative practices of the Court as reported by the literature involve the use of traditional legal *topoi*, generally classified as semantic, contextual and teleological, with the addition of peculiar canons specific to the EU (*effet utile*, proportionality principle, uniform application, etc.). While some studies on European jurisprudence detect an arbitrary imbalance in the weight assigned to such *topoi*, with a favour for teleological canons instead of semantic interpretations,²³ other researchers provide a different picture. Bengoetxea and Beck for example, in their respective works, affirm that semantic arguments are preferred by the Court whenever the text of the law is clear, detailed, and univocal (especially in different translations). In essence, if the Court appears to give to semantic arguments less weight than most high courts, it is because of the inherent ambiguity of European law.²⁴

When the letter of the law does not offer sufficient guidance, systematic arguments and teleological arguments are called into play. Bengoetxea argues that systematic criteria are preferred to a combination of systematic and teleological criteria,²⁵ while Beck finds that the Court makes large use of its discretion and flexibility (compared to national high courts) in order to implement a cumulative approach, which is used to justify its ruling. These rulings, according to Beck, are in fact prompted by 'steadying factors', such

²² See A. Arnulf, *The European Union and its Court of Justice* (Oxford: OUP 2006), 608. Also Bengoetxea n 24 above, 232.

²³ See above, Section 1.

²⁴ Bengoetxea, Joxerramon. *The legal reasoning of the European Court of Justice: towards a European jurisprudence* (Oxford : New York : Clarendon 1993) ; Gunnar Beck, *The Legal Reasoning of the Court of Justice of the EU* (Oxford: Hart Publishing 2012).

The ambiguity of European law is produced by the nature of the legal instrument at hand (directives often provide mere legal frameworks rather than defined norms) and by the multicultural nature of European legislators. See Beck n 24 above, 190.

²⁵ Bengoetxea n 24 above, 233-234.

as 'national political and budgetary sensitivities'.²⁶ This however does not suggest that the Court assumes the role of legislator and departs from the letter of the law, if this can be avoided. There is no evidence of an overly innovative or purposive approach of the Court in the interpretation of European law, apart from the extent that it is prompted by the legal uncertainty of the text. On the contrary, no clear path or direction seems to emerge from an analysis of the European jurisprudence. Thus, the rulings of the Court cannot be anticipated, to the detriment of legal certainty.²⁷

In sum, problematic issues regarding the approach of the ECJ in interpreting and applying European law are: a) the Court is said to over-use of teleological/dynamic interpretation in order to carry out its harmonising agenda; b) the rulings of the Court do not reveal a consistent and foreseeable pattern, apart from the consolidation of European law; c) the above issues are particularly evident in subject-specific areas, where the Court relinquish specialist doctrine in favour of a European agenda.

However, these assumptions have not been supported by empirical evidence; a gap that the present study will address.

Methodological approach

Previous systematic empirical research on the ECJ utilizes qualitative and quantitative methods to explore the influence of the Court on the EU policy-making. These studies are based either on a chronological selection of cases²⁸ or on a diachronic sectorial selection.²⁹ Mostly the coding of the ECJ case-law aimed to

²⁶ Beck n 24 above, 233.

²⁷ Beck argues the lack of 'reckonability' of European judgements, *ibid*, 233.

²⁸ Carrubba et al. n 1 above.

²⁹ A. Stone Sweet, *The Judicial Construction of Europe* (Oxford: OUP 2004). R. Cichowski, 'Integrating the Environment: The European Court and the Construction of Supranational Policy' (1998) 5(3) *Journal of European Public Policy* 387-405. R. Cichowski, 'Women's Rights, the European Court, and Supranational Constitutionalism' (2004) 38(3) *Law and Society Review* 489-512. R. Cichowski, *The European Court and Civil Society: Litigation,*

examine the impact of the observations of Member States and EU institutions (e.g. the EU Commission) on the conclusions of the Advocate General and on the judgement.

Other classic legal research (or legal philosophy research) examines the judicial decision-making process of the Court³⁰ by analysing a number of judicial decisions as case studies, in search of specific patterns in the Court's approaches. These studies are carried out either on the whole body of European jurisprudence or on subject-specific areas. As an example of the latter, Griffith and van Eechoud respectively have stressed the incoherence of the Court in relation to copyright matters and its creativity in justifying reasoning aimed mainly at further European integration.³¹

With a focus on copyright case law, our study aims at providing empirical evidence on the problematic issues mentioned above. Our sample is defined by all cases that are the result of preliminary references to the Court which refer in the Application and in the Ground of Judgement to one of the directives of the *acquis communautaire* on the subject-matter of copyright and related rights. These criteria render forty-nine cases in total between 1992 and February 2014, of which forty cases refer to copyright, related rights and software protection³² and nine cases relate to database rights.³³ The documents analysed

Mobilization and Governance (Cambridge: Cambridge University Press 2007). M. McCown, 'The European Parliament before the Bench: ECJ precedent and European Parliament Litigation Strategies' (2003) 10(6) *Journal of European Public Policy* 974-995. S. Nyikos, 'The Preliminary Reference Process: National Court Implementation, Changing Opportunity Structures and Litigant Desistment' (2003) 4(4) *European Union Politics* 397-419.

³⁰ J. Bengoetxea, N. McCormick and L. Moral Soriano, 'Integration and Integrity in the Legal Reasoning of the European Court of Justice', in G. De Búrca and J.H.H. Weiler (eds) *The European Court of Justice* (Oxford: OUP 2001), 43.

³¹ n 18 above.

³² Council Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, *OJ L 167, 22.06.2001 P. 10 – 19*; Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, *OJ L 346, 27.11.1992, p. 61–66*. Directive 92/100/EEC has been repealed and replaced by Directive 2006/115/EC, without prejudice to the obligations of the Member States relating to the time-limits for transposition into national

consist of the Opinions of the Advocate General (AG) and the Grounds for Judgement (including the Operational Part of the Judgement) of each case.

Following previous European³⁴ and American³⁵ models, the paper first employs descriptive statistics to track down the route of specialist subject-matter within the Court (case assignment, chamber, judges). It

law of the Directives; Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, *OJ L 248*, 6.10.1993, p. 15–21; Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art, *OJ L 272*, 13.10.2001, p. 32–36; Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights, *OJ L 290*, 24.11.1993, p. 9–13. Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights, *OJ L 372*, 27.12.2006, p. 12-18; Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works *OJ L 299*, 27.10.2012, p. 5-12; Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs, *OJ L 122*, 17.05.1991 p. 42 – 46. Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs, *OJ L 111*, 05.05.2009, p. 16 -22; Directive 98/84/EC of the European Parliament and of the Council of 20 November 1998 on the legal protection of services based on, or consisting of, conditional access, *OJ L 320*, 1998-11-28, pp. 54–57; Directives on the protection of semiconductor topographies (87/54/EC, 94/824/EC, 96/644/EC); Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights *OJ L 195/16*, 02.06.2004, p. 16-25.

³³ Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases *OJ L 077*, 27/03/1996 P. 0020 – 0028.

³⁴ n 29 above.

³⁵ M. A. Hall and R. F. Wright, 'Systematic Content Analysis of Judicial Opinions', Wake Forest Univ. Pub. Law & Legal Theory Research Paper Series, Working Paper No. 913336, 2006 at <http://ssrn.com/abstract=913336> (last visited 23 March 2014) ; Fred Kort, Content Analysis of Judicial Opinions and Rules of Law, in *Judicial Decision-making* 133 (Glendon Schubert, ed. 1963); R. C. Lawlor, 'Fact Content Analysis of Judicial Opinions', 8 *Jurimetrics* J. 107, 110 (1968); B. Beebe, 'An Empirical Study of U.S. Copyright Fair Use Opinions', (2008) 156 *Pennsylvania Law Review*

subsequently maps the legal background of the members of the European Court of Justice in search of relationships between subject-specific skills and the assignment of cases. Further, it applies qualitative content analysis to measure the recourse to certain legal approaches in the sampled cases, which are coded in variables that are in turn object of statistical computation and multiple regression analysis. The dependent variable is represented by the outcome of the case (the impact on the rights of the copyright owner) and the explanatory variables are represented by the legal approaches implemented by the Court.

Finally, the identified legal approaches are linked to court members and subject subareas (database, software), in order to identify causal relationships. The aim of the article is not an assessment of the substantive law, but rather an identification of predominant legal interpretative canons within the Court and their impact on the decision-making process. A better empirical understanding how European jurisprudence is created and shaped will contribute to identifying dysfunctions and loopholes that need to be addressed by prospective institutional reforms of the European Court of Justice.

Rules of procedure and lines of reform

The procedure of preliminary ruling is prompted by a reference from a national court of an EU Member State. The national court requires from the ECJ the interpretation of a point of European Law, which might indirectly involve the infringement of EU law by the Member State.³⁶ The reference is lodged with the Registrar's Office, which deals with the translation of the full text of the reference into the EU official languages. The Registrar also defines the category within which the case should be classified (e.g. the legal

549; B. Beebe, 'An Empirical Study of the Multifactor Tests for Trademark Infringement', (2006) 95 *California Law Review* 1581; M. Sag, 'Predicting Fair Use' (2012) 73(1) *Ohio State Law Journal* 47-91.

³⁶ For direct infringement a Breach Proceedings is brought by the Commission against the allegedly infringing Member State. These procedures are out of the scope of this work.

subject-matter, as for example 'social security' or 'citizenship' etc.).³⁷ The case is then transferred to the President of the Court and to the First Advocate General.

Further, the President of the Court assigns the case to a chamber, and appoints a Reporting Judge within this chamber, whereas the First Advocate General assigns the case to an Advocate General. According to the procedural rules of the Court, no particular order, as for example a rotation order, is provided for the assignment of a case to a particular chamber. The only rule established by the procedure in terms of case assignment provides that particularly important cases can be judged by Court in its formation as Grand Chamber.³⁸

The case assignment to the Reporting Judge and to the AG is made as well without specific procedural rules (e.g. there is no rotation among Court members). However, it is frequent that the same judges and the same AGs are responsible for cases relating to similar subject-matter.³⁹ Usually the AG to whom a case is

³⁷ The issue of categorization is not as trivial as it might seem. Defining a case as belonging to a subject matter can determine for example whether Member State decide to intervene in the process (by making observations). See Bengoetxea, McCornick and Moral Soriano, n 30 above, 52.

³⁸ Article 60 Rules of Proceedings of the ECJ: 'Assignment of cases to formations of the Court:

1. The Court shall assign to the Chambers of five and of three Judges any case brought before it in so far as the difficulty or importance of the case or particular circumstances are not such as to require that it should be assigned to the Grand Chamber, unless a Member State or an institution of the European Union participating in the proceedings has requested that the case be assigned to the Grand Chamber, pursuant to the third paragraph of Article 16 of the Statute.

2. The Court shall sit as a full Court where cases are brought before it pursuant to the provisions referred to in the fourth paragraph of Article 16 of the Statute. It may assign a case to the full Court where, in accordance with the fifth paragraph of Article 16 of the Statute, it considers that the case is of exceptional importance.' See the Rules of Procedure of the Court Of Justice, L 265/1 *Official Journal of the European Union*, 29.9.2012, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:265:0001:0042:EN:PDF> >

³⁹ T. Tridimas, 'The role of the Advocate General in the development of Community Law: some reflections', (1997-12) 34(6) *Common Market Law Review* 1349-1387, 1355. See N. Burrows and R. Greaves, *The Advocate General and EC*

assigned does not belong to the Member State involved in the litigation, or to the Member State of one of the parties in the case of a preliminary ruling.⁴⁰ However, this unwritten rule is not always followed.⁴¹

After the parties have filed their submissions, the Reporting Judge writes a preliminary report, to be presented at the Court general meeting,⁴² in which a summary of the case is made. The summary includes the main fact situation, the norms potentially applicable, and previous referable case law. The Reporting Judge might also indicate points of national law that need further clarifications or even details of the fact situation that would need further measures of inquiry. He or she can suggest to which formation of the Court the case should be assigned and whether to dispense with the hearing or the opinion of the AG.⁴³

Once the case has been presented to the general meeting, the written part of the procedure can start. Written submissions such as statements of case, defences, and observations by the parties and by any intervener (for example, interested Member States and the EU Commission) are received by the Registrar and circulated among the panellist judges and the AG. The submissions are accompanied, where possible, by the relevant documentary evidence. After the conclusion of the written part, a date for the hearing is fixed.

Before the hearing, if there is any, a report on the case written by the Reporting Judge is circulated among the parties and the judges. At the hearing, the pleadings of the parties and any observation by interveners are heard by the panel of judges that forms the chamber. If a supplement of inquiry is necessary, also witnesses and experts are heard by the Court. In the procedure for preliminary ruling there is no

Law (Oxford: OUP 2007), 23.

⁴⁰ Burrows and Greaves *ibid*, 23.

⁴¹ Tridimas n 39 above, 1356.

⁴² Article 59 of the Court Rules of Proceedings. The meeting is normally held on Tuesdays afternoon. See Burrows and Greaves n 39 above, 24.

⁴³ According to Article 20 (formerly Art.18) of the Statutes of the ECJ, as modified by the Nice treaty, ' [...] Where it considers that the case raises no new point of law, the Court may decide, after hearing the Advocate General, that the case shall be determined without a submission from the Advocate General'.

opportunity for the parties to reply in writing to the introductory statements of their adversary, therefore they respond to their argument at the hearing.⁴⁴

After the parties have exposed their arguments, at a request of the president of the chamber, the Reporting Judge and the AG can ask clarifications to the speakers. Finally, the Advocate General can issue his or her Opinion, but more often a date is announced for an opinion to be issued, around a month later.⁴⁵ In the Opinion, the AG exposes thoroughly any doctrinal and jurisprudential arguments underpinning her proposed solution of the case. Alternative draft opinions can also be submitted by the AG to the Court, supporting different arguments.⁴⁶ After the reading of the conclusions of the Opinion of the AG, the oral procedure is officially closed. However, the hearing can be reopened, after the submission of the AG, if further measures of inquiry are required.⁴⁷

Before the deliberation, the Reporting Judge circulates a note to the other judges to suggest a draft ruling for the case. In this note she will state her agreement or disagreement with the opinion of the Advocate general. Any dissenting judge will normally circulate another note to express her views. If there is clear disagreement on a case within the Court, a meeting would be normally set to discuss the matter. Dissenting opinions of any member of the panel are not cited in the judgement. Normally, the Opinion of the AG is not cited in detail within the judgement either. If the ruling disagrees with the opinion of the AG, it elaborates its own legal reasoning. In alternative, when the judges agree with the Opinion, they refer to it in full or in part, often without restating the arguments expressed therein.⁴⁸

The AG, in her Opinion, analyses previous Court case law on the same issue and, if necessary, points out discrepancies and inconsistencies of the Court's previous legal reasoning. A comparative analysis of

⁴⁴ Burrows and Graves n 39above, 27.

⁴⁵ *ibid.*

⁴⁶ Tridimas n 39 above, 1360.

⁴⁷ Burrows and Graves n 39 above, 28.

⁴⁸ *ibid.*

Member States legislation can also be included in the Opinion in order to support the arguments of the AG.⁴⁹ Overall, the opinion of the Advocate General provides the most detailed and exhaustive analysis of the case, and it is often much more voluminous than the ruling. On the one hand this is a guarantee of the doctrinal rigour with which a case is analysed before the Court, on the other hand this involves substantial costs both in terms of time and resources, especially due to the growing number of the official languages of the EU, in which the Opinion has to be translated. Prompted by these concerns, some arguments have been made for a redundancy of the role of the Advocate General within the Court.⁵⁰

In 2011, the Court proposed urgent modifications to reform the ECJ statutes to cope with the dramatic backlog in its case-load,⁵¹ which is expected to further increase due to EU enlargement.⁵² However, in 2012, very few modifications were introduced by EU Regulation to the Statutes of the European Court of Justice.⁵³

The modifications to the Court Statutes include for example the appointment of a vice-president of the General Court, who can relieve the president from part of his increasingly demanding tasks,⁵⁴ the increase

⁴⁹ Tridimas n 39 above, 1360.

⁵⁰ Burrows and Graves n 39 above, 297.

⁵¹ The Court referred an increase of 65 per cent of the cases pending between 2000 and 2010. See the summary of the proposed legislation at <http://www.europarl.europa.eu/oeil/popups/summary.do?id=1148372&t=e&l=en> (last visited 12 March 2014).

⁵² Although hitherto the substantial increase in workload due to the EU enlargement did not quite take place. See D. Tamm, 'The History of the court of Justice of the European Union since its Origin', in A. Rosas, Levits, E. Bot (eds) *The Court of Justice and the Construction of Europe* (eBook: Asser Press Springer 2013), 21. P. Craig, 'The Jurisdiction of the Community Court Reconsidered', in G. De Búrca and J.H.H. Weiler (eds) *The European Court of Justice* (OUP 2001), 183.

⁵³ Regulation (EU, Euratom) No 741/2012 of the European Parliament and of the Council of 11 August 2012 amending the Protocol on the Statute of the Court of Justice of the European Union and Annex I thereto, *OJ L 228*, 23.8.2012, p. 1–3.

⁵⁴ *ibid*, Article 1(1).

of the number of the judges that may sit in the Grand Chamber, and the elimination of the obligation for the presidents of the Chambers to sit in the Grand Chamber. This latter modification aims at allowing all judges to participate to the sitting of the Grand Chamber.⁵⁵ Another modification included the possibility to appoint temporary judges to cover for members of the Civil Service Tribunal prevented on medical ground from performing their duties.

Specialized courts for intellectual property cases, the creation of which is object of discussion since the Treaty of Nice⁵⁶ have not been introduced in the present reform although the Court had requested to increase the number of judges of the General Court and the formation of specialised chambers.

In the explanatory note to the proposal of amendment of the ECJ Statutes, the Court specified that two routes to reform were available by the Treaties in order to face the increasing workload of the ECJ: increasing the number of the judges of the General Court or establishing specialised courts. The Court suggested increasing the number of the judges of the General Court to 39, motivating this decision with the argument that specialised courts would be helpful to face the increased workload only after a relevant amount of time.⁵⁷ Increasing the number of judges to the General Court would instead provide for a quicker solution.

In its opinion to the legislative proposal of modification of the ECJ statutes, the Commission fully supported the request of the Court. It agreed with the proposal of increasing the number of judges and it specified that the General Court would however retain the power of organising its formation as appropriate. It therefore could form two or more specialised chambers to handle specific subject-matter.⁵⁸ However, the

⁵⁵ *ibid*, Article 1(3).

⁵⁶ N. Lavranos, 'The new specialised courts within the European judicial system', (2005) 30(2) E.L. Rev. 261-272, 261.

⁵⁷ Proposed amendments to the Statutes of the ECJ and explanatory note, 9, at http://curia.europa.eu/jcms/upload/docs/application/pdf/2011-04/projet_en.pdf (last visited 25 January 2014).

⁵⁸ The Commission suggested the formation of 'at least two' specialized chambers. See the Commission Opinion of 30.9.2011 on the requests for the amendment of the Statute of the Court of Justice of the European Union,

EU Regulation addressing the reform of the Statutes incorporated only part of the requests of the Court. The reform included the appointment of a vice-president to the Court, the increase of the components of the Grand Chamber (and its quorum), and the appointment of temporary judges to cover for the absences in the Civil Service Tribunal. But the number of the members of the General Court remained unchanged. Relevant reforms in this sense were referred in the text of the Regulation to 'a later stage'.⁵⁹

Other reforms largely discussed by EU scholars such as the decentralization of the Court of Justice,⁶⁰ a different distribution of the competences between the General Tribunal and the ECJ,⁶¹ and the different rules of appointment of EU judges⁶² have not been considered by the recent reform.

Copyright cases assignment

The sample analysed by our study includes all closed cases referring to one of the directives forming the *aquis communautaire* relating to copyright⁶³ that are object of a preliminary reference before the ECJ at the date of March 2014. This dataset allows us to investigate the pattern of case allocation among ECJ chambers in the matter of copyright. Since the ECJ does not have specialised sections, in practice the President of the Court, after the preliminary report of the Reporting Judge, allocates the case to a chamber.

presented by the Court, Brussels, 30.9.2011 COM(2011) 596 final, 5.

⁵⁹ Recital 7 of the Regulation (EU, Euratom) No 741/2012 of the European Parliament and of the Council of 11 August 2012 amending the Protocol on the Statute of the Court of Justice of the European Union and Annex I thereto, *OJ L* 228, 23.8.2012, p. 1–3.

⁶⁰ G. C. Rodriguez Iglesias, 'Levolution de l'architecture jurisdictionnelle de l'Union Européenne', in A. Rosas, E. Levits, Y. Bot (eds) *The Court of Justice and the Construction of Europe* (eBook: Asser Press Springer 2013), 46.

⁶¹ Weiler n 17 above, 222; Craig n 52 above, 193.

⁶² Arnull, n 22 above, 522.

⁶³ n 32 above.

The criteria of this assignment are unclear, as they are not provided by the rules of procedure of the Court.⁶⁴

Before the year 1998 preliminary rulings were not assigned to chambers, therefore our sample reveals interesting insights only from this year onwards. The data shows an unmistakable predominance of the third and fourth chambers of the Court, followed by a relevant share of cases assigned to the Grand Chamber and only few cases assigned to the other chambers. When these figures are broken down by year of registration, the data show a slow raise of the third and fourth chambers, alternatively, as a recipient of copyright cases. In the period going from the year 2008 and culminating in the year 2011, the third chamber slowly gained the monopoly of copyright litigation, only to leave the place to the fourth chamber in the following years.

The review of case allocation among chambers of the ECJ prompted an investigation on the identity of the judges sitting in the panels, in order to understand whether the choice of the chamber could correspond to the choice of a judge. The data show nine judges representing more than 80 per cent of the total presences in Court ruling on copyright cases. These judges are mostly part of the third and the fourth chambers of the ECJ. This suggests that the chambers were chosen on the basis of the composition of the panel, presumably because of a particular expertise in the subject-specific area.

A substantial share of cases however were referred to the Grand Chamber, which is called into action whenever a case is particularly complex. Our findings need to take into account the specific procedural rules according to which the Grand Chamber is formed. Panellists of Grand Chambers for example have to include the presidents of the other Chambers, irrespective of their background or experience. Keeping into account the potential distorting effects produced by these procedural rules the data show a predominance of the same selection of judges in both Court formations (Grand Chamber or other Chamber).

⁶⁴ *ibid.*

Further, the recurrence of Reporting Judges and of Advocate Generals (AGs) has also been calculated. In this respect, the prevalence of a restricted number of names is far more evident. Judge J. Malenovský registers an overwhelming majority of presences as Judge Rapporteur in the cases of the sample, followed at a large distance by Judge G. Arestis, and by Judge K. Lenaerts. The remaining judges have a number of presences inferior to three per cent.

Moreover, a subject-matter specific analysis reveals that judge Malenovský is the reporting judge in most cases on copyright and related rights since the year of his appointment (2004), whereas before this date this role was covered by judge Puissochet. On database rights, Judge Lenaertz is the Reporting Judge in almost all cases. Only three cases of our sample related to software protection. Two of them were assigned to Judge Arestis. A clear relationship therefore seems to emerge between specific judges and specific sub-areas of copyright law. However, since the year 2012 copyright cases tend to be assigned to members of the fourth chamber other than Malenovský. A possible explanation for this apparent change of policy could be provided by the remarkable increase in the copyright-related workload of the Court.

The analysis yields less extreme results with relation to the presence of specific Advocate Generals in the examined case-law. However, a pattern emerges also in this case. In the area of copyright law, two AGs show a number of presences notably higher to that of others: V. Trstenjak and E Sharpston. In the area of software, although the size of the sample is rather limited, AG Bot is assigned to all cases. Finally, in the area of the database right, despite an apparent prevalence of AG Stix-Hackl, the distribution among AGs is more balanced.⁶⁵

⁶⁵ AG Stix-Hackl in fact appears to have the highest share of cases, but this is a false positive, as the four cases assigned to her are in fact four parallel cases regarding the same factual situation (*C-444/02 Fixtures Marketing* [2004] ECR I-10549, *C-338/02 Fixtures Marketing* [2004] ECR I-10497, *C-203/02 The British Horseracing Board e.a.* [2004] ECR I-10415, *C-46/02 Fixtures Marketing* [2004] ECR I-10365).

ECJ copyright and database cases (1992-2014) by Judge Rapporteur and Advocate General

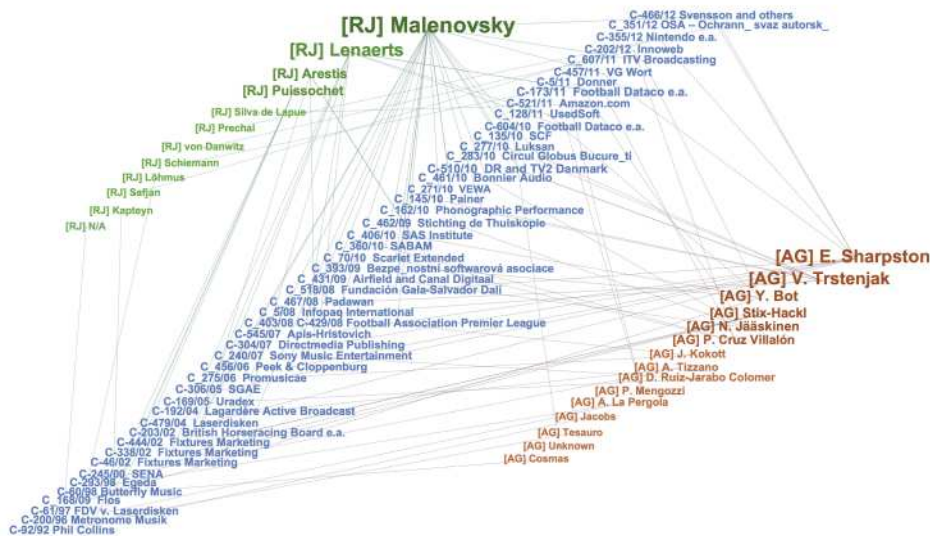


Figure 1

The data above shows a clear predominance of specific members of the ECJ in copyright and database cases, in what appears to be a traditional unwritten operational code of the Court, which tends to assign cases by subject matter, enabling the development of specific expertise.⁶⁶ In this sense, judge Malenovský seems to have taken the place of the famous Advocate General Francis Jacobs, who influenced European intellectual property law with his opinions in landmark cases.⁶⁷ Just as Jacobs, Malenovský has a background in European Law, without a specialization in Intellectual Property Law. His experience in copyright matters seems to derive from the practice before the Court. This is in line with the tradition of the CJEU where members have a generalist background, because they are expected to examine a wide array of subject-matters.⁶⁸

⁶⁶ A first-generation of intellectual property cases before the Court shows the prevalence of Advocate General Francis Jacobs and Reporting Judge Claus Christian Gulman (in turn, he was previously Advocate General before the Court and he had issued opinions on landmark intellectual property cases). See Burrows and Greaves n 39 above, 128.

⁶⁷ *ibid*, 157-165.

⁶⁸ *ibid*, 297.

A cross comparison between chamber assignment and member assignment confirms the above observations. Copyright cases assigned to the Fourth Chamber coincide with cases assigned to Judge Malenovský, who was assigned to both the Third and the Fourth Chambers. After Malenovský, a much lower recurrence of presences can be registered by Judges Arestis and Lenaertz, also from the Third and Fourth Chamber, more often though sitting when the Court was in Grand Chamber formation. A marginal share of copyright cases is assigned to the Second, Fifth and Sixth Chamber. Incidentally, it is worth noting that one of these cases has been severely criticised, referring to the composition of the Court and to its 'lack of experience'.⁶⁹

The members of the ECJ

Members of the European Court of Justice (judges and Advocates General), according to European Law, must be appointed by a 'common accord of the governments of Member States.'⁷⁰ However, since its inception the practice of the recruitment of the Court involved individual Member States appointing 'their' judges without any interference from the others.⁷¹ Necessary experience and qualifications for the appointment of a member to the Court of Justice of the European Union (including all courts) are only broadly specified.

Article 253 of the Treaty of the European Union provides that candidates to the European Court of Justice should be 'persons whose independence is beyond doubt and who possess the qualifications for appointment to the highest judicial offices in their respective countries or who are jurists of

⁶⁹ L. Bently, 'The return of industrial copyright?' (2012) 34(10) EIPR 654-672, 663.

⁷⁰ Lisbon Treaty, Article 19 available <http://register.consilium.europa.eu/pdf/en/08/st06/st06655-re07.en08.pdf> (last visited 28 November 2013).

⁷¹ F. G. Jacobs, 'The Court of Justice in the Twenty-First Century: Challenges Ahead for the judicial System?', in Rosas, A. Levits, E. Bot (eds) *The Court of Justice and the Construction of Europe* (eBook: Asser Press Springer 2013) , 58. See also Dehousse n 6 above, 12.

recognised competence'. Article 254 instead requires candidates to the General Court to be 'persons whose independence is beyond doubt and who possess the ability required for appointment to judicial office'.⁷²

However, according to the Judges' Charter in Europe (1993) of the European Association of Judges, the selection of the judges should be based 'on objective criteria designed to ensure professional competence. Selection must be performed by an independent body which represents the Judges. No outside influence and, in particular, no political influence must play any part in the appointment of Judges'.⁷³

The procedure of appointment of the members of the Court, therefore, departs from the most common procedures implemented in national jurisdictions, which are based either on a public competition, under the supervision of a magistracy body, or on public elections. This peculiar procedure for the appointment of European judges inspired concerns relating to the independence of the Court.⁷⁴ In fact, the first historic accounts of the ECJ composition report that no judge or advocate general was appointed to the Court without being very close to the political establishment that selected him⁷⁵ (or her, although we have to wait till 1990 to see the first female judge of the Court⁷⁶). Moreover, despite academic concerns,⁷⁷ court members are appointed for six years, and their mandate is freely renewable by Member States. This

⁷² The text of the Treaty (Consolidated version of the Treaty of the European Union) is available at <http://register.consilium.europa.eu/pdf/en/08/st06/st06655-re07.en08.pdf> (last visited 28 November 2013).

⁷³ Available online at <http://www.richtervereinigung.at/international/eurojus1/eurojus15a.htm> (last visited 23 October 2013).

⁷⁴ See Rasmussen n 3 above, 34.

⁷⁵ See generally Nicole Condorelli Braun, *Commissaires et juges dans le communautés européennes* (Paris: Pichon et Durand-Auzias 1972). This finding was confirmed by following research. See Dehousse n 6 above, 12.

⁷⁶ This was Fidelma O' Kelly Macken, although Simone Rozès had already been appointed as Advocate General in 1981. See Tamm n 52 above, 20.

⁷⁷ The EU Parliament proposal to extend the mandate of the judges to 10 years, not renewable, was rejected. Some commentators suggest that this is a clear sign that Member States do not intend to renounce their power of pressure on the Members of the Court. See Dehousse n 6 above, 18.

represents an obvious tool of pressure on the judge by the Member State, which is only partially balanced by the procedure providing for collegial decisions and confidentiality of dissenting opinions.⁷⁸

The gradual expansion of the Court, both in terms of members and competences, fuelled the debate around its judicial independence, hence calling for reform of the appointment process.⁷⁹ A special committee was therefore created by the Article 255 of the Lisbon Treaty (2009).⁸⁰ This panel of seven members, appointed by the Council for four years, is formed by former members of the ECJ, juridical figures of the highest quality, and one member proposed by the EU Parliament. The committee examines the candidatures of new members as well as membership renewals, and issues a non-binding confidential opinion to the appointing Member State.⁸¹ Effects of the activity of this committee on the independence of court members would need to be measured by further research, in due course.⁸² Meanwhile, critics of this institution suggest that improvements should be made in order to enhance the impact of the committee on the impartiality of the judges.⁸³

⁷⁸ Dehousse n 6 above, 15. Minority opinions in fact are not published in judgements, in order to preserve the independence of the judge, especially vis-à-vis the member state that has appointed them. Arnull 2006 n 45 above, 11.

⁷⁹ The European Parliament has proposed repeatedly to expand the term of judges' appointment but to make it non-renewable, in order to guarantee their independence. But the proposal has never been accepted. See Weiler 2001 n 17 at 225; and Arnull n 22 above, at 22.

⁸⁰ Text of the Treaty (consolidated) at <
<http://register.consilium.europa.eu/pdf/en/08/st06/st06655-re07.en08.pdf>>.

⁸¹ The committee is referred in practice as '*le comité 255*'. See generally J.M. Sauvé, 'Le rôle du comité 255 dans la sélection du Juge de l'Union', in Rosas, A. Levits, E. Bot (eds) *The Court of Justice and the Construction of Europe* (eBook: Asser Press Springer 2013).

⁸² The committee is active since the year 2010, and although it has already examined 35 between new memberships and renewals, further jurisprudential production is needed to carry out significant research.

⁸³ Arnull for example suggests that the 'committee 255' could choose from a list of three candidates, as it is currently done for the appointment of ECHR judges. See Arnull n 22 above at 25. In fact, many of the problems that have

The professional background of the members of the European Court of Justice has been object of a limited body of research. Nicole Condorelli Braun for example carried out one of the first analyses of the background of the members of the Court from its establishment until the beginning of 1970. She explored in detail the biography of the -then- few judges of the European Court and reported anecdotal evidence of their political connections as well as their recruitment.⁸⁴ More recently, Antonin Cohen⁸⁵ and Sally Kenney⁸⁶ have examined the background of the members of the Court with a focus on their professional experience and background, as well as their career provenance.⁸⁷ All the above studies substantially present a scenario with court member that are mainly academics in the area of community, comparative or international law, often in addition to being high members of the judiciary and high officials (or consultants) in their respective governments.

Further, Kenney enlarged the scope of her studies by including the staff of the Cabinet of each judge or Advocate General. Each member of the ECJ has three 'référéndaires' (legal clerks, or secretaries) who help with members' ordinary functions. Kenney's research focussed on the background of these important and yet overlooked employees of the Court, by analysing their rules of appointments and their previous and

been identified regarding the appointment process of judges at the ECHR are applicable to ECJ judges as well. See Interight Report 'Judicial Independence: Law and Practice of appointments to the ECHR, available at <<http://www.interights.org/jud-ind-en/index.html> > (last visited 23-10-13).

⁸⁴ Condorelli Braun n 75 above.

⁸⁵ A. Cohen, 'Sous la robe du juge: le recrutement social de la Cour', in Pascal Mbongo and Antoine Vauchez (eds) *Dans la fabrique du droit européen. Scènes, acteurs et publics de la Cour de justice des Communeautés européennes* (Bruylant 2009). See also Antonin Cohen, 'The Legal Community: Judges, Lawyers, Officials and Clerks in the Writing of Europe', European University Institute Working Papers, at <http://cadmus.eui.eu/handle/1814/10029> (last accessed 12 February 2014).

⁸⁶ See generally S. Kenney, 'The members of the Court of Justice of the European Communities', (1998) 5 *Columbia Journal of European Law* 101-133

⁸⁷ *ibid*, 107.

subsequent careers.⁸⁸ Vauchez as well examined the background of the *référéndaires*, suggesting that their career path is by and large similar to that of the judges, in that it combines profiles coming from academia, magistracy, legal practice, and public administration.⁸⁹ Kenney suggests that European legal clerks do not displace the power of the judge, as they do in other legal systems:⁹⁰ the member always supervises the work and is aware of the content of the legal deeds produced by the Cabinet. However, she also speculates that members of the ECJ might become more dependent on staff as the workload of the Court increases.⁹¹

Antonin Cohen's research includes Courts members in post until the year 1999. He identifies three periods in the distribution of the background of the judges of the ECJ. These are: a) From 1952 to 1972; b) From 1973 to 1985; and c) From 1986 to 1999. These periods coincide with the general evolution of the Court, following successive enlargements of the EU. Cohen reports that at its outset (1958) the Court was composed mostly by academics, specialised in international law, while a smaller portion was represented by high-ranking judges⁹². These academics however had always some connection with the government of the appointing Member State. Their background was therefore mixed, political and technical, the technical

⁸⁸ See generally S. Kenney, 'Beyond Principals And Agents, Seeing Courts as Organizations by Comparing Référéndaires at the European Court of Justice and Law Clerks at the U.S. Supreme Court', (2000) 33(5) *Comparative Political Studies* 593-625.

⁸⁹ Among the 105 law clerks (*référéndaires*) recruited between 1997 and 2001 by the Cabinets of the members of the ECJ, 28 were coming from the Court, 21 were academics, 16 were lawyers, 13 were coming from the national magistracy and 16 from the Public Administration. Moreover, 10 had been in post in an European institution and one was coming from his national Chamber of Commerce . See A. Vauchez, 'Conclusion: le magistère de la Cour', in Pascal Mbongo and Antoine Vauchez (eds) *Dans la fabrique du droit européen. Scènes, acteurs et publics de la Cour de justice des Communeautés européennes* (Brusseles : Bruylant 2009), 235.

⁹⁰ Kelly compares the ECJ with the US Supreme Court. See Kelley n 89 above, 603 .

⁹¹ Kenney n 89 above, 620.

⁹² Cohen n 85 above, 20. It has been suggested that this atypical source of recruitment for the Court has had an influence on the way it performed its duties. See Dehousse n 6 above, 13.

part being mostly focused on administrative law and civil law, which at the time provided most of the tools necessary to understand and interpret European law.⁹³

In the second period, members of the ECJ were increasingly coming from the ranks of the national magistracy and from the public administration, whereas the third period, according to Cohen, registered a further increase of the presence of academics. He argues that this has to be put in relation with the EU enlargement to southern European countries such as Greece, Spain, and Portugal. These countries, similarly to Italy, tend to appoint academics as members of the Court, whereas other EU Member Founders such as France and Germany tend to privilege appointments of previous judges and public servants.⁹⁴ At the same time, this third period witnesses a decrease in the number of judges coming from posts in the public administration of their country of origin.⁹⁵

The relevant presence of academics among the Court's members is further confirmed by other research on the background of the ECJ judges. Scheeck for example reports that in 2006, among the twenty-five judges and eight AGs in post at the time, sixteen had a PhD in Law and twenty-one were or had been professional academics.⁹⁶

As for the provenance of the member of the Court, Cohen notes a certain 'circulation' among international courts such as the High Authority, the International Court of Justice, and the European Court of Justice⁹⁷ Moreover, his research shows that some of the judges had participated, mostly informally, in the

⁹³ Condorelli Braun n 75 above, 63.

⁹⁴ Cohen n 85 above, 27-28.

⁹⁵ *Ibid*, 28.

⁹⁶ L. Scheeck, 'La diplomatie commune des Cours européennes', in Pascal Mbongo and Antoine Vauchez (eds) *Dans la fabrique du droit européen. Scènes, acteurs et publics de la Cour de justice des Communautés européennes* (Bruylant 2009), 210.

⁹⁷ The term European Court of Justice (ECJ) here include the Court in all its former and present denominations: Court of Justice of the European Coal and Steel Community, Court of Justice of the European Community, and Court of Justice of the European Union. Cohen n 85 above, 20-21.

negotiation of the European Treaties,⁹⁸ and several of them practised before the Court before becoming a member.⁹⁹ The 'circulation' within the Court, intended as recruitment from the ranks of AGs and legal clerks (*référéndaires*), according to Cohen has substantially increased in the third period, while it was virtually non-existent in the previous two.¹⁰⁰

Both Kenney's and Cohen's studies reveal very interesting details about the composition of the Court of Justice. However, the time-frame of these studies ends before substantial EU enlargements.¹⁰¹ A more recent analysis of the court composition could reveal a different scenario, prompted by the increased number of the Court members and of the competences of the Court. Although our study focus on copyright case-law as a case study, we examined the profile of forty-five members of the ECJ, since we included in our sample also judges sitting in the Grand Chamber. Thus, in effect our study covers most members (judges and Advocate Generals) of the ECJ.

Our analysis shows a remarkable prevalence of EU Law and Public Law in the professional background of the members of the Court. A large majority has performed studies or held academic positions in the fields of: European Union (or Community) Law, Public Administration Law, Public International Law, or Public European Law. A background in Constitutional Law and Human Rights is also relatively common among ECJ members, also because many of them come from a post in their national Constitutional Court or a in the European Court of Human Rights.¹⁰² Minority specializations, in relative terms, include Civil Law, Criminal Law, Political Science, and Trade Law, followed by International Private Law (Conflict of Laws), Comparative Law, and Law and Economics. The smallest percentage in turn is represented by specialists in Family Law, Tax Law, Competition Law, and Business Law.

⁹⁸ However, this figure is low in comparison to the number of judges of the High Authority that participated to drafting and negotiation of the Treaties. *ibid*, 22-23.

⁹⁹ *ibid*, 23.

¹⁰⁰ *ibid*, 28.

¹⁰¹ From 2004 to 2013 twelve new countries joined the EU, thus bringing the total number of Member States to 28.

¹⁰² See below, in the same section.

Most of the ECJ members, as expected, have composite careers, featuring academic positions alongside juridical professions and governmental posts. We have stratified the sample in four main profiles, which seem to remain the leading careers of the members of the European Court since its inception:¹⁰³ a) Academics; b) Judiciary; c) Lawyers (including public prosecutors); d) Public Administration (including consultancy appointments). First we have calculated the recurrence of each of the above profiles in the career of each member, therefore including several profiles in each career. Secondly we have attempted to identify the prevailing profile in each career, in order to compute each member for his main professional background. We also have considered the economic expertise of each member,¹⁰⁴ and their provenance from another international or European institution.

The analysis indicates that the majority of ECJ members have held academic posts at some stage in their career. Most of these members are university professors, but some are part-time lecturer or researchers in addition to their main career, which is not in academia. The majority of the members have also held posts within their home public administration, often as a consultant of the government, but mainly as a civil servant for some ministry or public institution. A similar share of the sample has occupied a post in another international institution before being appointed to the Court. The European Court of Human Rights seems to be the main provider of members of the ECJ. However, a substantial share of the members comes from the Court itself, as previous judges of the General Court, or legal clerks (*référéndaires*) at the ECJ or Advocates General. Some other members come from EU institutions (Commission, Council and Parliament), or from delegations to the EU institutions, or from advisory bodies to the EU institutions. One member comes from a European agency (Europol).

¹⁰³ Previous literature did not analyse separately the skills of the members. However, the comparison with their findings relating to the main career of each member reveals by and large the same proportions among the Court's main profiles (academics, judges and administrators). See Cohen n 85 above, 22-23 and Kelley n 86 above, 107.

¹⁰⁴ In addition to an expertise in Law and Economics, indicated in the previous paragraph, the data revealed the presence of an economic component in the examined curricula, in the form of other academic qualifications or professional experiences.

More than half of the examined members come to the Court of Justice after a career experience in their national judiciary, often at the highest level (Constitutional Court, Highest Court, or Administrative Highest Court). A relative minority instead performed some legal practice, either in ordinary courts or administrative tribunals.

MAIN BACKGROUND	Number	Percentage
PUBLIC ADMINISTRATION	15	33%
JUDICIARY	14	31%
ACADEMIC	13	29%
LEGAL PRACTICE	3	7%
	45	
PROVENANCE	Number	Percentage
ECHR	7	25%
TRIBUNAL EU (prev.CFI)	6	21%
REFERENDAIRE	4	14%
COMMISSION	3	11%
DELEGATIONS	2	7%
ADVOCATE GENERAL	2	7%
COMM. VENICE	2	7%
COUNCIL	1	4%
PARLIAMENT	1	4%
	28	

Table 1

The examination of the *main* careers of the members suggests a balance between Judiciary, Academe and Public Administration, with a moderate prevalence of the latter. Only a minority has been shaped by legal practice. It is interesting to note that a sizeable share of the sample has some background or experience in

economic matters. This is consistent with the findings of previous research on the Court's membership.¹⁰⁵ In fact, starting with the famous Jacques Rueff,¹⁰⁶ economic expertise seems to remain stable among members of the ECJ.

As anticipated, although our data is limited to the Court's member involved in copyright cases, the size of the sample gives an indication of the general composition of the Court. Our findings appear to be in line with older research. It seems that the prevalence of academic, judiciary and public administration background still holds, despite considerable enlargement of the EU and despite the resulting growing membership of the Court. What is most interesting is that a European/Public legal background and strong linguistic skills are still paramount within the Court, while specialized subject-matters such as for example employment law and intellectual property law could not be identified in any of the examined professional profiles.

A substantial difference registered by a comparison of our analysis with previous research relates to the 'circulation' between international/European courts and other European institutions. The provenance from the European Court of Human Rights or from other European institutions seems to be more relevant now than in the past. This is arguably due the increasing number of courts, of courts' members, and more generally of personnel within the EU institutions. An arguable consequence of this 'internal circulation' can be that professional backgrounds remain anchored to EU/Public administration competences as opposed to the specialised competences that would be more in line with the current jurisdiction of the Court.

In conclusion, the analysis shows that the composition of the Court did not dramatically change from its inception, and it is still mainly formed by high ranking professional often combining an academic career with jurisdictional practice and governmental appointments. These preliminary findings suggest that concerns about the independence of the Court have not substantially been addressed by the reform of the

¹⁰⁵ Kelley n 86 above, 107.

¹⁰⁶ Jacques Rueff (1896-1978) French Prime Minister and Minister of Finances, among other government appointments and a brilliant academic career in economics and finance, was a member of the ECJ (formerly ECSC) from 1952 to 1962.

Statutes of the Court, as the profiles of former public administrators are still dominant among the judges.¹⁰⁷

However, the most specific finding of our study relates to the number and variety of legal skills that the Court can use. Relevant gaps have been identified by the analysis of the areas of legal expertise within the Court, including but not limited to copyright law.

A comparison between these findings and the findings of the previous section shows that there is no apparent relationship between the assignment of copyright cases to specific Reporting Judges or Advocate General, because not one of the examined profiles indicates a particular expertise in copyright law. Judge Malenowsky, for example, who is the Reporting Judge in most copyright cases is a university professor of International, European, and Public Law, and also a judge of the Constitutional Court, who worked for his national Ministry of Foreign affairs and was sent to the EU Council in this capacity (he was President of the Committee of Ministers' Deputies) before being appointed as a judge of the ECJ. Judge Lenaertz was also a professor of Public and European law who comes from the Court of the First Instance of the EU, whereas judge Arestis was mainly a judge in his native country. Among most recurring AGs in copyright cases, Eleonor Sharpston has a background in economics, language and law. She is a barrister and has been an academic in EC and comparative law and she was legal secretary (*référéndaire*) at the ECJ before becoming judge. AG Verica Trstenjak instead, who left the court in 2012, is a Private Law professor who covered high posts within her home government before being appointed as a member of the Court.

As we see, nothing in the background of these court members indicates the reason why they have been selected to cover copyright cases. The recurrence of the Reporting Judges and of the AGs seems therefore inspired by other considerations than their previous professional background.

¹⁰⁷ The *Comité 255* is active only since 2010. Further research is therefore needed to ascertain this point.

The legal approaches of the ECJ

The jurisprudence of the European Court of Justice has been object of commentary by a relevant body of literature, among which copyright commentators.¹⁰⁸ However, the main focus of the analysis has been on the juridical substance of the Court's decisions, rather than on the legal approaches privileged by the Court in its reasoning. The legal techniques of the Court have however been analysed in the framework of European governance, where some reasons for concern have emerged. The lack of reasoning in the grounds of judgement, for example, or insufficient reasoning, has been criticised.¹⁰⁹ Moreover, the Court has often been accused of judicial activism, over-reaching its powers, and resulting in controversial rulings.¹¹⁰

Among the minority of scholars who have devoted specific attention to the legal arguments employed by the European Court in their context of justification, Joxerramon Bengoetxea deserves close attention.¹¹¹

¹⁰⁸ See for example M. van Eechoud, 'Along the Road to Uniformity —Diverse Readings of the Court of Justice Judgments on Copyright Work' (2012) *JIPITEC* 1. Also J. Griffiths, 'Constitutionalising or harmonising? The Court of Justice, the right to property and European copyright law' (2013) 1 *ELRev* 65; and J. Griffiths, 'Dematerialization, Pragmatism and the European Copyright Revolution' (2013) *Oxford Journal of Legal Studies*, forthcoming; Queen Mary School of Law Legal Studies Research Paper No. 156/2013. Available at SSRN: <http://ssrn.com/abstract=2291502> (accessed 12 December 2013)

¹⁰⁹ E. Muir, M. Dawson and B. de Witte, 'The European Court of justice as a Political Actor', in E. Muir, M. Dawson and B. de Witte (eds) *Judicial activism at the European Court of Justice* (Cheltenham: Edgard Elgar 2013), 3. Also M. Dawson, 'The political face of judicial activism: Europe's law-politics imbalance', in the same volume, 19. Also A. Arnull 'Judicial activism and the European court of justice: how should academics respond?', in the same volume, 231.

¹¹⁰ For a definition of judicial activism see K. Kmiec, 'The Origin and Current Meaning of "Judicial Activism"' (2004) 92 *California Law Review* 1441-1451. For judicial activism related to the ECJ see Arnull, *ibid*, 215. The judicial activism of the Court has been imputed to the lack of dialogue between the European Political power and the jurisdictional power. See Hatzopoulos, n 1 above, 139.

¹¹¹ Bengoetxea n 24 above.

Crucially to our discourse, he provided the first systematic analysis of the legal approaches implemented by the Court. To this end, he examined decisions of the Court in which the methodology implemented for the interpretation of the law was expressly discussed by the judges, and decisions in which the Court clearly employed a given approach, without explicitly justifying it.

Bengoetxea finds that the European Court adopts by and large the same *topoi* of legal interpretation that are recognised by the most advanced legal systems, and that can be summarised in linguistic or semiotic arguments, contextual or systematic arguments, and teleological or dynamic arguments. Among the dynamic arguments Bengoetxea includes the use of *topoi* peculiar to the European legal framework, such as the uniform application of EU law, the *effet utile*, the principle of supremacy, the direct effect, the principle of proportionality, etc.¹¹² Finally, in the absence of an exhaustive normative system it becomes important for the Court to recur to its own case-law both as a *topos* and as a normative source.¹¹³

More recently, another exhaustive review of the legal approaches employed by the European Court has been carried out by Gunnar Beck. As Bengoetxea, he finds that by and large the legal arguments or *topoi* employed by the ECJ in its legal reasoning coincide with those recognised by most advanced legal systems. He critically assesses the choices of the Court in matter of legal interpretation and tests the criticisms according to which the European judges cumulatively use a number of legal approaches, without a hierarchical order. In essence, he finds that on the one hand the occurrence of a cumulative attitude of the Court is mostly justified, and on the other hand the impact of this approach on the jurisprudence of the Court should not be exaggerated.¹¹⁴

¹¹² Bengoetxea n 24 above, 218. See also Beck, n 24 above, 187.

¹¹³ One of the *topoi* employed by the Court in its interpretative technique is the recognition of its own previous case-law. Recognition and examination of previous case law is important in the court reasoning. Although the Court is not bound by its precedents as in the common law system, it is compelled to seriously consider its previous case law by the need for stability and legitimacy. See Beck n 24 above, 274.

¹¹⁴ *ibid*, 439.

The cumulative method of the Court represents a departure from the three-step approach theorized by McCormick and Summers.¹¹⁵ According to their theory, courts should address legal cases in three steps. The first step involves an exam of the text of the law in search of a legal meaning that clearly applies to the factual situation (semiotic argument). This legal analysis involves to some extent contextual analysis, intended as the analysis of the literal context in which the letter of the law is framed. In the case of EU directives, for example, this would involve an analysis of the recitals of the directive, in order to provide clarifications on the meaning of the text. This is mostly sufficient in the grounds for judgement when a case is clear.¹¹⁶ But for most cases, when the text of the law does not suffice to provide a solution, other arguments have to be called upon.

Step two therefore involves a systematic or contextual interpretation, which goes beyond the semantic context of the legal text. Historical considerations (for example, preparatory works for a directive), economic considerations (for example, advantages or disadvantages for the internal market), contextual legislative frameworks (for example other directives, international treaties, fundamental principles of law) are called into play. Step three, finally, involves a purposive or teleological reading of the law, which takes into account the intention of the legislator, as deduced from the above sources. Step three is seen by some as a potentially risky approach because involves a larger amount of discretion by the judge. Therefore,

¹¹⁵ See generally McCormick D.N. and Summers R. *Interpreting Statutes: a Comparative Study* (Dartmouth: Aldershot 1991).

¹¹⁶ Bengoetxea n 24 at 171. Bengoetxea makes a distinction between clear cases and difficult cases submitted to the Court. In clear cases only simple justifications are required and provided by the Court. This means that a specific norm, whose meaning is not controversial, apply to a given factual situation. For difficult cases, conversely, more complex justifications are needed. Among the more sophisticated justifications, we find, for example: a) consistence with precedent binding law (treaties, directives); b) consistence with general principles of law (ex. *Ne bis in idem*, *lex specialis derogat lex generali*, etc.); c) consequent reasoning (ex. *a fortiori*, *a contrario*), showing that the chosen solution is preferable to the alternatives; d) etc. Clear cases are currently addressed by the Court by Court Order, in which they generally refer to a previous ruling of the Court. Difficult cases are the most important source of European jurisprudence, and they are able to shape the details of EU law.

according to these commentators, step three should be called into play only when the first two steps did not help with the interpretation of the legal text.¹¹⁷

Critics of the cumulative approach of the Court in essence reproach the European judiciary to favour purposive interpretation over semantic techniques in order to foster European integration.¹¹⁸ Beck admits this attitude of the Court, but he argues that this '*communautaire* flavour' find its origin not only in the Courts judicial activism but also in the legal uncertainty of European law.¹¹⁹ Moreover, he argues, the occurrence of such attitude in the European jurisprudence is not evenly employed but depends on subject areas.¹²⁰

Finally, Beck admits that the legal reasoning of the Court is less constrained than that of other high courts, but he ascribes this to the peculiar nature of the European judiciary. On the one hand a multilingual and multi-governmental legal system offers more uncertainty over literal interpretations and historical interpretations (instrumental to understand the 'intention' of the legislator'¹²¹); and on the other hand, as

¹¹⁷ Beck n 24 above, 279.

¹¹⁸ Rasmussen n 4 above, 29-33; P. Neill, *The European Court of Justice: A Case Study in Judicial Activism* (London: European Policy Forum, 1995), 47. However, this argument is challenged by Beck n 24 above, 285. Beck acknowledges that the ECJ Court accords less presumptive importance to linguistic argument than other supreme courts, but he argues that the impact of this factor on the quality of the jurisprudence of the Court should not be exaggerated.

¹¹⁹ Beck n 24 above, 439. On the same position, see generally T. Tridimas, 'The Court of Justice and Judicial Activism', [1996] 21(3) *European Law Review* 199-210, arguing that not all ruling of the EU court of Justice are innovative (many practice some form of self-restraint) and the teleological approach often utilised by the Court is imposed by its constitutional role conferred by the treaties. See also Arnull n 22 above, 618 and Arnull n 109 above, 224. See also Beck n 24 above, 235. However, Beck's findings are not uncontroversial. Others have argued that the peculiar characteristics of the EU legal system do not justify the departure from traditional legal interpretation. See Conway 2013 n 3 above, 273.

¹²⁰ Beck n 24 above, 313.

¹²¹ The text of the Treaties is inherently vague, and it represents a pluralism of values. This for example is one source

in most legal systems, there is no hierarchical order of the *topoi*¹²² to be employed in the legal justifications, hence the relevant amount of discretion that the Court enjoys in its reasoning.¹²³ This is how other extra-legal ‘steading factors’ enter the determination of the Court’s judgements. While the *topoi* relate to the context of justification of a judgement, the ‘steading factors’ relate to the context of discovery. These are political, social, psychological factors that impact on the decision, because they ultimately determine the weight that is given to each *topos*, and are much more volatile and difficult to assess.¹²⁴

Our work aims to identify specific patterns in the Court’s legal approaches, using copyright case law as the ‘site’. To this end, standard canons of legal interpretation, classified in semantic, systemic, and teleological, are empirically quantified in our study by each textual occurrence suggesting the implementation of a given legal technique. The content analysis has produced variables that, through statistical analysis, capture the prevailing approaches of the Court and predict relationships between these and the outcome of the case.

of leeway for the legal reasoning of the Court. Beck n 24 above, 235-237

¹²² These are interpretative arguments that the Courts use in their legal reasoning. The CJEU courts uses by and large the same *topoi* than other courts worldwide: reference to general principles of law, purposive (teleological, *effet utile*), comparative, historic (intention of the legislator), logic (*a contrario*, *a fortiori*, *ad absurdum*), reference to principles of law (*lex specialis*, *lex superior*) etc. However, some of the systemic and purposive *topoi* are specific to EU Law (for example, *the effet utile*). Beck 2013 n 24 at 230. Also Bengoetxea n 24 above at 254. The lack of hierarchy in the Court’s legal approaches is confirmed by the analysis of Arnall n 22 above, 617.

¹²³ Beck n 24 above, 278. For a contrasting position, arguing that literal *topoi* should precede systematic arguments, and that purposive *topoi* should be used only when the previous two are insufficient. See McCormick and Summers n 115 above.

¹²⁴ Beck n 24 above, 435.

Analysis and findings

Semantic, Systematic or Teleological?

In each case before the Court of Justice, discussion starts with a reference to the letter of the relevant legislation. In fact, the Court has expressly declared the importance of this approach by stating that the judges cannot 'interpret a provision in a manner contrary to its express wording'.¹²⁵ The semantic approach therefore occurs in all cases of the sample. The content analysis also codes references to the recitals of the cited directives, which we consider as part of the semantic approach because they are instrumental to clarifying the text of the law. However, if the text of the recitals suggested an wider approach, the recitals were coded accordingly.¹²⁶ Evidence of a semantic approach was indicated by references to particular words or expressions, for example in their different linguistic translation, or accompanied by a discussion on differences in meaning. This evidence was considered in relation to other approaches in order to determine its significance.

'Systematic' (or 'contextual') coding was applied whenever one or more contextual factors were called into play to support a given interpretation of a piece of European legislation. In these cases reference was made for example to international legislation, to the legislative history of the legal text, to other EU legislation (normally EU directives), to legal philosophy arguments, or to economic factors (impact on competition or on the internal market). The 'systematic' code was also applied to logical arguments (*a contrario*, *a fortiori*,

¹²⁵ C-376/98 *Germany v. Parliament and Council* [2000] ECR 08419 (83). Cited by Beck n 24 above, 188.

¹²⁶ Other researchers have classified recitals as 'systematic', because they belong to a contextual interpretation of the law (Beck n 24 above, 191); However, we have distinguished between semiotic/contextual (which we have coded as 'semiotic', and broadly contextual, which in our analysis refers to historical, philosophical, economical context, or reference to international treaties or other directives. For the function of Recitals as mere clarification of the text of the law see the Joint practical guide of the European Parliament, the Council and the Commission, available at <http://eur-lex.europa.eu/en/techleg/10.htm> (last accessed 5 January 2014):'10. The purpose of the recitals is to set out concise reasons for the chief provisions of the enacting terms, without reproducing or paraphrasing them. They shall not contain normative provisions or political exhortations.'

a pari, by analogy) and hierarchical arguments (*lex specialis*, *lex generalis*, etc.) traditionally utilised in legal reasoning, because these arguments are normally recalled with reference to other legal sources (law or case law), which are part of the context in which the piece of EU legislation is examined.¹²⁷

The analysis shows that the recourse to systematic/contextual arguments was made by Advocate Generals much more often than by judges in the Grounds for Judgement. Mostly the reference was made to the legislative history of the examined piece of legislation (e.g. preparatory works of directives). However, very often the legal interpretation of European law was underpinned by the norms of international treaties (TRIPS, Berne convention, WTO Treaties, HR Convention and Charter). Less frequently, the examined cases included reference to other EU directives or to economic considerations (favourable or unfavourable impact on the Internal Market). Philosophical considerations in our sample were rare.

A tentative explanation for this prevalence of systematic arguments in the Opinions compared to the Judgements can be suggested by the institutional role of the Advocate General, who is charged to provide the most comprehensive and in-depth analysis of the case.¹²⁸

‘Teleological’ or purposive coding refers to dynamic¹²⁹ approaches where the Court textually refers to the aim or objective (or equivalent wording) of the piece of EU legislation that it is called to interpret. For example wording such as: ‘First of all, it is to be noted that the principal objective of Directive ... is to establish...’ or ‘it is clear ... that the legislature intended...’ will be coded as ‘teleological’. Teleological justifications were mostly recalled in order to assist in the interpretation of European directives, but in a few occurrences they were also employed to explain the reference to international treaties and to international sources of Human Rights law.¹³⁰

¹²⁷ This classification was implemented by Bengoetxea n 24 above, 240.

¹²⁸ Burrows and Greaves, n 39 above, 297.

¹²⁹ Bengoetxea n 24 above, 251.

¹³⁰ C-393/09 - *Bezpečnostní softwarová asociace* [2007] ECR I- 4887 , Judgement, 30; C-431/09 - *Airfield and Canal Digitaal* [2012] ECDR 3, Opinion of AG Jääskinen, 50; C-5/08 - *Infopaq International* [2009] ECR I-6569, Judgement, 32; C-403/08 - *Football Association Premier League and Others* and C429/08 *Murphy* [2011] ECR I-09083 , Opinion

In addition, we have applied the ‘teleological’ code to parts of text in which the Court implemented specific approaches peculiar to the EU system such as the *effet utile* doctrine, the proportionality principle, the uniform application of the EU law, etc.¹³¹ Peculiar EU approaches seem to belong in the teleological (dynamic) coding more than traditional and ‘orthodox’ interpretative techniques.

A large majority (87 per cent) of the judgements referred to the aim of the legislator while arguing for a particular legal interpretation of the text. This figure includes also the peculiar approaches of European law, which are however much less frequent than the references to the objective of the legislation.¹³² It is important to note that teleological/dynamic justifications are normally summoned in addition to semantic considerations, and often in addition to systematic/contextual justifications. Interestingly, Advocate Generals recalled the intention of the legislator more often than judges in their rulings, although the asymmetry between Opinions and Judgements is here less evident than in the use of systematic arguments. Again, this asymmetry could be ascribed to the fact that the Advocate General provides a more comprehensive analysis of the case.

The balance among semiotic, contextual and teleological argument therefore reveals a prevalence of semantic and teleological approaches over contextual approaches, more evident in the Judgements than in the Opinions. This balance, moreover, did not suffer extreme variations over the years, neither in the Grounds for Judgement or in the Opinions of the Advocate Generals. Importantly, one occurrence was detected of an explicit argument assessing one of these approaches *against* the other. In *DR*, the Judgement specifies ‘a purely literal interpretation of the recital at issue does not, in itself, provide an answer to the question referred since it inevitably results in an outcome which proves to be *contra*

of AG Kokott, 120.

¹³¹ *ibid.*

¹³² More in detail, we have found one reference to the ‘*effet utile*’ doctrine, in C-462/09 - *Stichting de ThuisKopie* [2011] ECR I-05331, Opinion of AG Jääskinen, « The *effet utile* of Articles 2 and 5(2) of Directive 2001/29 could not otherwise be achieved». (25) Moreover, we have found few references to the uniform application of the law (six cases) and to the proportionality principle (five cases).

legem'.¹³³ The teleological interpretation of the legal text was therefore explicitly preferred to the semantic interpretation. The aim of the legislator, in *DR*, was also called into play to settle the contrast among diverging translations of the directive.¹³⁴ However, these are overall exceptional findings in the sample. Mostly, the text of the examined legal cases revealed an implementation of several combined approaches (semantic, systematic and teleological), supporting each other.

Reversing vs Consolidating previous Case-Law

Reference to European case law is undoubtedly a very important canon of interpretation implemented by the European Court. This is normally ascribed to the indeterminate and fragmentary nature of European law. Both the above-mentioned studies on the European jurisprudence have recognised the important weight of this interpretative *topos* in the approaches of the Court.¹³⁵ Our analysis confirms these findings.

In most of the cases examined, both within the Grounds of Judgement or the Opinion, reference was made to at least a few instances of European previous case law. Some of these previous rulings were recalled to confirm the position of the Court on a point that had already been discussed in another case. Other rulings were cited in order to distinguish the factual situation from that of the previous case. 'Reversal' coding in our analysis was applied to instances of open criticism and distance taken from the Court's previous case law, whereas every other self-referencing of the Court, intended as citation of previous case law in support of the legal reasoning, was coded as 'consolidation'.

In order to give a 'reversal' coding to a case, we have been looking for evidence of an express change of route of the Court. For example, the landmark case HAG II¹³⁶ studied by EU intellectual property

¹³³ C-510/10 – *DR and TV2 Danmark* [2013] ECR I-0000, Judgement, 43.

¹³⁴ *ibid*, 45. See also *ibid*, the Opinion of AG Trstenjak, 40: «In my opinion, the numerical ratio of the language versions containing the conjunctions in question ('and' or 'or') is as immaterial as differences of linguistic detail, the determining factor being the purpose and general scheme of the rules of which they form a part.'

¹³⁵ Beck n 24 above, 235ss. Bengoetxea n 24 above, 225.

¹³⁶ C-10/89 SA *CNL-SUCAL NV v. HAG GF AG* [1990] ECR 1-371.

commentators¹³⁷ as the most obvious example of reversal of the ECJ jurisprudence (reversing HAG I¹³⁸), includes in its documents express statements of criticism of the previous case law, such as: 'With the benefit of hindsight, one can see there were in the previous case-law signs of an unduly negative attitude to the value of trademarks'¹³⁹ or 'one might perhaps have expected to find in the Court's judgment in HAG I a detailed, convincing statement of the reasons that led it to give birth to this new principle of Community law. But that is not the case.'¹⁴⁰

In our sample, the Court cites on average almost seven other cases in each judgement. We found hardly any case in which no reference¹⁴¹ was made to previous case law. At the other extreme, in one case 28 other cases were cited.¹⁴² The self-referencing attitude of the Court in copyright cases appears very strong, with 312 previous cases of the ECJ cited within the 59 cases object of our study. Of these, only one instance of 'reversal' was found, in an Opinion of an Advocate General which did not specifically pertain to copyright law.

It was the Advocate General Trstenjak in *Painer* who argued: 'In the light of the criticism of the Court's previous case-law, which I consider to be justified, I suggest that a slightly modified criterion be applied in examining whether there is a sufficiently close connection for the purposes of Article 6(1) of Regulation No 44/2001'.¹⁴³ This instance, albeit interesting, is not strictly applicable to our area of interest, as it does not refer to copyright subject-matters. The content analysis of the documents object of our study, therefore, did not reveal any explicitly expressed conflict in the Court's case law on copyright.

¹³⁷ See for example A. Turk, *Judicial Review in EU Law* (Cheltenham: Elgar European Law 2010).

¹³⁸ C- 192/73 *Van Zuylen v HAG* [1974] ECR 731.

¹³⁹ C-10/89 SA *CNL-SUCAL NV v. HAG GF AG* [1990] ECR 1-371, Opinion of AG Jacobs, 16.

¹⁴⁰ *ibid*, 21.

¹⁴¹ The only occurrence in the copyright sample is represented by *VG Wort*: C-457/11 *VG Wort* [2013] ECR I-0000.

Another three cases are included in the sample on the Database *sui generis* Right.

¹⁴² C- 145/10 *Painer* [2011] ECDR 6.

¹⁴³ C- 145/10 *Painer* [2011] ECDR 6. Opinion of AG Trstenjak, 86.

Broad vs Narrow concepts and broadening the rights of the copyright owner

In every examined preliminary ruling the discussion has normally involved the definition of key concepts, such as for example ‘reproduction right’ or ‘international exhaustion’. These concepts in our content analysis have been identified and coded as ‘broad’ or ‘narrow’ according to whether their scope has broadened or narrowed following the interpretation of the Court. This analysis will give indications on the approaches of the Court only when combined with the object of the legal issue to which the concept is related. For example, the concept of ‘reproduction right’ can give useful indications on the approach of the Court only if we consider that this is one of the main entitlements of the copyright owner. A broad interpretation of such a concept would broaden the rights of the owner, whereas a narrow interpretation of the same concept would somewhat constrain copyright protection. Conversely, a broad interpretation of copyright limits and exceptions would constrain the entitlements of the owner, whereas a narrow interpretation would reinforce them.

Conventional wisdom in the copyright literature suggests that the Court normally gives a broad interpretation of the rights of the owners and a narrow interpretation of copyright exceptions and limitations. This general approach on copyright is grounded on a number of Recitals of Directive 29/2001/EC¹⁴⁴ (hereinafter, the InfoSoc Directive), which requires a ‘high level of protection to the author’ and narrow boundaries for copyright exceptions.¹⁴⁵ Broad or narrow interpretation of concepts therefore

¹⁴⁴ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, *Official Journal L 167, 22/06/2001 P. 0010 – 0019*.

¹⁴⁵ C- 607/11 *ITV Broadcasting* [2011] EWHC 2977 , Judgement, 20; C-277/10 – *Luksan* [2012] ECR I-0000, Judgement, 66; C- 145/10 *Painer* [2011] ECDR 6, Judgement, 107; C-462/09 - *Stichting de Thuiskopie* [2011] ECR 05331, Judgement, 32; C-393/09 - *Bezpečnostní softwarová asociace* [2007] ECR I- 4887, Judgement, 54; C-5/08 - *Infopaq International* [2009] ECR I-6569, Opinion, 57; C- 467/08 *Padawan* [2010] ECR I-10055, Opinion, 42; C- 456/06 *Peek & Cloppenburg (Cassina)* [2008] ECR I-02731, Opinion, 33; C-275/06 *Promusicae* [2008] ECR I-00271, Judgement, 36; C-306/05 – *SGAE* [2006] ECR I-11519, Opinion of AG Sharpston, 33 and 43, and Judgement 36; C-60/98 *Butterfly* [1999] ECR I-03939, Opinion of AG Cosmas, 31.

should normally be grounded on the specific text of a directive¹⁴⁶ and should therefore be determined by the piece of legislation that the Court is called to interpret.

However the analysis of our data reveals quite a different picture. Only little more than half of the examined judgements called to interpret the rights of the owner gave a broad interpretation, and only little more than half of the rulings involving copyright limits displayed a narrow construct. In essence, the analysis suggests that the strong protection of the copyright owner, or the narrow construction of copyright limits, do not guide the approach of the Court on copyright as one might have expected.

This finding however must be understood in context, i.e. the nature of the main copyright issues discussed in each case. Almost half of the examined cases involved a copyright issue stemming from the InfoSoc Directive whereas the other half of the sample discussed entitlements of copyright owners *related* to copyright, such as broadcasting rights, rental rights, and resale rights, copyright enforcement, software protection and copyright term. The ‘high protection’ for the copyright owner is cited only by the Infosoc directive. Therefore, a substantial difference could be expected between the protection of the author under this directive and the protection of rightholders under the other directives. In fact, our data reveals that the difference is quite small. The rights of the owner are expanded in 56 per cent of the cases stemming from the InfoSoc directive and in 45 per cent of case stemming from the other directives. Nine out of twelve cases discussing the rights of the owner under the InfoSoc directive were interpreted broadly,¹⁴⁷ while half of the cases regarding copyright exceptions and limits were construed narrowly.¹⁴⁸

¹⁴⁶ For example, the concept of « communication to the public » is given a broad interpretation based on the wording of Recital 23 of the InfoSoc Directive. See for example C-306/05 - *SGAE* , Opinion of the AG Sharpston, 26 and the Judgement, 26. See also C- 607/11 *ITV Broadcasting* [2013] ECR I-0000, Judgement, 20.

¹⁴⁷ Three cases related to fair compensation (C- 431/09 *VG Wort* [2011] ECR I-09363; C-403/08 C-521/11 *Amazon.com* [2013] ECR I-0000; C- 518/08 *Stichting de Thuis kopie* [2011] ECR 05331); one to distribution rights (C- 5/08 *Donner* [2009] ECR I-06569); one to technological protection measures (C-355/12 *Nintendo e.a.* (not yet published)); and four to communication to the public C- 393/09 *ITV Broadcasting* [2010] I-13971; C- 128/11 *SGAE* [2006] ECR I-11519, C- 351/12 *OSA – Ochranný svaz autorský pro práva k dílům hudebním o.s.* (not yet available); C-466/12

Across the whole sample, an interesting example is the concept of 'communication to the public'. This concept was indeed recalled under a number of circumstances related to copyright, to resale rights, and to broadcasting rights. The data suggest that the European judges initially revealed a strict attitude in relation to the concept of communication to the public, with relation to a retransmission of a radio signal in hotel rooms. In *SGAE* the Court, against the opinion of Advocate General La Pergola, excluded the application of the broadcasting directive and referred the case to national legislation. No other directive was in force at the time to offer a solution of this case.¹⁴⁹ A few years later, after the entry into force of the InfoSoc directive, the Court gave another reading of the same factual case by giving a broad interpretation of the concept of communication to the public. The Operational part of the Judgement in *Egeda* stated: 'the distribution of a signal by means of television sets by a hotel to customers staying in its rooms, whatever technique is used to transmit the signal, constitutes communication to the public within the meaning of Article 3(1) of that directive.'¹⁵⁰ The judges also specified: 'It follows from the 23rd recital in the preamble to Directive 2001/29 that 'communication to the public' must be interpreted broadly'.¹⁵¹

Svensson and others (not yet available)). Narrow interpretation was given to four cases related to the communication to the public (C-467/08 *Circul Globus București* [2010] ECR I-10055; C- 456/06 *Peek & Cloppenburg* [2008] I-02731; C-403/08 - *Football Association Premier League and Others* and C429/08 *Murphy* [2011] ECR I-09083; C-457/11 *SCF v. Del Corso* (not yet available)); and one case related to fair compensation (C- 240/07 *Padawan* [2010] ECR I-10055).

¹⁴⁸ The exception for quotation and judiciary proceedings (Art 5.2(d,e))(C- 461/10 *Painer* [2011] ECDR 6); the exception of transient reproduction (Art 5.1)(C- 168/09 *Infopaq International* [2009] ECR I-6569); and of the international exhaustion of copyright (Art. 4.2) (C- 462/09 *Laserdisken* [2011] ECR I-05331). A broad interpretation instead was given to the concept of 'own facilities' related to the exception of ephemeral recording for broadcasting organizations (Art 5.2(d)) (C- 271/10 *DR and TV2 Danmark* (not yet available)); to the concept of transient reproduction (C-403/08 - *Football Association Premier League and Others* and C429/08 *Murphy* [2011] ECR I-09083); and to community exhaustion (C-61/97 *FDV v. Laserdisken* [1998] ECR I-05171)

¹⁴⁹ C- 128/11 *SGAE* (not yet available).

¹⁵⁰ C- 360/10 *Egeda* (not yet available), Judgement, 55.1.

¹⁵¹ *ibid*, Judgement at 36.

This approach was also followed with reference to a retransmission of a TV signal from one Member State to another¹⁵² and in relation to the broadcasting of a TV signal in a pub.¹⁵³ However, the Court appears to change this attitude when ruling again on the retransmission of a radio signal in a dentist practice.¹⁵⁴ It reverses again this attitude when ruling on the retransmission on a signal in hotel rooms, by applying a broad construct.¹⁵⁵ Further the European Court inverts again this approach when ruling on the communication of a work in a place open to the public, by adopting a narrow stance.¹⁵⁶ Finally, the broad approach reappears when the judges rule on the retransmission of TV shows via the Internet¹⁵⁷ and on the broadcasting of TV signals in spa hotel rooms,¹⁵⁸ only to disappear again on internet links on a web page.¹⁵⁹ What is interesting to note is that the changes in the approach of the Court do not depend on whether or not the communication rights stems from the InfoSoc Directive, and it does not depend on the legal approaches applied to these cases either. According to our data, all the above cases are grounded on a semantic interpretation of the law, confirmed by a teleological interpretation (in all cases) and by a systematic interpretation (in most cases).

Finally, a certain consistency has to be reported on the approach used by the ECJ in cases regarding copyright enforcement, software protection, and term protection, although the small size of the sample on these subject-matters does not allow any conclusive findings. In the matter of enforcement, four cases are included in our sample. In two cases the rightholder has asked the Court to approve, by preliminary ruling, the imposition of filtering devices to Internet Service Providers in order to detect copyright infringement. In these two cases the Court refused to give a positive answer underpinning its arguments with the protection

¹⁵² C-431/09 - *Airfield and Canal Digitaal* [2012] ECDR 3.

¹⁵³ C-403/08 - *Football Association Premier League and Others* joint with C-429/08 *Murphy* [2011] ECR I-09083.

¹⁵⁴ C-457/11 *SCF v. Del Corso* (not yet available).

¹⁵⁵ C- 607/11 *Phonographic Performance* (not yet available).

¹⁵⁶ C- 283/10 *Circul Globus București* [2010] ECR I-10055.

¹⁵⁷ C- 607/11 *ITV Broadcasting* [2010] I-13971.

¹⁵⁸ C-351/12 *OSA – Ochranný svaz autorský pro práva k dílům hudebním o.s.* (not yet available).

¹⁵⁹ C-466/12 *Svensson and others* (not yet available).

of fundamental rights.¹⁶⁰ In another two cases, although not excluding the possibility for a national court to issue an order to release personal data in civil proceedings for copyright infringement, the Court invited the national judiciary to balance the interests at stake with fundamental rights (protection of personal data and privacy) and to respect the principle of proportionality.¹⁶¹ The protection of fundamental rights in relation to copyright users therefore seems to find unchallenged shelter under the *aegis* of the Court.

On the matter of software, the sample presents three cases, relating respectively to the object of protection, to the exception for decompilation, and to the exhaustion of rights. Here the attitude of the Court seems to be somewhat opposite to what it is expected in the field of copyright protection. The right of the owner (object of protection) relating to the graphic user interface of a computer software¹⁶² was construed narrowly. Conversely, an exception to copyright (decompilation)¹⁶³ and a limitation (exhaustion)¹⁶⁴ were construed broadly.

On the copyright term, finally, the data included two examples of cases in which the copyright protection was revived thanks to a number of EU directives. Although copyright term should be in principle a limit to copyright protection, by limiting in time the entitlements of the copyright owners, several pieces of legislation extending copyright protection, first to copyright than to related rights, have in practice expanded the strength of copyright protection. On this subject the Court has implemented a broad approach, by conferring copyright protection to works previously not protected¹⁶⁵ (or no longer protected) by copyright.¹⁶⁶

¹⁶⁰ C- 360/10 *SABAM* (not yet available); C- 70/10 *Scarlet Extended* (not yet available).

¹⁶¹ C- 461/10 *Bonnier Audio* (not yet available); C- 275/06 *Promusicae* [2008] ECR I-00271.

¹⁶² C- 393/09 *Bezpečnostní softwarová asociace* [2010] ECR I-13971.

¹⁶³ C- 406/10 *SAS Institute* (not yet available).

¹⁶⁴ C- 128/11 *UsedSoft* (not yet available).

¹⁶⁵ C- 240/07 *Sony Music Entertainment* [2009] ECR I-00263.

¹⁶⁶ C-60/98 *Butterfly* [1999] ECR I-03939.

The above findings in the matter of enforcement, software and copyright term can give only indications of the approaches of the Court on a given subject matter, due to the small size of the sample.

Judges vs Advocate Generals

The analysis of forty cases related to copyright and related rights object of preliminary rulings of the European Court of Justice revealed sometimes a contrast between the Opinions of the Advocates Generals and the text of the Judgements. In seven of the examined cases the Advocate General interpreted the main issue in a way contrasting to the interpretation of the Judges. When the judges had given a broad interpretation to the main issue, the AG had proposed a narrow interpretation and *vice versa*. The copyright issues on which these divergences took place are: communication to the public (three cases), equitable remuneration for broadcasting (two cases), fair compensation (one case), and exhaustion relating to software (one case). Interestingly, the combination of reporting judges and advocate generals, in these seven cases, is always different. This is somewhat in contrast to the general picture provided by copyright jurisprudence, which shows a recurrence of the presence of judge Malenovský as a reporting judge and the Advocate Generals Trstenjak or Sharpston.¹⁶⁷

In *VG Wort*, the reading of Article 5(2)(a) of Directive 2001/29/EC by Advocate General Sharpston diverged with the interpretation of the Court because she found that 'reproduction on paper or any similar medium' referred only to 'reproductions on analogue originals', whereas for the judges this wording referred also to 'reproductions effected using a printer and a personal computer'. The concept of reproduction was therefore interpreted restrictively by AG Sharpston and broadly by the Court, although they both implemented the same legal *topoi* (semantic, contextual and teleological) to reach their respective conclusions. In *Usedsoft*, according to Advocate General Bot the subsequent purchaser of a computer software cannot rely on the exhaustion of the distribution right of the owner, whereas the Court disagreed. Both the AG and the Court argued for the same teleological interpretation of the principle of exhaustion,¹⁶⁸

¹⁶⁷ See above, Section 4.

¹⁶⁸ Case C- 128/11 *Usedsoft* (not yet available), Opinion of AG Bot: «The aim of the principle of exhaustion ... is to

but they reached opposite conclusions. In *Lagardère* and *SENA*, two of the first cases related to neighbouring rights, the Court and the AGs reached different conclusions on the equitable remuneration in Rental and Lending Rights while both employing teleological arguments.¹⁶⁹

On the apparently thorny issue of communication to the public, three cases are available with a contrast between the opinion of the AG and the ruling of the Court. While Advocate General La Pergola in *Egeda* tried to convince the Court, without success, that broadcasting a signal in hotel rooms amounted to a 'communication to the public',¹⁷⁰ few years and a directive later (the InfoSoc Directive) AG Sharpston used the same arguments, repeatedly citing La Pergola, to convince the judges of the same point, with a different outcome.¹⁷¹

strike a balance between the necessary protection of intellectual property rights...and the requirements of the free movement of goods (43). Judgement: the objective of the principle of the exhaustion of the right of distribution of works protected by copyright is, in order to avoid partitioning of markets, to limit restrictions of the distribution of those works...(62).

¹⁶⁹ C-192/04 *Lagardère Active Broadcast* (not yet available) Opinion of AG Tizzano: « in such cases, it must be given 'an autonomous and uniform interpretation throughout the Community; that interpretation must take into account the context of the provision and the purpose of the legislation in question (68)». C-192/04 *Lagardère Active Broadcast*, Judgement: « it is clear from its wording and scheme that Directive 92/100 provides for minimal harmonisation regarding rights related to copyright. Thus, it does not purport to detract, in particular, from the principle of the territoriality of those rights, which is recognised in international law and also in the EC Treaty. (46)». C-245/00 *SENA*, Judgement: «the concept of equitable remuneration, a concept which must, in the light of the objectives of Directive 92/100, as specified in particular in the preamble thereto, be viewed as enabling a proper balance to be achieved between the interests of performing artists and producers in obtaining remuneration for the broadcast of a particular phonogram» (36). C-245/00 *SENA*, Opinion of AG Tizzano: «it seems to me to be immediately clear that remuneration cannot be considered to be equitable if it is likely to prejudice the outcome sought by the Directive», (46).

¹⁷⁰ C-293/98 *Egeda* (not yet available), Opinion of AG La Pergola.

¹⁷¹ C-306/05 *SGAE* (not yet available), Opinion of AG Sharpston: «As Advocate General La Pergola put it in his Opinion in *EGEDA*, (54)'[I]t is all too clear – given that such retransmission is not just a technical means to ensure or

Another divergence between AGs and judges is revealed by the analysis of the joint cases *Football Association and Murphy*, where both Opinion and Judgement reached the same result, by allowing Ms Murphy to use a Greek card in a British decoder, through two diverging tortuous paths.¹⁷² While both AG and Court gave a broad construction of the concept of 'reproduction',¹⁷³ AG Kokott did not see in the factual situation a 'communication to the public'¹⁷⁴ or an act of 'transient reproduction',¹⁷⁵ whereas the Court did.¹⁷⁶ Both appealed to teleological, systematic, and semantic arguments to prove their points. Finally, the broadcasting of a radio signal in a dentist practice was not considered an act of communication to the public in *SCF*, despite the efforts of AG Trstenjak, who utilised the argument of the 'spirit and

improve reception of the original broadcast in the catchment area, as in the case, for example, of the installation and use of transceivers – that [the hotel proprietor] gave the hotel guests access to the protected work.'».(52)

¹⁷² C-403/08 - *Football Association Premier League and Others* joint with C429/08 *Murphy* [2011] ECR I-09083.

¹⁷³ *ibid*, Judgement: «the reproduction right extends to transient fragments of the works within the memory of a satellite decoder and on a television screen» (159); *ibid*, Opinion of AG Kokott : «Acts of reproduction occur where frames of digital video and audio are created within the memory of a decoder, as those frames constitute part of the broadcast authors own intellectual creation. (252,3(b));'The display of a broadcast on a screen also constitutes reproduction.»(252.3(c))

¹⁷⁴ *ibid*, Opinion of AG Kokott: 'A copyright work is not communicated to the public by wire or wireless means, within the meaning of Article 3(1) of Directive 2001/29, where it is received or viewed as part of a satellite broadcast at commercial premises (for example, a bar)'(252.5).

¹⁷⁵ *ibid*, Opinion of AG Kokott : «Transient copies of a work created on a television screen linked to the decoder box have independent economic significance within the meaning of Article 5(1) of Directive 2001/29 » (252 .4).

¹⁷⁶ *ibid*, Judgement: 'Communication to the public' within the meaning of Article 3(1) of Directive 2001/29 must be interpreted as covering transmission of the broadcast works, via a television screen and speakers, to the customers present in a public house. (211.7). Acts of reproduction such as those at issue in Case C-403/08, which are performed within the memory of a satellite decoder and on a television screen, fulfil the conditions laid down in Article 5(1) of Directive 2001/29 and may therefore be carried out without the authorisation of the copyright holders concerned.' (211.6).

purpose' of directive 2006/115/EC¹⁷⁷ to support broad protection for right holders, while the Court distinguished between the objectives of this directive and the objectives of the InfoSoc directive to argue for a narrow construct of the concept of communication to the public.¹⁷⁸ Overall, the data shows a marginally stronger engagement of the Advocate Generals in the defence of the rights of the owner, translating into broad construction of rights and narrow construction of exceptions, compared to the attitude of the Court.

Court members and their approach

Judge Jiri Malenovský was the reporting judge in 25 of the 40 cases relating to copyright and related subject-matters (excluding database). It is interesting therefore to compare his approach to that of the other reporting judges. The data show interesting findings in this respect. Judge Malenovský seems to broaden the rights of the owner much more sparingly than his colleagues, by applying comparatively less often a broad interpretation of the rights and a narrow interpretation of the exceptions. The data suggest that he makes less use of teleological interpretation compared to the others and substantially more use of systematic approaches. Other judges such as Arestis and Puissechet clearly show higher favour towards rightholders, although they use different arguments, prompted by different case subject-matters. Judge Arestis often argues for free competition, because half of his cases relate to software, whereas Judge Puissechet, who was in post before the InfoSoc directive entered in force, mostly argue for harmonization of European law. In essence, therefore, judge Malenovský shows a more conservative attitude in the legal interpretation of copyright law while containing the rights of the owner within reasonable boundaries. At

¹⁷⁷ *ibid*, Opinion of AG Kokott: 'Furthermore, according to the spirit and purpose of Directive 2006/115, it would appear to be sufficient if the customer has the legal and practical possibility of enjoying the phonograms.' (33).

¹⁷⁸ C-135/10 - *SCF* (not yet available) Judgement: 'It is clear from a comparison of Article 3(1) of Directive 2001/29 and Article 8(2) of Directive 92/100 that the concept of communication to the public appearing in those provisions is used in contexts which are not the same and pursue objectives which, while similar, are none the less different to some extent.' (74).

the same time, he shows the same recurrence of disagreement with Advocate Generals compared to his colleagues.

Among the Advocate Generals, it is interesting to note that the two prevailing members in copyright cases, AG Trstenjak and AG Sharpston have a surprisingly similar approach. They both (and to the same extent) tend to favour the rightholder more sparingly than their colleagues and they both implement (to the same extent) the argument of the 'high protection' for the author more often than their colleagues. Among the latter, at least two deserve to be cited: AG Jaaskinen who has advised in favour of rightholders in all his cases, and AG Bot who consistently expressed opinions against the rightholder in his software-related cases. The first used arguments for free competition, overcoming legal uncertainty, and high protection of the author, to the same extent. The second argued for competition, harmonization and, to a less extent, fair balance of rights. Overall, the data seem to suggest that the favour for the rightholder is inversely proportional to the experience in copyright matters matured by each member.

Database rights

Within the framework of our study, a separate dataset was collected including nine cases relating to the *sui generis* database rights,¹⁷⁹ which was examined with the same approach applied to copyright case-law. The sample was analysed separately in order to avoid distortions of the findings caused by a type of entitlement (the *sui generis* rights) which, albeit closely related to copyright, retains its own characteristics and peculiarities.

Cases on the *sui generis* rights discuss mostly the scope of database protection, including the definition of concepts such as 'extraction', 're-utilization', 'investment' and 'substantial part'. A few differences can be detected between the approaches to database rights and to copyright. First, there is hardly any reference in the ruling to the history of the legislation, whereas in all examined cases there is a reference to the

¹⁷⁹ Two cases presented overlapping between copyright and database rights: C-5/08 *Infopaq International* and C-545/07 *Apis-Hristovich*. Of these, the first presented as main issue a copyright issue and the latter presented as a main issue a database issue. Therefore, the first was included in the copyright sample, and the latter in the database sample.

objective of the legislation. Further, interpretation of the European law in the light of international legislation seems to be much less recurrent in database cases than in copyright cases. Moreover, the self-referencing of the Court, intended as the average of citations of previous European case law, is much weaker in database case law than in copyright case law. Finally, a rather interesting finding reveals virtually no conflict on database rights between the position of the judges and the opinion of the Advocate General.¹⁸⁰ Overall, the share of cases related to database protection that are ruled in favour of the owner resembles the share of cases stemming from the InfoSoc Directive, and is therefore higher than the share of pro-rightholder case law related to other directives.

In sum, differences in the implementation of the teleological approach of European judges between the rights of the owner of a database and of copyright appear not relevant. On the contrary greater proximity can be detected among approaches and outcome of the cases (pro rightholders) in database cases and in copyright cases stemming from the InfoSoc directive, although the database directive does not require a 'high protection' for the owner.

Underpinnings of the legal approaches and impact on the decision

A breakdown of the teleological and systematic explanatory variables in sub-variables expressing the arguments that the Court uses to underpin its approaches also produced interesting findings. Arguments justifying a teleological interpretation of the law, when the outcome of the case did not favour the copyright holder, involve mostly promoting a fair balance of rights between copyright holders and users (or third parties). Other arguments used in cases ruled against the rightholder are, to a lesser extent: free competition or free movements of goods in the Internal Market; fostering technological development; harmonization of European law (often only 'minimal harmonization', which is a counterargument for harmonization); and 'adequate' protection for the rightholder. To a further less extent, overcoming the

¹⁸⁰ Only one case (C-338/02 *Fixtures Marketing* [2004] ECR I-10497) displayed a divergence between the conclusions of the AG and the Operational part of the judgement. However, rather than a different stance on the same point, the divergence is explained by the fact that AG and judges expressed two different points ('purpose of the investment' and 'resources covered by the investment' on the same concept ('investment')).

legal uncertainty in the Internal Market and promoting the circulation and development of culture were also mentioned.

Unsurprisingly, a teleological interpretation of the Infosoc Directive based on a high protection for the rightholder was found in more than one third of cases where the outcome favoured the owner of copyright. The harmonization of European law was also called into action to rule in favour of the rightholder, whereas the above mentioned arguments (competition, fair balance of rights, overcoming legal uncertainty, and fostering technological development) were a minority.

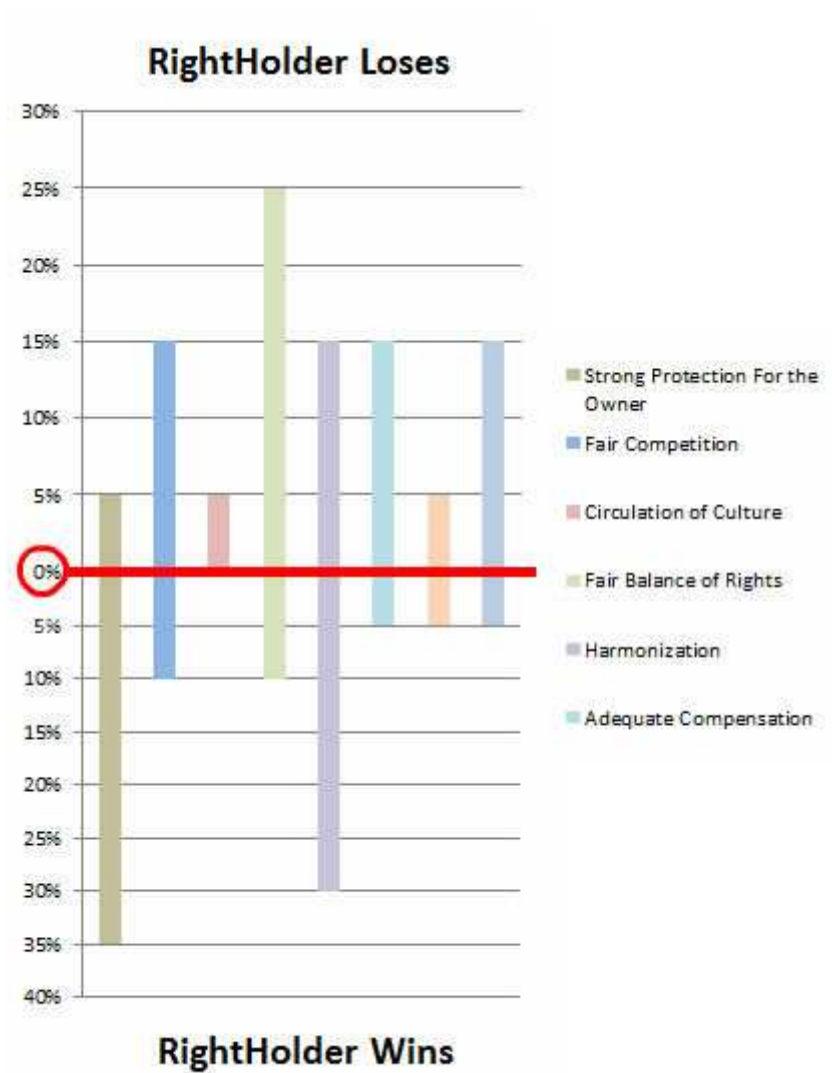


Figure 2

These arguments, often literally drawn from the recitals of the interpreted directives ('high protection' from the 2001/29/EC directive, 'fair balance' from the 93/83/EC directive, 'minimal harmonization' from the 92/100/EC directive, etc.) are to some extent merely rhetorical. In fact, almost all arguments are put forward to underpin a teleological interpretation both in cases favourable and unfavourable to copyright owners. However, the findings show a clear distinction between arguments 'pro rightholder' and arguments 'pro user' (or anyway third party), the presence of which in the legal discourse of the Court provides indications on the final outcome of the case.

Finally, the breakdown of the underpinnings of the systematic approach shows that the ECJ grounds its decisions mainly on its own case law and, to a lesser extent, on international treaties, whereas historical considerations, other directives and fundamental rights are much less decisive.

Conclusion

This study investigated empirically two theories in relation to the development of EU copyright law: (i) that the Court has failed to develop a coherent copyright jurisprudence (lacking domain expertise, copyright specific reasoning, and predictability); (ii) that the Court has pursued an activist, harmonising agenda (resorting to teleological interpretation of European law rather than – less discretionary – semantic and systematic legal approaches). On these matters, the study finds that: a) the lack of specific copyright expertise of the European judges indeed holds back the formation of a coherent copyright jurisprudence, and b) there is no upwards harmonizing agenda of the European Court overreaching beyond its institutional role.

The members of the European Court of Justice are mainly ex-academics, civil servants, judges, or all of these things. They have mostly a background in European Law or Public law. While some subject-specific competences (criminal matters, family law, competition and commercial law) are slowly entering the European Court, not all areas are covered. For example, there are no specialists in employment law and copyright law, despite the increasing workload of the Court on these matters. This lack of specialization is perhaps compensated by a subject-specific distribution of the workload among court members, enabling ‘judicial learning’.

Among the legal approaches applied by the Court, the analysis confirm a certain preference for teleological and dynamic rather than systematic arguments,¹⁸¹ although the recourse to traditional *topoi* is far larger than the implementation of peculiar European canons (*effet utile*, proportionality, etc.). However, overall the data suggest a balance in the approach of the Court on copyright matters, in line perhaps with the ‘rule

¹⁸¹ Bengoetxea and Becks n 24 above.

of reason' theorized by some commentators, which involves a balancing between the rights codified in European law and community interests, in an attempt to develop both coherence and integration in the European jurisdiction.¹⁸²

On the entitlements of copyright owners and users, for example, the analysis provides a *chiaroscuro* of broad and narrow interpretations of rights and exceptions, which reveals that the picture of European copyright jurisprudence is complex, beyond traditional claims of copyright overprotection. Narrow construction of the rights of the owner are at least as frequent as broad constructions, and they often occur on similar copyright issues, or they are based on similar copyright arguments, such as the strong protection of the author recommended in the preamble of the InfoSoc directive. The Court in fact seems to strive to balance the latter principle with other considerations.

An analysis of the arguments used by the Court to justify their rulings, in the form of the 'intention of the legislator' reveals interesting cues about what these other considerations might be. 'Fair balance' of rights and interests is argued in many cases with an unfavourable outcome for the rightholder, together with free competition, fostering technological development, 'adequate' protection of rightholder, and 'minimal harmonization'. Copyright harmonization is instead favoured by pro-rightholder rulings, surpassed only by the 'high protection for the author'. The data analysis shows a significant impact of the latter argument on the outcome of the case, which is (with one exception only¹⁸³) favourable to the rightholder.

A further difference in approach can be observed between copyright cases stemming from the InfoSoc directive and cases on copyright-related rights (stemming from the other directives). While the first reveal a higher probability of a favourable outcome for the rightholder (although maybe not as high as one could expect), the second feature a higher predictability and consistency in the approach. For example, cases of software protection or exhaustion of rights invariably prompt competition arguments (and are ruled

¹⁸² Bengoetxea, McCormick and Moral Soriano, n 30 above, 67.

¹⁸³ C-466/12 Svensson and others (not yet available).

against the owner) whereas rental and lending rights are often solved by shifting the decision to Member States, in the name of 'minimal harmonization'.

However, on more nuanced issues such as the right of communication to the public or, more generally, rights or exceptions stemming from the InfoSoc directive, approach patterns are more volatile. As the recent rulings *OSA* and *Svensson* show, the same argument (high protection for the author) and the same approach (teleological) on the same concept (communication to the public from the InfoSoc directive) can lead to opposite outcomes. This suggests on the one hand that when the legislation is clearly formulated the impact of subject-specific knowledge (or lack of it) on the ruling is contained. On the other hand it might also suggest that when the subject-matter is more difficult to define, or more controversial, subject-specific knowledge is essential. This is confirmed by the analysis of the relationships between the approaches and court members. Those that have developed within the Court a relatively larger domain expertise issue more balanced rulings or opinions, while developing a larger array of arguments. The balance between copyright owners and users is in fact a more subtle but more important overarching principle of copyright law than 'high protection' for rightholders.

Striving for balance is certainly an essential quality for a court. At least, the data clearly show that the ECJ is not biased either towards or against rightholders, as its judgements so far are perfectly distributed between the two outcomes. However, better legislative drafting and coherent specialist reasoning would improve both the predictability and the credibility of the rulings of the Court. Our study suggests that the introduction of specialised professionals within the Court is essential: this is the path of reform that the ECJ should follow.

APPENDIX I – Codebook

List of codes used for content analysis

broad concept: broad interpretation of the main concept or issue that the court is called to interpret or define

narrow concept: a narrow interpretation of the main concept or issue that the court is called to interpret or define

semantic: text of the law interpreted according to its wording. This includes also the context of the wording, as for example the recitals of a directive. In this sense, the word «context» is still related to the textual analysis, whereas a larger contextualization of the norm would involve historical or economic considerations.

systemic/contextual:

- interpretation in light of international treaties
- historical (legislative history of the legal text)
- economic (economic reasons for the provisions)
- philosophical (mention of legal philosophy arguments to interpret concepts)
- logic: analogy, *a fortiori*, *a contrario*

dynamic/teleological:

- interpretation according to the perceived purpose of the legislator
- *approaches specific to the EU (effet utile, uniform application, stc.)*
- reasonableness : a contrary interpretation would lead to an aberrant result

Examples of coding

C-466/12 Svensson

JUDGEMENT

Broad, teleological

As regards the first of those criteria, that is, the existence of an 'act of communication', this must be construed broadly (see, to that effect, Joined Cases C-403/08 and C-429/08 Football Association Premier League and Others [2011] ECR I-9083, paragraph 193), in order to ensure, in accordance with, inter alia, recitals 4 and 9 in the preamble to Directive 2001/29, a high level of protection for copyright holders (17)

Teleological

Recital 7 in the preamble to the directive indicates that the directive does not have the objective of removing or preventing differences that do not adversely affect the functioning of the internal market (36)

C-351/12 OSA

OPINION

Broad, teleological

the expression must be interpreted broadly, in such a way as to ensure a high level of protection for right holders (27)

JUDGEMENT

Broad

the concept of 'communication to the public' in Article 3(1) of that directive must be interpreted broadly, as recital 23 in the preamble to the directive indeed expressly states (23)

Teleological

the principal objective of Directive 2001/29 is to establish a high level of protection of authors (23)

EU law

Questions on the interpretation of EU law referred by a national court in the factual and legislative context which that court is responsible for defining, and the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance (56)

C-355/12 Nintendo e.a.

OPINION

broad

On a proper construction of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, 'technological measures' within the meaning of Article 6 of that directive may include measures incorporated not only in protected works themselves but also in devices designed to allow access to those works; (79,1)

JUDGEMENT

broad

the concept of an 'effective technological measure', for the purposes of Article 6(3) of that directive, is capable of covering technological measures comprising, principally, equipping not only the housing system containing the protected work, such as the videogame, with a recognition device in order to protect it against acts not authorised by the holder of any copyright, but also portable equipment or consoles intended to ensure access to those games and their use.

Teleological

Such a definition, moreover, complies with the principal objective of Directive 2001/29 which, as is apparent from recital 9 thereof, is to establish a high level of protection in favour, in particular, of authors, which is crucial to intellectual creation. (27)

EU/proportionality

the examination of that question requires that account be taken of the fact that legal protection against acts not authorised by the rightholder of any copyright must respect the principle of proportionality, in accordance with Article 6(2) of Directive 2001/29, interpreted in the light of recital 48 thereof, and should not prohibit devices or activities which have a commercially significant purpose or use other than to circumvent the technical protection. (30)

systematic/lex specialis

Directive 2009/24 constitutes a *lex specialis* in relation to the provisions of Directive 2001/29

APPENDIX III – PROFILES

JUDGE	ACADEMIC BACKGROUND (studies and teaching)	ACADEMIC PROF.	JUDICIARY	national	LEGAL PRACTICE	PUBLIC SERVICE	EU INSTIT	WHICH INST	ECONOMIC BKGR	MAIN BKGR
J. Malenkovský	EU Law ; International Law	1	1	1	0	1	1	1 (delegations)	JU	
K. Lenaerts	EU Law ; Public Law	1	0	0	1	1	0	1 (REF, CFI)	AC	
R. Silva de Lapuerta	EU Law	0	1	0	1	1	0	1 (delegations)	PA	
E. Juhász	Comparative Law, EU Law	0	0	0	1	1	1	0	1 PA	
G. Arestis	Law and Policy	0	1	1	1	0	0	0	JU	
T. von Danwitz	Public Law ; EU Law	1	0	0	0	0	0	0	AC	
D. Šádry	Civil Law ; Family Law ; trade Law ; Human Rights ; Constitutional Law	0	1	1	0	0	0	1 (ECHR and CFI)	JU	
U. Lohmus	Criminal Law ; Human Rights ; Constitutional Law	0	1	1	0	1	1	1 (echr)	JU	
A. Rossas	EU Law ; International Law ; Human Rights ; Constitutional Law, Public Law	1	0	0	0	1	1	1 (Comm)	AC	
A. Berg Barhet	Civil Law ; Comparative Law	0	1	1	1	1	1	0	LAW	
S. von Bahr	Public Law ; Tax Law	0	1	1	0	1	1	0	1 PA	
A. O'Caoháin	EU Law ; Civil Law ;	1	1	1	0	0	0	0	LAW	
L. Bay Larsen	Law and Policy ; Public Law ; Family Law	1	1	1	1	1	1	1 (Europol)	PA	
M. Safjan	Civil Law ; Ethics (medical law) EU Law	1	1	1	0	0	0	0	AC	
A. Arabadjiev	Constitutional Law ; Human Rights ; EU Law	1	0	0	0	1	1	1 (echr)	JU	
J.-C. Bonichot	EU Law ; Public Law	1	1	1	0	0	1	1 (REF)	PA	
G. Hirsch	Constitutional Law ; EU Law	0	1	1	0	0	0	0	JU	
H. Ragnemalm	Public Law	1	0	0	0	1	1	0	AC	
J. N. Cunha Rodrigues	Human Rights ; Criminal Law	0	1	1	1	1	1	1 (echr)	PA	
J.L. da Cruz Vilaca	Economics ; EU Law ; Competition Law ; Public Law	1	0	0	1	1	1	1 (CFI and AG)	1 PA	
C. Toder	Civil Law ; Contract Law ; Private International Law ; EU Law	1	1	1	1	1	0	0	AC	
E. Jaraškinas	Constitutional Law	1	1	1	0	1	1	1 (Venice)	JU	
J.-P. Pilssochet	Public Law	0	0	0	0	1	1	1 (Council)	1 PA	
P. Lindh	Public Law ; Trade Law	0	1	1	0	1	1	1 (CFI)	PA	
A. Pechtal	EU Law	1	0	0	0	0	0	1 (REF)	AC	
J. Klucka	International Law ; Constitutional Law	1	1	1	0	1	1	1 (Venice)	JU	
K. Schiemann	EU Law ; Competition Law ; Comparative Law	0	1	1	1	1	1	0	JU	
A. Tizzano	EU Law	1	0	0	0	0	0	1 (AG)	PA	
Grand Chamber Only										
M. Berger	Law and Economics, Public Law, Law and Policy	1	1	0	0	0	1	1 (Parl)	1 PA	
E. Levits	Law and Policy, Constitutional Law, Public Law	1	1	0	0	0	1	1 (echr)	1 PA	
J. Makarczyk	Public Law, EU Law Human Rights	1	0	0	0	0	1	1 (echr)	PA	
J.-J. Kasel	Public Law	1	0	0	1	1	1	1 (Comm)	PA	
C.W.A. Timmermans	EU Law	1	1	1	0	0	0	1 (Comm)	JU	
M. Ilešič	Civil Law ; trade Law ; Private International Law	1	1	1	0	0	0	0	AC	
V. Skouris	Constitutional Law ; Public Law ; Law and Economics	1	0	0	1	1	1	0	1 PA	
AG										
V. Trstenjak	Civil Law ; Comparative Law ; Private International Law ; EU Law	1	1	0	1	1	1	1 (CFI)	AC	
E. Sharpston	Economics ; EU Law ; Comparative Law	1	1	1	1	1	0	1 (REF)	1 AC	
N. Jääskinen	EU Law ; Public Law	1	1	1	0	0	0	0	JU	
Y. Bot	Criminal Law	0	0	0	1	1	0	0	LAW	
P. Cruz Villalón	Law and Policy ; Constitutional Law	1	1	1	0	0	0	0	JU	
D. Ruiz-Jarabo Colomer	EU Law ; Public Law	1	1	1	0	1	1	1 (echr)	JU	
J. Kokott	Public Law, EU Law International Law Business Law	1	0	0	0	0	0	0	1 AC	
A. Tizzano	EU Law	0	0	0	0	0	0	0	AC	
A. La Pergola	Constitutional Law ; Public Law	0	0	0	0	0	0	0	JU	
P. Mengozzi	EU Law ; Business Law ; Trade Law	1	0	0	0	1	1	1 (CFI)	AC	
TOTAL		45	28	23	16	26	26		9	
PERCENTAGE		62%	51%	36%	58%	58%	20%			