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# Is There a EU Copyright Jurisprudence?

## An Empirical Analysis of the Workings of the European Court of Justice

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## 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\*

#### Abstract:

*The Court of Justice of the European Union (ECJ) has been suspected of carrying out a harmonising agenda over and beyond the conventional law-interpreting function of the judiciary. 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).*

*We have collected two data sets relating to all ECJ copyright and database cases up to Svensson (February 2014): (1) Statistics about the allocation of cases to chambers, the composition of chambers, the Judge Rapporteur, and Advocate General (including coding of the professional background of the personnel); (2) Content analysis of argumentative patterns in the decisions themselves, using a qualitative coding technique. Studying the relationship between (1) and (2) allows us to identify links between certain Chambers/ Court members and legal approaches, over time, and by subject. These shed light on the internal workings of the court, and also enable us to explore theories about the nature of ECJ jurisprudence.*

*The analysis shows that private law and in particular intellectual property law expertise is almost entirely missing from the Court. However, we find that the Court has developed a mechanism for enabling judicial learning through the systematic assignment of cases to certain Judges and AGs. We also find that the Court has developed a “fair balance” topos linked to Judge Malenovský (rapporteur on 24 out of 40 copyright cases) that does not predict an agenda of upward harmonisation, with about half of judgments narrowing rather than widening the scope of copyright protection.*

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

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## INTRODUCTION

This article explores the origin of copyright jurisprudence in the European Union. The role of the Court of Justice of the European Union (ECJ)<sup>1</sup> in shaping this contested, and heavily lobbied field of law is attracting considerable attention. There has been a dramatic recent increase in references to the Court, with 6 cases filed in the 10 years following the Phil Collins case of 1992, 6 cases in the 5 years between 2002 and 2006, and 28 cases between 2007 and 2012. Critiques of this emerging EU copyright jurisprudence range from an alleged lack of judicial expertise in a technical and complex area of law to the pursuit of a barely veiled harmonising agenda, stepping in where the European legislator failed.<sup>2</sup>

The ECJ has been said to interfere with established copyright concepts (for example, now equating “work” with “creativity”), and to introduce non-copyright concepts from human rights law, thus removing tools from national courts.<sup>3</sup> The lack of copyright specific reasoning has been attributed to a ‘lack of experience’<sup>4</sup> as well as to deliberate judicial intervention ‘to achieve a single market’<sup>5</sup>. Various harmonizing techniques have been identified, including (i) rephrasing the referred questions, (ii) assuming the principle of autonomous interpretation as a default (forcing uniform EU-wide meaning where it was not intended), and (iii) constructing harmonized criteria from international sources.<sup>6</sup> In summary, the literature appears to suggest that the Court has failed to develop a coherent copyright jurisprudence; and that the Court is pursuing an activist, harmonising agenda.

This study takes the novel approach that such doctrinal claims about the development of jurisprudence are in principle open to empirical investigation. A cursory review of the judgments of the Court immediately reveals that copyright decisions were mostly drafted by reporting judges Puissochet (until 2003) and then Malenovský (from 2004, often twinned with AGs Sharpston and Trstenjak). All software copyright cases were prompted by opinions from AG Bot, and Judge Lenaerts sat on all database right cases (see Appendix I for full sample of cases). So an empirical approach to analysing the development of the jurisprudence of the Court might start with tracing the background of the judges and advocates general, in order to understand whether they have specific competences to address copyright issues. In addition, the Court’s processes, for example for allocating cases to chambers, might also offer an empirical window.

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<sup>1</sup> Throughout this article we use the abbreviation ECJ (European Court of Justice) to cover the various instantiations of the Court, created in in 1952 as the Court of Justice of the European Coal and Steel Communities, then Court of Justice of the European Communities, and since 1 December 2009 (when the Treaty of Lisbon entered into force) the Court of Justice of the European Union (comprising the Court of Justice where all references for a preliminary ruling investigated in this study were heard), the General Court (since 1988) and the Civil Service Tribunal (since 2004).

<sup>2</sup> Leistner calls this ‘a result of the waning of the political (i.e. legislative) possibilities to achieve a comprehensive copyright framework for the use of protected subject matter in the single market, in particular for digital and other pan-European networks’. 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, 599.

<sup>3</sup> J. Griffiths, ‘Dematerialization, Pragmatism and the European Copyright Revolution’ (2013) 33 *Oxford Journal of Legal Studies* 4, 767-790: ‘The apparent equation of “work” with “creativity” in the Court’s jurisprudence threatens the maintenance of the “hybrid” and shifting concept of the “work” that has previously played a role in the law of this [UK] jurisdiction in the past. As a consequence, courts in this jurisdiction may have lost an important conceptual tool for placing limits on the scope of the powers granted under copyright law.’ Griffiths also argues that the Court tends to refer 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.

<sup>4</sup> L. Bently, ‘The return of industrial copyright?’ (2012) 34(10) *EIPR* 654-672, 663.

<sup>5</sup> 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, 598.

<sup>6</sup> M. van Eechoud, ‘Along the Road to Uniformity – Diverse Readings of the Court of Justice Judgments on Copyright Work’ (2012) *JIPITEC* 1, 83.

Our second empirical strategy draws on recent work in the United States that attempts to quantify the application of legal factors in judicial opinions through quantitative content analysis.<sup>7</sup> In the context of the European Court of Justice, this method should allow both the identification of a harmonising agenda (if, for example, teleological *topoi* of reasoning dominate over less discretionary semantic and systematic approaches), and may predict outcomes (if more specific patterns that occur in the opinions and decisions can be linked to the outcome of each case, for example widening or narrowing the scope of protection).

From a wider perspective, this study is one of the first empirical attempts to investigate for a specific subject domain (copyright and related rights) how a court develops jurisprudence from an indeterminate and fragmentary starting point (as European Law has been characterised, for example by Beck and Bengoetxea<sup>8</sup>). The findings therefore may be of wider theoretical interest for explaining the nature of transnational jurisprudence.

The article is structured as follows. We begin by situating our investigation in the intergovernmental and neo-functionalist integration theories of political science. We then create a sample of all copyright decisions from the first explicit copyright reference in 1992 (*Phil Collins*)<sup>9</sup> to the judgment in *Svensson*<sup>10</sup> a case registered in 2012, and delivered on 13 February 2014. This rendered a total of 40 cases filed over a period of 20 years that refer to copyright and related rights (including software protection), and 9 database right cases.

The next sections investigate the operations of the Court of Justice, starting with the identification of the chambers and of the court members that examine copyright cases. Then, we investigate the biographical background of judges and advocates general, and attempt to establish if assignment to copyright cases may be linked to expertise. The pattern in the assignment of cases is tested for statistical significance (chi-square test).

The second half of the article reports the results of a quantitative content analysis, analysing the reasoning of the Court of Justice for the use of semantic, systematic, teleological approaches, and for broad and narrow interpretation of concepts. Within the Court's teleological reasoning we also identify a range of arguments: (i) high level of protection for copyright holders, (ii) fair competition, (iii) circulation of culture, (iv) fair balance between the rights and interests of authors and the rights of users, (v) harmonization, (vi) adequate compensation, (vii) resolving legal uncertainty, (viii) technological development. The use of these rhetorical arguments is captured by reporting judge, and linked to the outcome of each case, using descriptive statistics (the sample of cases is too small to test for statistical significance). We then evaluate if the appearance of certain arguments explains if a judgment results in an outcome 'pro rightholder' or not.<sup>11</sup>

The final section discusses the implications of our empirical findings for generalised claims about the nature of the ECJ's jurisprudence, in particular the alleged failure to develop coherent, copyright specific reasoning under a teleological interpretation of European Law. A better empirical understanding of how European jurisprudence is created and shaped will also contribute to identifying dysfunctions that need to be

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<sup>7</sup> B. Beebe, 'An Empirical Study of U.S. Copyright Fair Use Opinions', (2008) 156 *Pennsylvania Law Review* 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.

<sup>3</sup> J. Bengoetxea, *The Legal Reasoning of the European Court of Justice: Towards a European Jurisprudence* (Oxford/New York: Clarendon 1993); G. 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 frameworks rather than defined norms) and by the multicultural nature of European legislators.

<sup>9</sup> C-92/92 - *Collins et Patricia Im- und Export / Imtrat et EMI Electrola* [1993] I-05145 (whether the general principle of non-discrimination laid down in the EC Treaty applies to copyright and related rights).

<sup>10</sup> C-466/12 - *Svensson* (ECLI:EU:C:2014:76) (whether hyperlinking constitutes an act of communication to the public).

<sup>11</sup> Please note that an activist, harmonising agenda is not equated with either a broad or narrow construction of the key concept, nor an expansionist outcome (favouring rightholders). Incoherence and expansionism are tested separately. As we shall see, 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 2001/29/EC) can lead to opposite outcomes (e.g. in the cases of *OSA* C-351/12 and *Svensson* C-466/12).

addressed by prospective institutional reforms. The introduction of specialised (intellectual property) professionals within the European Court system is suggested as a possible solution.

### THEORETICAL APPROACHES TO 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 contained<sup>12</sup> and prudent<sup>13</sup> or innovative and activist,<sup>14</sup> justice dispensed by the European Court 'elicits compliance and bolsters its authority'.<sup>15</sup> Two integration theories dominate the field of European political science: intergovernmental and neo-functionalist. According to the first, policy-making at 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 'judicialisation' 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.<sup>16</sup> 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.<sup>17</sup>

Member States seem to accept the jurisprudence of the Court, willingly<sup>18</sup> or unwillingly,<sup>19</sup> because on the one hand overturning its ruling requires a modification of the Treaties<sup>20</sup> and on the other hand the Court

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<sup>12</sup> 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.

<sup>13</sup> 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.

<sup>14</sup> 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.

<sup>15</sup> Conant n 12 above, 39.

<sup>16</sup> 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 12 above.

<sup>17</sup> R. Dehousse, *La Cour de Justice des Communautés Européennes* (Paris: Montchrestien 1997), 72.

<sup>18</sup> 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 14 above, 69, arguing that the Court does so by implementing a 'majoritarian activism'.

<sup>19</sup> 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.

<sup>20</sup> Stone Sweet and Brunell n 14 above, 69.

enjoys support by legal and political mobilization of interested parties.<sup>21</sup> However, it has been suggested that the Court is adopting approaches that contain its potential over-expansion.<sup>22</sup>

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)<sup>23</sup> and others claiming that the Court, as many international courts, is impartial, independent, and conscious of its reputation and mandate (Trustee rather than Agent).<sup>24</sup> Although not immune from policy influence and pressure, the ECJ often produces outcomes unexpected, and uncontrolled by Member States.<sup>25</sup> 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.<sup>26</sup> This is true both thematically and chronologically.<sup>27</sup> In other words, the degree of innovation introduced by the ECJ judgments varies across time and areas of law.

These theories, albeit to a different extent, acknowledge that the Court triggers significant changes to EU policies, thanks to interventionist legal interpretations.<sup>28</sup> Moreover, the Court's remit witnessed a gradual expansion, including jurisdiction on highly technical subject-matters (for example, competition law, constitutional law, labour law, etc.) without a corresponding specialisation of the Court's chambers or judges, hence raising concerns about its credibility.<sup>29</sup> 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. 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) in order to advance a harmonising or political agenda.<sup>30</sup>

In sum, thanks to the indeterminacy of European law, 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*

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<sup>21</sup> Conant n 12 above, 38. See also generally R. Cichowski, *The European Court and Civil Society: Litigation, Mobilization and Governance* (Cambridge: CUP 2007).

<sup>22</sup> 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 Springer 2013), 56, advocating self-restraint of the Court when supporting the 'green light' theory. See also Dehousse n 17 above, 16-17, arguing in essence that the Court uses its 'policy-making' powers with discretion.

<sup>23</sup> 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.

<sup>24</sup> 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.

<sup>25</sup> K. Alter, *The European Court's Political Power* (Oxford: OUP 2009), 237.

<sup>26</sup> 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.

<sup>27</sup> 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 17 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 12 above, 38 for the role of activist mobilization; and on the same topic Alter, n 25 above, 63.

<sup>28</sup> Alter *ibid*, 47. The author cites the liberalisation of telecommunications as an example.

<sup>29</sup> 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. 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.

<sup>30</sup> Griffiths; van Eechoud; Leistner, n 3 above. On the same point related to general EU Law see Stone Sweet and Brunell n 14 above, 68.

*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*<sup>31</sup>, 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; secondly, that Community law has its peculiar terminology; thirdly, that provisions of European law need to be put in context and interpreted according to the purpose of community law as a whole.<sup>32</sup>

Common interpretative practices of the Court as reported by the literature involve the use of traditional interpretative approaches, generally classified as semantic/semiotic, contextual/systematic and teleological/dynamic, 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,<sup>33</sup> 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). 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.<sup>34</sup>

In sum, problematic issues identified in the literature regarding the approach of the ECJ in interpreting and applying European law are: a) the Court is said to over-use teleological 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 explored empirically, a gap that the present study will address in one specific subject domain.

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<sup>31</sup> Case 283/81 *CILIFT* [1982] ECR 3415 (17-20).

<sup>32</sup> See A. Arnall, *The European Union and its Court of Justice* (Oxford: OUP 2006), 608. Also Bengoetxea n 8 above, 232.

<sup>33</sup> See for example Griffiths; van Eechoud; Leistner, n 3 above.

<sup>34</sup> See Beck n 8 above, 190.

## METHODOLOGICAL APPROACH

Previous empirical research on the ECJ has used both qualitative and quantitative methods to explore the influence of the Court on EU policy-making. These studies are based either on a chronological selection of cases<sup>35</sup> or on a thematic selection<sup>36</sup>. Mostly, these studies examined the impact of the observations of Member States and EU institutions (e.g. the EU Commission) on the opinions of the Advocate General and on the judgment.

Other jurisprudential research examines the decision-making process of the Court<sup>37</sup> by analysing a number of judicial decisions as case studies, in search of specific patterns in the Court's approaches.

With a focus on copyright case-law, our study aims to provide empirical evidence on the claims that the Court is pursuing an interventionist agenda by analysing the complete set of judgments in one specific technical subject domain where the pattern (according to theory) should be particularly apparent (e.g. through inconsistent, unpredictable reasoning and expansionist outcomes).

Our sample is defined by all cases decided as of February 2014 that are the result of preliminary references to the Court which refer in the Application and in the Ground of Judgment to one of the directives of the *acquis communautaire* on the subject-matter of copyright and related rights, or the database right. The focus is solely on preliminary references<sup>38</sup>, and the time frame ranges from the first copyright case of *Phil Collins* (registered in 1992 and delivered on 20 October 1993) to *Svensson* (registered in 2012 and delivered on 13 February 2014). These criteria render 49 cases, of which 40 cases refer to copyright, related rights and software protection<sup>39</sup> and 9 cases relate to the database right.<sup>40</sup> The documents analysed consist of

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<sup>35</sup> Carrubba et al. n 12 above.

<sup>36</sup> 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, 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 Desistance' (2003) 4(4) *European Union Politics* 397-419.

<sup>37</sup> 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.

<sup>38</sup> The procedure for a preliminary ruling is prompted by a reference from a national court of a EU Member State, requiring the interpretation of a point of European Law, which might indirectly involve the infringement of EU law by the Member State. For direct infringement, Breach Proceedings can be brought by the Commission against the allegedly infringing Member State, but these have not contributed to the development of copyright jurisprudence. Breach Procedures also present a different decision structure and would not be codable by the categories we employ for statistical analysis (for example, outcome of the case classified as 'rightholder wins = 1; rightholder loses = 0'). Breach Procedures remain outside the scope of this study. Since the ECJ does not have any influence over preliminary references from courts in Member States, there are no 'selection effects', e.g. that the Court may have admitted cases for certain reasons.

<sup>39</sup> 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 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



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

Our first methodological approach investigates the workings of the Court by tracking down the route of specialist subject-matter within the Court (descriptive statistics of case assignment, chambers, AGs and judges). Subsequently the legal background of the members of the European Court of Justice is mapped in search of relationships between subject-specific expertise and the assignment of cases. The second method applies systematic content analysis<sup>41</sup> to capture the recourse to certain legal approaches in the text of the sampled cases, which are coded in variables that can in turn be subjected to statistical computation and 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 individual court members and subject sub-areas (database, software), in order to identify possible causal relationships. The aim is not an assessment of the substantive law, but rather an identification of predominant legal interpretative approaches within the Court and their impact on the decision-making process.

The coding required a technical understanding of both EU and copyright law, and was carried out by one of the authors, not a research assistant. Pilot codings were jointly reviewed, and problematic instances were discussed throughout the process between the authors to increase reliability.<sup>42</sup>

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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.

<sup>40</sup> 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.

<sup>41</sup> M. A. Hall and R. F. Wright, 'Systematic Content Analysis of Judicial Opinions', 96 *Cal. L. Rev.* 63 (2008); 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* 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.

<sup>42</sup> For transparency, coding was recorded in a Codebook which will be made available online on the website of the CREATE centre.

## EMPIRICAL STUDY I: THE COURT AT WORK (PROCESSES AND BIOGRAPHIES)

### Assignment of Copyright cases

The sample analysed by our study includes all closed cases up to *Svensson* (February 2014) referring to one of the directives forming the *acquis communautaire* relating to copyright.<sup>43</sup> 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. The criteria for this assignment are unclear, as they are not provided by the rules of procedure of the Court.<sup>44</sup>

Before the year 1998<sup>45</sup> preliminary rulings were not assigned to chambers. Thereafter, the data reveals a predominance of the Third Chamber of the Court, followed by cases assigned to the Fourth and Grand Chamber. Controlling for the number of cases in total to each Chamber, the picture remains stable.

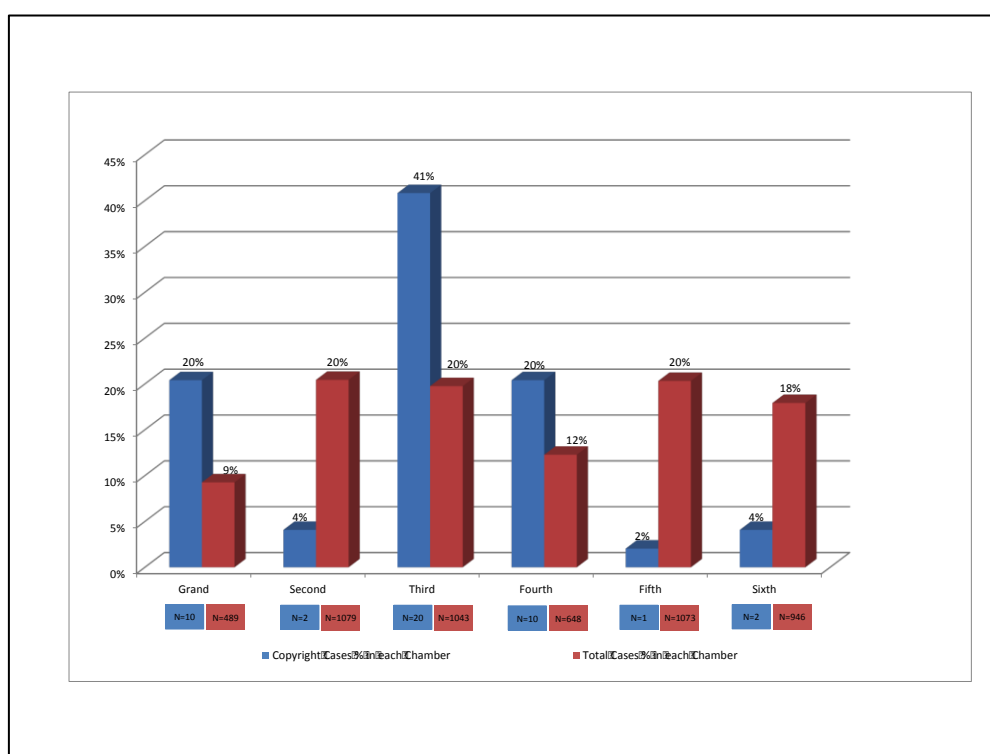


Figure 1 – Portion of copyright cases assigned to each Chamber (post-1998)

<sup>43</sup> n39 above.

<sup>44</sup> 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>

<sup>45</sup> In our sample, all cases in chronological order are assigned to the Court in Plenary formation up to C-60/98 *Scarlet Extended* [2011] ECR I-11959). The following cases lodged from 1998, starting with C-293/98- *Egeda* (ECLI:EU:C:2012:85), were assigned to the Court in Chamber formation.

When these figures are broken down by year of registration, the data show a steady raise of assignments to the Third Chamber, with the Fourth Chamber taking over in 2011.

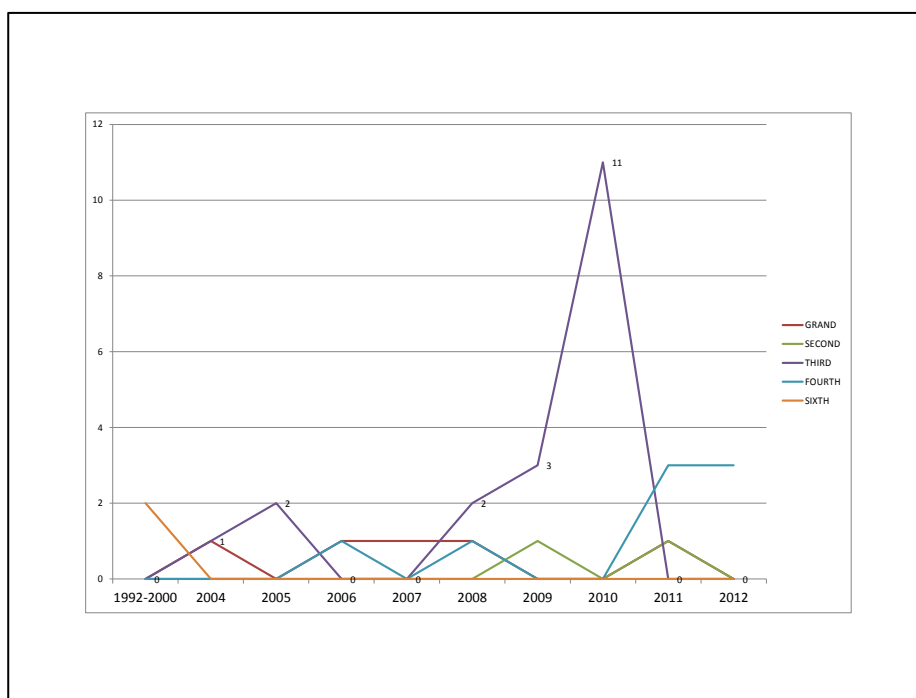


Figure 1 – Assignment of copyright cases to Chamber by year

We applied a chi-square test to this data to establish if it was statistically possible that the assignment of cases was random. The test resulted in a p-value of 0.13702, meaning that there is an approximately 1.37% chance that the patterns of assignment are *not* the result of an external influence.<sup>46</sup>

The review of case allocation among chambers of the ECJ prompted an investigation of the identity of the judges sitting on the panels, in order to understand whether the choice of the chamber might correspond to the choice of a judge. The data show nine judges representing more than 80 per cent of the total presences in Court when 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 and of potentially wider significance. Our analysis needs 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. Accounting for the potential distorting effects produced by these procedural rules the data still appear to indicate a deliberate selection of judges in both Court formations (Grand Chamber or other Chamber).

Further, the recurrence of Reporting Judges and of Advocates General (AGs) has also been calculated. Judge J. Malenovský registers an overwhelming majority of presences as Judge Rapporteur in the cases in the sample, followed at a large distance by Judge G. Arestis, and by Judge K. Lenaerts.

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 Puissechet. For database rights, Judge Lenaerts is the Reporting Judge in

<sup>46</sup> Statistical significance at the 5% level (i.e. a p-value of .05) is considered high. At the 1% level (p-value of .01), the null hypothesis (that the cases are randomly distributed) can be ruled out.

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 2011 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 the remarkable increase in the copyright-related workload of the Court.

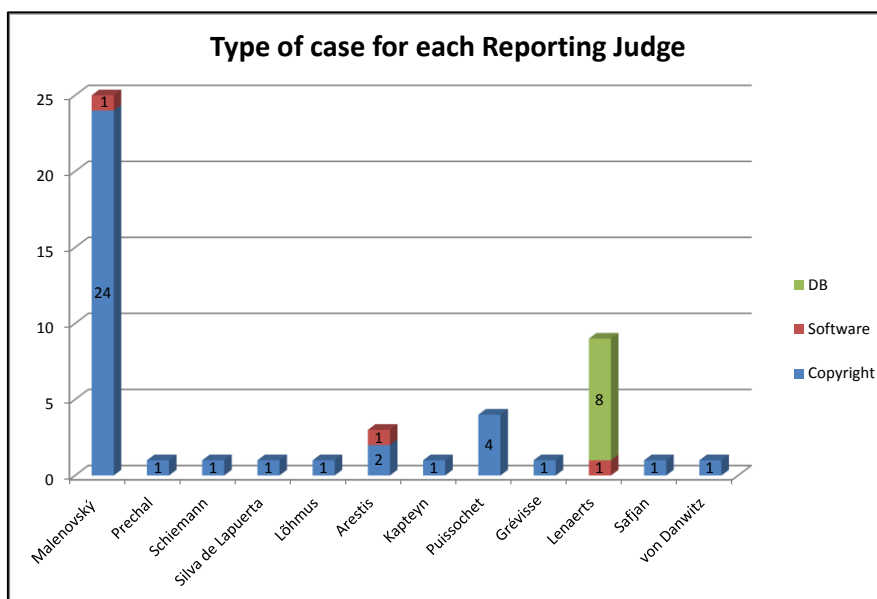


Figure 3– Cases by Reporting Judge and subject matter

Running the chi-square test on the assignment of cases to individual reporting judges, the statistical findings (unsurprisingly) are striking. The results are significant at a p-value of 0.000713, that is there is a probability below 0.1 per cent that the assignments are *not* the result of external factors (such as deliberate choices).

The analysis yields less extreme results with relation to the presence of specific Advocates General in the examined case-law. However, a pattern emerges also here. 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 small, AG Bot is assigned to all three cases. Finally, in the area of the database right, despite an apparent prevalence of AG Stix-Hackl, the distribution among AGs is more balanced.<sup>47</sup>

<sup>47</sup> 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* [2004] ECR I-10415, C-46/02 *Fixtures Marketing* [2004] ECR I-10365).

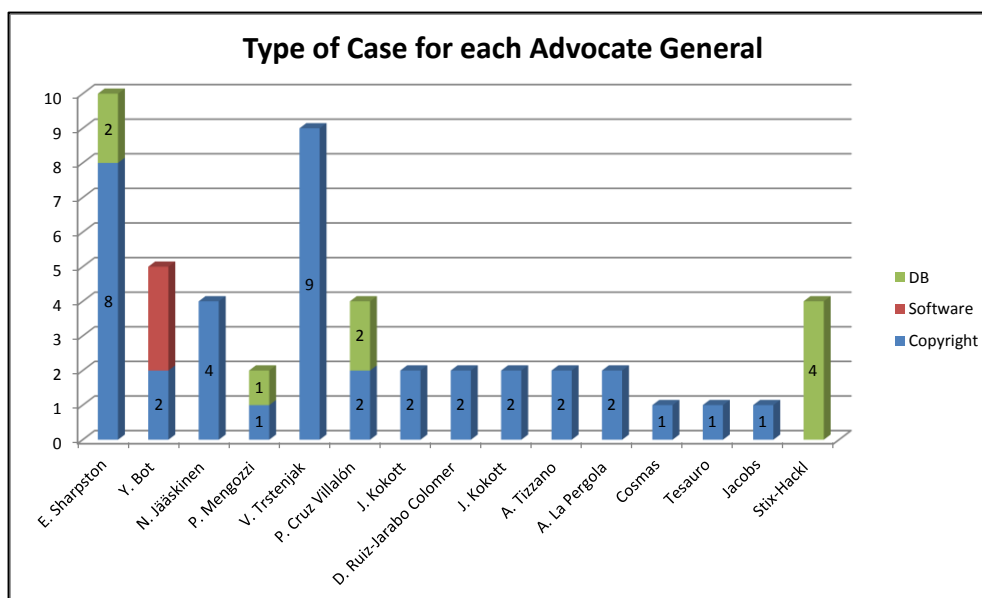


Figure 4 – Cases by Advocates General and subject matter

Appendix 1 of this article shows the complete sample of cases, categorised by parties, year, chambers, AG and reporting judge.

The data above show a statistically significant dominance of specific members of the ECJ in copyright and database cases, in what appears to reflect a traditional unwritten operational code of the Court, which tends to assign cases by subject matter, enabling the development of specific expertise.<sup>48</sup> Judge Malenowsky clearly prevails in the assignment of copyright cases, while database cases are assigned to Judge Lenaertz. Malenovský has a background in European Law, without a specialisation 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 Court. Members have a generalist background, because they are expected to examine a wide array of subject-matter.<sup>49</sup>

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 Lenaerts, 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. As noted in section 1, it was in one of these cases that the composition of the Court (and its 'lack of experience') has been severely criticised.<sup>50</sup>

<sup>48</sup> This observation was first made with reference to a first-generation of intellectual property cases before the Court that show a prevalence of Advocate General Francis Jacobs and Reporting Judge Claus Christian Gulmann (who in turn was previously Advocate General before the Court). See N. Burrows and R. Greaves, *The Advocate General and EC Law* (Oxford: OUP 2007), 128.

<sup>49</sup> *ibid*, 297.

<sup>50</sup> L. Bently, 'The return of industrial copyright?' (2012) 34(10) EIPR654-672, 663.

## The members of the ECJ

Having identified a pattern of case assignment that must be deliberate, we now examine if there is specific subject expertise revealed by the background of those judges that appear to be shaping the development of EU copyright jurisprudence.

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'.<sup>51</sup> 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.<sup>52</sup> 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 recognised competence'.<sup>53</sup>

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'.<sup>54</sup>

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.<sup>55</sup> 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 him<sup>56</sup> (or her, although we have to wait till 1990 to see the first female judge of the Court<sup>57</sup>). Moreover, despite concerns, court members are appointed for six years, and their mandate is freely renewable by Member States.<sup>58</sup> This 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.<sup>59</sup>

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<sup>51</sup> Lisbon Treaty, Article 19 available <http://register.consilium.europa.eu/pdf/en/08/st06/st06655-re07.en08.pdf> (last accessed 28 June 2015).

<sup>52</sup> F. G. Jacobs, 'The Court of Justice in the Twenty-First Century: Challenges Ahead for the judicial System?', in A. Rosas, E. Levits, Y. Bot (eds) *The Court of Justice and the Construction of Europe* (eBook: Asser Press Springer 2013), 58. See also Dehousse n 17 above, 12.

<sup>53</sup> 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 accessed 28 June 2015).

<sup>54</sup> Available online at <http://www.richtervereinigung.at/international/eurojus1/eurojus15a.htm> (last accessed 23 October 2013).

<sup>55</sup> See Rasmussen n 14 above, 34.

<sup>56</sup> See generally Nicole Condorelli Braun, *Commissaires et juges dans le communauté européenne* (Paris: Pichon et Durand-Auzias 1972). This finding was confirmed by later research. See Dehousse n 17 above, 12.

<sup>57</sup> This was Fidelma O' Kelly Macken, although Simone Rozès had already been appointed as Advocate General in 1981. 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) **Error! Reference source not found.**, 20.

<sup>58</sup> The European 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 17 above, 18; Weiler n 29 above at 225; and Arnull n 32 above, at 22.

<sup>59</sup> Dehousse n 17 above, 15. Minority opinions in fact are not published in judgments, in order to preserve the independence of the judge, especially vis-à-vis the member state that has appointed them. Arnull 2006 n 32 above, 11.

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. A special committee was created by the Article 255 of the Lisbon Treaty (2009).<sup>60</sup> 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.<sup>61</sup> Effects of the activity of this committee on the independence of court members would need to be assessed by further research, in due course.<sup>62</sup> 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.<sup>63</sup>

The professional background of the members of the European Court of Justice has been object of a limited body of research.<sup>64</sup> More recently, Antonin Cohen<sup>65</sup> and Sally Kenney<sup>66</sup> 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.<sup>67</sup> All the above studies 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.

We analysed the profile of all 45 members of the ECJ who sat on our sample of copyright cases, including those decided in the Grand Chamber, out of a total of 94 Members sitting in the Court during the period examined.

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 join from a post in their national Constitutional Court or on the European Court of Human Rights.<sup>68</sup> Minority specialisations, 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.

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<sup>60</sup> Text of the Treaty (consolidated) at <http://register.consilium.europa.eu/pdf/en/08/st06/st06655-re07.en08.pdf>.

<sup>61</sup> 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).

<sup>62</sup> The committee has been active since the year 2010.

<sup>63</sup> Arnulf 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 Arnulf n 32 above at 25. In fact, many of the problems that have been identified regarding the appointment process of judges at the ECHR are applicable to ECJ judges as well. See Interights Report '*Judicial Independence: Law and Practice of appointments to the ECHR*', available at <http://www.interights.org/jud-ind-en/index.html> (last accessed 6 March 2015).

<sup>64</sup> Nicole Condorelli Braun 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. Condorelli Braun n 56 above.

<sup>65</sup> 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 Communautés 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 6 March 2015).

<sup>66</sup> See generally S. Kenney, '*The members of the Court of Justice of the European Communities*', (1998) 5 *Columbia Journal of European Law* 101-133

<sup>67</sup> *ibid*, 107.

<sup>68</sup> See below, in the same section.



Figure 5 – Main background of Members by specialist area of law

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:<sup>69</sup> 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<sup>70</sup>, and their provenance from another international or European institution<sup>71</sup>.

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 (non-academic) career. 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 a 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 (ECHR) seems to be the largest feeder of members to the ECJ. However, a considerable share of members comes from the Court itself, as previous judges of the General Court, or legal clerks (*référéndaires*) at the ECJ or as Advocate General. Other members join 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).

<sup>69</sup> 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 65 above, 22-23 and Kelley n 66 above, 107.

<sup>70</sup> 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.

<sup>71</sup> Data on the background of the Court Members was mainly sourced on the website of the Court ([http://curia.europa.eu/jcms/jcms/Jo2\\_7026/](http://curia.europa.eu/jcms/jcms/Jo2_7026/)), with the addition of internet searches, where possible.



More than half of the examined members of the Court of Justice had served at some point of their career in their national judiciary, often at the highest level (Constitutional Court, Highest Court, or Administrative Highest Court). Only seven per cent have worked in legal practice, either in ordinary courts or administrative tribunals.

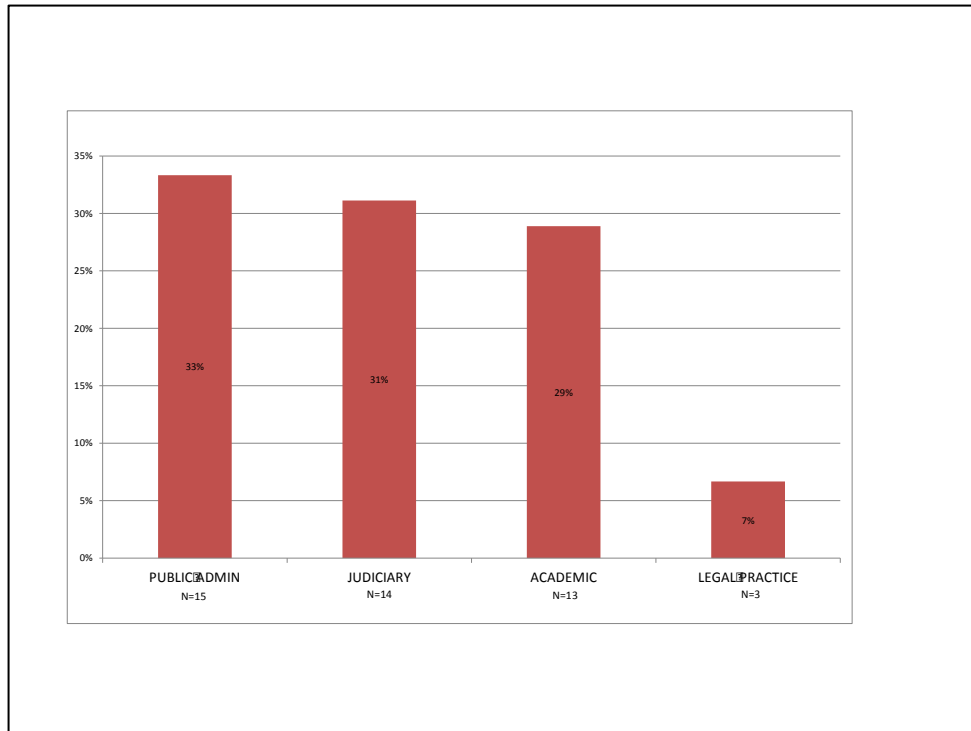


Figure 6 – Main career background of Court Members sitting on copyright cases

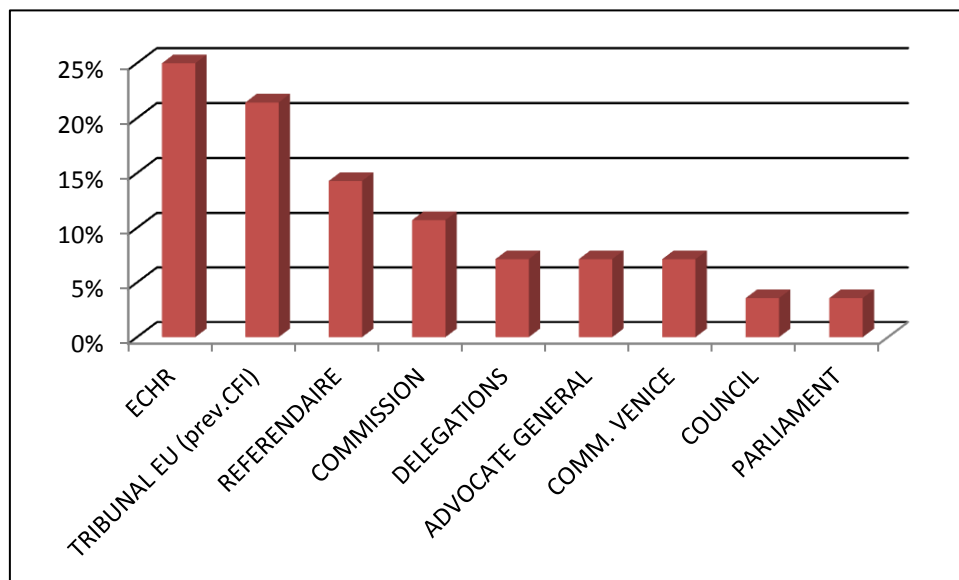


Figure 7 – Provenance of Court Members sitting on copyright cases

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.<sup>72</sup> In fact, starting with the famous Jacques Rueff,<sup>73</sup> economic expertise seems to remain stable among members of the ECJ.

Although our data is derived only from the Court members involved in copyright cases, the size of the sample gives an indication of the general composition of the European Court of Justice, and findings appear to be in line with previous 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. A European/Public legal background is still paramount within the Court, while specialised subject-matters such as employment law and intellectual property law could not be identified in any of the examined professional profiles.

One variation to previous research relates to the movement in personnel between international/European courts and other European institutions. 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' might be that professional backgrounds remain anchored to EU/Public administration competences rather than 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. It is still shaped by high ranking professionals often combining an academic career with juridical 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 Statutes of the Court, as the profiles of former public administrators are still dominant among the judges.<sup>74</sup> However, the most important finding for the purposes of this study relates to the range of expertise that the Court can use. Relevant gaps have been identified, including but not limited to copyright law.

Relating these findings to the analysis of case allocation in the previous section shows that there is no obvious reason for the assignment of copyright cases to a specific Reporting Judge or Advocate General, because not one of the examined profiles indicates a particular prior expertise in copyright law. Judge Malenovský, for example, who is the dominant Reporting Judge in copyright cases is a university professor of International, European, and Public Law. He was also a judge of the Czech 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 Lenaerts who dominates database right jurisprudence was also a professor of Public and European law in Belgium, and joined the ECJ from the Court of First Instance, whereas judge Arestis was mainly a judge in his native country (Greece). Among the recurring AGs in copyright cases, Eleonor Sharpston (UK) has a background in economics, language and law. She is a barrister and former academic in EC and comparative law, and was legal secretary (*référéndaire*) at the ECJ before becoming a judge. AG Verica Trstenjak (Slovenia), 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.

In summary, the combined findings from the allocation of cases and the analysis of biographical backgrounds suggest that the workings of the Court of Justice rely on a mechanism for judicial learning (by repeat assignment of case types to the same professionals). However, there appears to be no procedure for passing on this expertise. The development of subject specific jurisprudence may be set back periodically, as members join the Court as non-experts, and leave the Court with their acquired expertise.

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<sup>72</sup> Kelley n 66 above, 107.

<sup>73</sup> 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.

<sup>74</sup> The *Comité 255* is active only since 2010. Further research is therefore needed to ascertain this point.

In order to explore this potential tension further, we next investigate specific patterns of legal reasoning that may be linked to judges and outcomes.

## EMPIRICAL STUDY II: CONTENT ANALYSIS

### The legal approaches of the ECJ

The main focus of academic analysis of the copyright jurisprudence of the ECJ has been on the doctrinal 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 judgment, for example, or insufficient reasoning, has been criticised.<sup>75</sup> Moreover, the Court has often been accused of judicial activism, over-reaching its powers, and resulting in controversial rulings.<sup>76</sup>

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's 1993 study deserves close attention.<sup>77</sup> In our theoretical context, 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 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. They 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.<sup>78</sup> 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.<sup>79</sup>

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 the legal arguments or *topoi* employed by the ECJ in its legal reasoning are those recognised by most advanced legal systems. He critically assesses the choices of the Court in matters of legal interpretation, and tests the critique 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 this latter 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.<sup>80</sup>

The cumulative method of the Court represents a departure from the three-step approach theorised by McCormick and Summers.<sup>81</sup> 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,

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<sup>75</sup> 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.

<sup>76</sup> 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 attributed to the lack of dialogue between European political and jurisdictional power. See Hatzopoulos, n 12 above, 139.

<sup>77</sup> Bengoetxea n 8 above.

<sup>78</sup> Bengoetxea n 8 above, 218. See also Beck, n 8 above, 187.

<sup>79</sup> 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's 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 8 above, 274.

<sup>80</sup> *ibid*, 439.

<sup>81</sup> See generally D.M. McCormick and R. Summers, *Interpreting Statutes: a Comparative Study* (Dartmouth: Aldershot 1991).

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 judgment when a case is clear.<sup>82</sup> 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, 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.<sup>83</sup>

Critics of the cumulative approach of the Court reproach the European judiciary for favouring purposive interpretation over semantic techniques in order to foster European integration.<sup>84</sup> 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.<sup>85</sup> Moreover, he argues, the occurrence of such attitude in the European jurisprudence is not evenly employed but depends on subject areas.<sup>86</sup>

Finally, Beck suggests 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<sup>87</sup>); and on the other hand, as in most legal systems, there is no hierarchical order of the *topoi*<sup>88</sup> to be employed in the legal justifications,

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<sup>82</sup> Bengoetxea n 8 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, is applied 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. Clear cases are currently addressed by the Court through Court Orders which generally refer to a previous ruling of the Court. Difficult cases are the most important source of European jurisprudence, and they shape the contours of EU law.

<sup>83</sup> Beck n 8 above, 279.

<sup>84</sup> 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 8 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.

<sup>85</sup> Beck n 8 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 Arnulf n 32 above, 618 and Arnulf n 75 above, 224. See also Beck n 34 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 14 above, 273.

<sup>86</sup> Beck n 8 above, 313.

<sup>87</sup> The text of the Treaties is inherently vague, and it represents a pluralism of values. This for example is one source of leeway for the legal reasoning of the Court. Beck n 8 above, 235-237

<sup>88</sup> These are interpretative arguments that the Courts use in their legal reasoning. The literature suggests that the ECJ 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

hence the relevant amount of discretion that the Court enjoys in its reasoning.<sup>89</sup> This is how other extra-legal ‘steading factors’ enter the determination of the Court’s judgments. While the *topoi* relate to the context of justification of a judgment, 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.<sup>90</sup>

Applying this theoretical approach to the ECJ’s copyright jurisprudence, we classified patterns of reasoning into semantic, systematic, and teleological by each textual occurrence suggesting the implementation of a given legal technique. This content analysis produces variables that, through statistical analysis, capture the prevailing approaches of the Court and may predict relationships between these and the outcome of the case.

## 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’.<sup>91</sup> 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 a wider approach, the recitals were coded accordingly.<sup>92</sup> 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*, *a pari*, by analogy) and hierarchical arguments (*lex specialis*, *lex generalis*, etc.) traditionally utilised in legal

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purposive *topoi* are specific to EU Law (for example, the *effet utile* that amongst competing interpretations the one will prevail that best guarantees the practical effect of existing community law). Beck 2013 n 8 at 230. Also Bengoetxea n 8 above at 254. The lack of hierarchy in the Court’s legal approaches is confirmed by the analysis of Arnall n 32 above, 617.

<sup>89</sup> Beck n 8 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 81 above.

<sup>90</sup> Beck n 8 above, 435.

<sup>91</sup> C-376/98 *Germany v. Parliament and Council* [2000] ECR 08419 (83). Cited by Beck n 34 above, 188.

<sup>92</sup> Other researchers have classified recitals as ‘systematic’, because they belong to a contextual interpretation of the law (Beck n 34 above, 191). However, we distinguish between recitals as a mere clarification of the text of the law (which we have coded as ‘semantic’), references to historical, philosophical, economical context, or to international treaties or other directives (which we have coded as ‘systematic’), and the use of recitals for constructing aims (which we have coded as ‘teleological’). 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.’

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.<sup>93</sup>

The analysis shows that the recourse to systematic/contextual arguments was made by Advocates General much more often than by judges in the Grounds for Judgment. 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 Judgments 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.<sup>94</sup>

‘Teleological’ or purposive coding refers to dynamic<sup>95</sup> 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.<sup>96</sup>

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.<sup>97</sup> Peculiar EU approaches lean towards teleological (dynamic) reasoning more than traditional and ‘orthodox’ interpretative techniques.

A large majority (eighty-seven per cent) of the judgments 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.<sup>98</sup> It is important to note that teleological justifications are normally mentioned in addition to semantic considerations, and often in addition to systematic/contextual justifications. Interestingly, Advocates General recalled the intention of the legislator more often than judges in their rulings, although the asymmetry between Opinions and Judgments is here less evident than in the use of systematic arguments. Again, this asymmetry could be attributed to the fact that the Advocate General provides a more comprehensive analysis of the case.

Overall, the analysis reveals a prevalence of semantic and teleological approaches over contextual approaches, more evident in the Judgments than in the Opinions. This balance, moreover, did not suffer extreme variations over the years, neither in the Grounds for Judgment or in the Opinions of the Advocates General. Importantly, one occurrence was detected of an explicit argument assessing one of these approaches *against* the other. In the *DR* case, the Judgment 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

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<sup>93</sup> This classification was implemented by Bengoetxea n 8 above, 240.

<sup>94</sup> Burrows and Greaves, nError! Bookmark not defined.

<sup>95</sup> Bengoetxea n 8 above, 251.

<sup>96</sup> C-393/09 - *Bezpečnostnísoftwarováasociace* [2007] ECR I- 4887, Judgment, 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, Judgment, 32; C-403/08 - *Football Association Premier League and Others* and C429/08 *Murphy* [2011] ECR I-09083, Opinion of AG Kokott, 120.

<sup>97</sup> *ibid.*

<sup>98</sup> 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).

outcome which proves to be *contra legem*'.<sup>99</sup> 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.<sup>100</sup> These are 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 approach of the Court.<sup>101</sup> Our analysis confirms these findings.

In most of the cases examined, both within the Grounds of Judgment or the Opinion, reference was made to at least a few instances of previous ECJ 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 assign a 'reversal' coding to a case, evidence of an express change of route of the Court was required. For example, the landmark case *HAG II*<sup>102</sup> studied by EU intellectual property commentators<sup>103</sup> as the most obvious example of reversal of the ECJ jurisprudence (reversing *HAG I*<sup>104</sup>), includes in its documents explicit 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'<sup>105</sup> 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.'<sup>106</sup>

In our sample, the Court cites on average almost seven other cases in each judgment. We found hardly any case in which no reference<sup>107</sup> was made to previous case-law. At the other extreme, in one case 28 other cases were cited.<sup>108</sup> The self-referencing attitude of the Court in copyright cases appears very strong, with 312 previous cases of the ECJ cited within the 49 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'.<sup>109</sup> This instance, albeit interesting, does not bear on copyright subject-matter. The content

<sup>99</sup> C-510/10 – *DR and TV2 Danmark* [2013] ECR I-0000, Judgment, 43.

<sup>100</sup> *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.'

<sup>101</sup> Beck n 8 above, 235ss. Bengoetxea n 8 above, 225.

<sup>102</sup> C-10/89 *SA CNL-SUCAL NV v. HAG GF AG* [1990] ECR I-371.

<sup>103</sup> See for example A. Turk, *Judicial Review in EU Law* (Cheltenham: Elgar European Law 2010).

<sup>104</sup> C-192/73 *Van Zuylen v HAG* [1974] ECR 731.

<sup>105</sup> C-10/89 *SA CNL-SUCAL NV v. HAG GF AG* [1990] ECR I-371, Opinion of AG Jacobs, 16.

<sup>106</sup> *ibid*, 21.

<sup>107</sup> 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 of the Database *sui generis* Right.

<sup>108</sup> C-145/10 *Painer* [2011] ECDR 6.

<sup>109</sup> C-145/10 *Painer* [2011] ECDR 6. Opinion of AG Trstenjak, 86.



analysis of the documents object of our study, therefore, did not reveal any explicitly expressed reversal in the Court's case-law on copyright.

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

In every examined preliminary ruling the discussion involves 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 the Court stated, directly or indirectly, that the interpretation to be given to the concept at hand was broad or narrow. Examples of a direct statement include the use of the words 'broad' or 'narrow' in the coded text. Examples of indirect broad definition of a concept involve the expansion of the concept at hand, which is stated 'including' further categories of items.<sup>110</sup> It needs to be recalled that this is textual content analysis, not legal analysis, therefore instances of 'broad' interpretations will be picked up by the coding even though their use by the Court may be merely rhetorical.<sup>111</sup>

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.

The copyright literature has suggested 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 derives from a number of Recitals of Directive 29/2001/EC<sup>112</sup> (hereinafter, the InfoSoc Directive), which requires a 'high level of protection to the author' and narrow boundaries for copyright exceptions.<sup>113</sup> Broad or narrow interpretation of concepts therefore should normally be grounded on the specific text of a directive<sup>114</sup> and should 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. Just over half of the examined judgments called to interpret the rights of the owner gave a broad interpretation, and only little more than half of the

<sup>110</sup> The example is included in the excerpt of the Codebook, APPENDIX II: '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" [emphasis added].

<sup>111</sup> For example, in *Svensson*, it is stated 'As regards the first of those criteria, that is, the existence of an 'act of communication', this must be construed broadly' (See APPENDIX II). This text has been coded as 'broad'. However, the Court in effect narrowed the 'communication right' of the right holder, by ruling that communication must be directed at a new public (i.e. at a public that was not taken into account by the copyright holders at the time the initial communication was authorised). Thus hyperlinking remained permitted without seeking permission from the linked site. We capture this with an additional 'outcome' code (is the outcome of the judgment favourable to right holders or not).

<sup>112</sup> 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*.

<sup>113</sup> C- 607/11 *ITV Broadcasting* [2011] EWHC 2977 , Judgment, 20; C-277/10 – *Luksan* [2012] ECR I-0000, Judgment, 66; C- 145/10 *Painer* [2011] ECDR 6, Judgment, 107; C-462/09 - *Stichting de ThuisKopie* [2011] ECR 05331, Judgment, 32; C-393/09 - *Bezpečnostisofwarováasociace* [2007] ECR I- 4887, Judgment, 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, Judgment, 36; C- 306/05 – *SGAE* [2006] ECR I-11519, Opinion of AG Sharpston, 33 and 43, and Judgment 36; C-60/98 *Butterfly* [1999] ECR I-03939, Opinion of AG Cosmas, 31.

<sup>114</sup> 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* [2006] ECR I-11519, Opinion of the AG Sharpston, 26 and the Judgment, 26. See also C- 607/11 *ITV Broadcasting* [2013] ECR I-0000, Judgment, 20.

rulings involving copyright limits displayed a narrow construct. In essence, the analysis suggests that the high protection of the copyright owner, or the narrow construction of copyright limits, do not guide the copyright jurisprudence of the Court 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 modest. The rights of the owner are expanded<sup>115</sup> in fifty-six per cent of the cases stemming from the InfoSoc directive and in forty-five 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,<sup>116</sup> while half of the cases regarding copyright exceptions and limits were construed narrowly.<sup>117</sup>

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.<sup>118</sup> 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 Judgment 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.’<sup>119</sup> 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’.<sup>120</sup>

This approach was also followed with reference to a retransmission of a TV signal from one Member State to another<sup>121</sup> and in relation to the broadcasting of a TV signal in a pub.<sup>122</sup> On each occasion the court held

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<sup>115</sup> Please recall however that these broad and narrow interpretations are merely referring to the text of the document coded, not to the effects of the concept as modified by the final ruling.

<sup>116</sup> Three cases related to fair compensation (C- 431/09 *VG Wort* [2011] ECR I-09363; C-403/08 *Amazon.com* [2013] ECR I-0000; C- 518/08 *Stichting de ThuisKopie* [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.* (ECLI:EU:C:2014:25)); 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 – Ochrannýsvazautorský pro práva k dílůmhudebnímo.s.* [2014] EUJECJ Case 351/12; C- 466/12 *Svensson and others* [2014] ECDR 9). 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* (ECLI:EU:C:2012:140)); and one case related to fair compensation (C- 240/07 *Padawan* [2010] ECR I-10055).

<sup>117</sup> 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* (ECLI:EU:C:2012:244)); 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)

<sup>118</sup> C-306/05 *SGAE* [2006] ECR I-11519.

<sup>119</sup> C- 360/10 *Egeda* (ECLI:EU:C:2012:85), Judgment, 55.1.

<sup>120</sup> *ibid*, Judgment at 36.

<sup>121</sup> C-431/09 - *Airfield and Canal Digitaal* [2012] ECDR 3.

<sup>122</sup> C-403/08 - *Football Association Premier League and Others* joint with C-429/08 *Murphy* [2011] ECR I-09083.

that a new public was given access to the copyright work and that a communication to the public occurred. That latter concept was therefore interpreted broadly. However, the Court appears to change this attitude when it ruled on the retransmission of a radio signal in a dentist practice.<sup>123</sup> No new communication to the public took place, as there was no aim to obtain a profit and only a limited number of persons had access to the copyright work (as if the Court introduced a kind of *de minimis* rule). The Court reverses its attitude again when ruling on the retransmission of a signal in hotel rooms, by applying a broad construct, arguably because a profit was once again sought and because a broader audience was involved.<sup>124</sup> The Court inverts again when ruling on the communication of a work in a place open to the public, by adopting a narrow stance.<sup>125</sup> Finally, the broad approach reappears when the judges rule on the retransmission of TV shows via the Internet<sup>126</sup> and on the broadcasting of TV signals in spa hotel rooms,<sup>127</sup> only to disappear again when the case concerned internet links on a web page.<sup>128</sup> 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). The Court seems to operate a broad concept of communication to the public, but this concept is applied in a balanced way, taking into account various factors relating to the facts of the case.

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 of fundamental rights.<sup>129</sup> 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.<sup>130</sup> The protection of fundamental rights in relation to copyright users therefore seems to find shelter under the *aegis* of the Court.

On the matter of software, the sample includes 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 software<sup>131</sup> was construed narrowly. Conversely, an exception to copyright (decompilation)<sup>132</sup> and a limitation (exhaustion)<sup>133</sup> 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 effect expanded the strength of copyright protection. On this subject the Court has implemented a broad approach, by

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<sup>123</sup> C-135/10 *SCF v. Del Corso* (ECLI:EU:C:2012:140).

<sup>124</sup> C-607/11 *Phonographic Performance* [2013] EUECJ Case 607/11.

<sup>125</sup> C-283/10 *Circul Globus București* [2010] ECR I-10055.

<sup>126</sup> C-607/11 *ITV Broadcasting* [2010] I-13971.

<sup>127</sup> C-351/12 *OSA – Ochraný svaz autorský pro práva k dílům hudebním o.s.* [2014] EUECJ Case 351/12.

<sup>128</sup> C-466/12 *Svensson and others* [2014] ECDR 9.

<sup>129</sup> C-360/10 *SABAM* (ECLI:EU:C:2012:85); C- 70/10 *Scarlet Extended* [2011] ECR I-11959).

<sup>130</sup> C-461/10 *Bonnier Audio* (ECLI:EU:C:2012:219); C- 275/06 *Promusicae* [2008] ECR I-00271.

<sup>131</sup> C-393/09 *Bezpečnostní softwarová asociace* [2010] ECR I-13971.

<sup>132</sup> C-406/10 *SAS Institute* (ECLI:EU:C:2012:259).

<sup>133</sup> C-128/11 *UsedSoft* (ECLI:EU:C:2012:407).

conferring copyright protection to works previously not protected<sup>134</sup> (or no longer protected) by copyright.<sup>135</sup>

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 Advocates General*

The analysis of forty cases involving copyright and related rights revealed sometimes a tension between the Opinions of the Advocates General and the text of the Judgments. 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 advocates general, in these seven cases, is always different.

In *VG Wort*, the reading of Article 5(2)(a) of Directive 2001/29/EC by Advocate General Sharpston diverged from 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,<sup>136</sup> 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.<sup>137</sup>

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',<sup>138</sup> few years and a directive later (the InfoSoc Directive) AG Sharpston used

<sup>134</sup> C-240/07 *Sony Music Entertainment* [2009] ECR I-00263.

<sup>135</sup> C-60/98 *Butterfly* [1999] ECR I-03939.

<sup>136</sup> Case C-128/11 *UsedSoft* (ECLI:EU:C:2012:407), Opinion of AG Bot: 'The aim of the principle of exhaustion ... is to strike a balance between the necessary protection of intellectual property rights ... and the requirements of the free movement of goods (43). Judgment: 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).'

<sup>137</sup> C-192/04 *Lagardère Active Broadcast* [2005] ECR I-07199, 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*, Judgment: '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*, Judgment: '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).

<sup>138</sup> C-293/98 *Egeda* [2000] ECR I-00629, Opinion of AG La Pergola.

the same arguments, repeatedly citing La Pergola, to convince the judges of the same point, with a different outcome.<sup>139</sup>

Another divergence between AGs and judges is revealed by the analysis of the joint cases *Football Association* and *Murphy*, where both Opinion and Judgment reached the same result, by allowing Ms Murphy to use a Greek card in a British decoder, through two diverging tortuous paths.<sup>140</sup> While both AG and Court gave a broad construction of the concept of ‘reproduction’,<sup>141</sup> AG Kokott did not see in the factual situation a ‘communication to the public’<sup>142</sup> or an act of ‘transient reproduction’,<sup>143</sup> whereas the Court did.<sup>144</sup> 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 purpose’ of directive 2006/115/EC<sup>145</sup> 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.<sup>146</sup>

### *Court members and their approach*

Judge Jiri Malenovský was the reporting judge in 24 of the 40 cases relating to copyright and related subject-matter (excluding database right). It is interesting therefore to compare his approach to that of the other reporting judges. 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 matter. 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

<sup>139</sup> C-306/05 *SGAE* [2006] ECR I-11519, 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 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)

<sup>140</sup> C-403/08 - *Football Association Premier League and Others* joint with C429/08 *Murphy* [2011] ECR I-09083.

<sup>141</sup> *ibid*, Judgment: ‘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)).

<sup>142</sup> *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).

<sup>143</sup> *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).

<sup>144</sup> *ibid*, Judgment: ‘“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).

<sup>145</sup> *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).

<sup>146</sup> C-135/10 - *SCF* (ECLI:EU:C:2012:140) Judgment: ‘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).

entered in force, mostly argues for harmonisation of European law. In essence, therefore, Judge Malenovský shows a more conservative attitude in the legal interpretation of copyright law while constructing the rights of the owner quite narrowly. At the same time, he shows the same recurrence of disagreement with Advocates General compared to his colleagues.

Among the Advocates General, it is interesting to note that the two prevalent 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 less than their colleagues and they both implement (to the same extent) the argument of the 'high protection' for the copyright holder 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, harmonisation and, to a lesser extent, fair balance of rights.

### *Database rights*

Within the framework of this study, a separate dataset was collected of nine cases relating to the *sui generis* database rights,<sup>147</sup> 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 objective of the legislation. Further, interpretation of European law in the light of international legislation is much less recurrent in database cases than in copyright cases (unsurprisingly, since the database right is a European creation). Moreover, the self-referencing of the Court, captured 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.<sup>148</sup> 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 linked 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*

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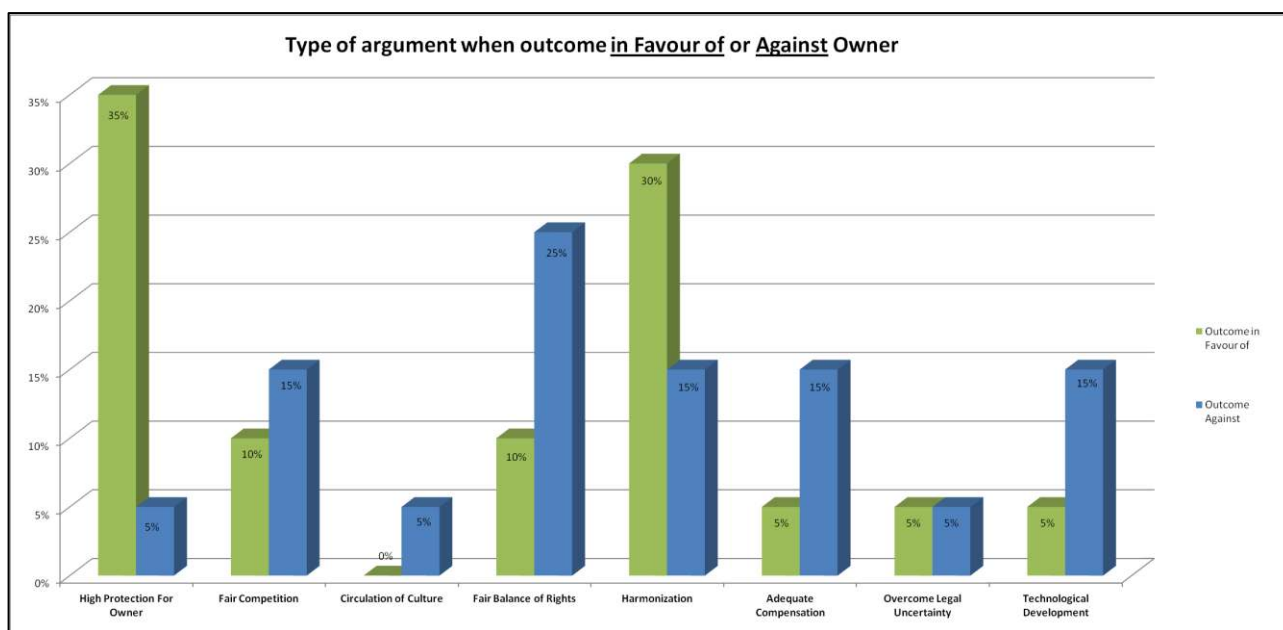
<sup>147</sup> Two cases presented an overlap between copyright and database rights: C-5/08 *Infopaq International* and C-545/07 *Apis-Hristovich*. Of these, the first presented as main issue a copyright issue and the latter presented as a main issue a database issue. Therefore, the first was included in the copyright sample, and the latter in the database sample.

<sup>148</sup> 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 judgment. 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')).

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. In our sample of forty copyright cases, twenty-two decisions were perceived to be favouring right holders and eighteen decisions were not.

Arguments justifying a teleological interpretation of the law, when the outcome of the case did not favour the copyright holder, involve often 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; harmonisation of European law (often only ‘minimal harmonisation’, which is a counterargument for harmonisation); and ‘adequate’ protection for the rightholder. Overcoming legal uncertainty in the Internal Market and promoting the circulation and development of culture were also mentioned.

A teleological interpretation of the Infosoc Directive based on a high protection for copyright holders was found in more than one third of cases where the outcome favoured the owner. The harmonisation 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 8 – Teleological arguments used by the Court when the outcome of the case favours or disfavors Copyright owner*

These arguments, often literally drawn from the recitals of the interpreted directives (‘high protection’ from the 2001/29/EC (InfoSoc) directive, ‘fair balance’ from 2001/29/EC (InfoSoc) directive and 93/83/EEC (Satellite and Cable) directive, ‘minimal harmonization’ from the 92/100/EEC (Rental) directive, etc.) may be merely rhetorical. In fact, they 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’, the presence of which in the legal discourse of the Court may provide indications of the final outcome of the case.

The comparison between the rulings of the Court where Judge Malenovský is the Reporting Judge and the rulings where the Reporting Judge is another Court Member offers some interesting insights. The large number of copyright cases reported by Judge Malenovský suggests the acquisition of subject-specific experience in these matters. The content analysis of Malenovský decisions reveals the use of the teleological argument of the ‘high level of protection for the copyright holders’ required by the InfoSoc directive, also in cases (six per cent) whose outcome is not favourable to the rights holder; whereas all the other judges use this argument only in cases whose outcome favours the rights holder.

Also, the argument of the ‘fair balance of rights’, which is used by other judges solely to rule against the copyright holders, is employed by Malenovský both in cases whose outcome favours and disfavours the right holder. While the small size of the sample suggests caution in interpreting these data, Malenovský appears to see the balance between the rights and interests of copyright holders and users of protected subject matter as a more central issue than other judges. He also uses a greater range of copyright specific arguments rather than focussing on harmonization.

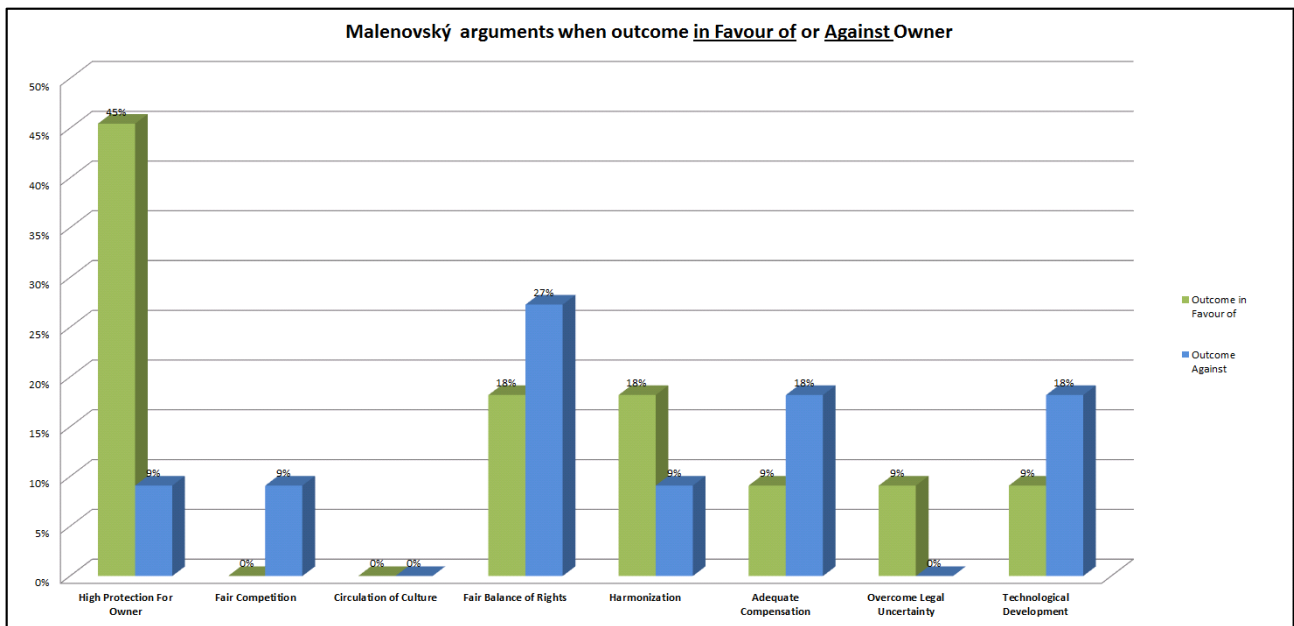


Figure 9 – The approach of Reporting Judge Malenovský



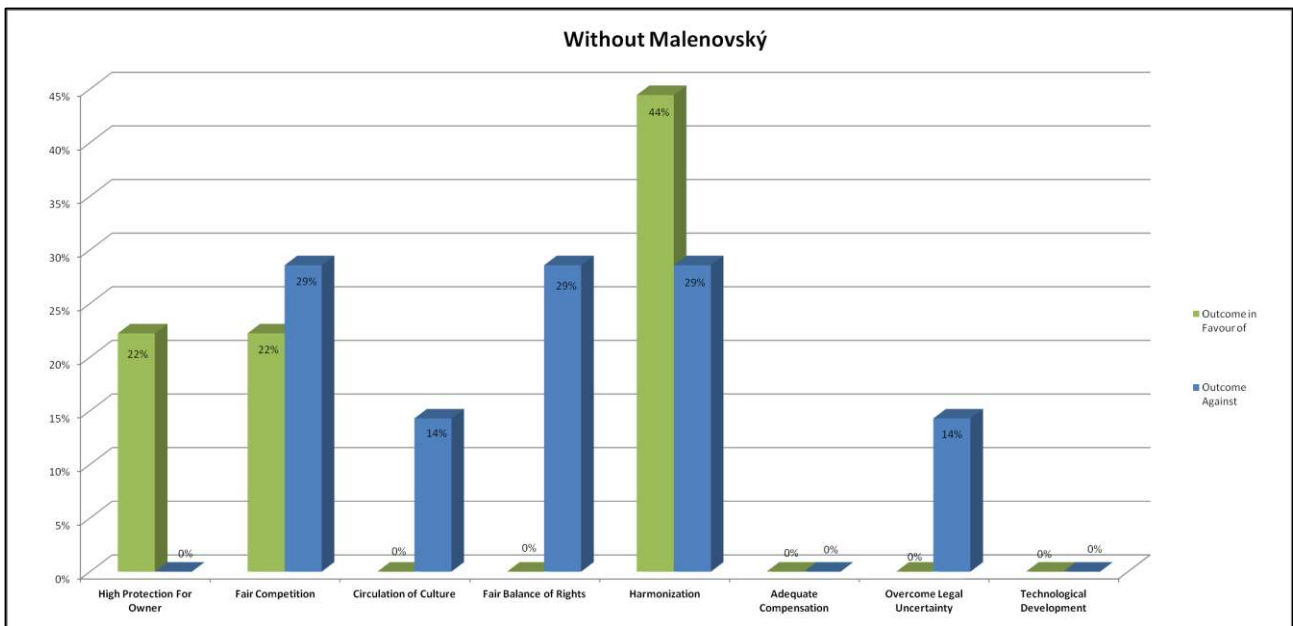


Figure 10 – The approach of the other Reporting Judges (without Malenovský)

In summary, among the legal approaches applied by the Court, the analysis confirms a preference for teleological and dynamic rather than systematic arguments,<sup>149</sup> although the recourse to traditional *topoi* is far larger than the implementation of particularly European canons (*effet utile*, proportionality, etc.). However, overall the data suggest a sophisticated approach of the Court on copyright matters, in line perhaps with the ‘rule of reason’ theorised 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.<sup>150</sup>

On the entitlements of copyright owners and users, the analysis provides a *chiaroscuro* of broad and narrow interpretations of rights and exceptions, which reveals a complex picture of European copyright jurisprudence beyond claims of copyright overprotection. Narrow constructions of the rights of the owner are at least as frequent as broad constructions. They often occur on similar copyright issues, and may be based on similar arguments, such as the high protection of copyright holders recommended in recitals (4) and (9) 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, citing 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 copyright holder’. The data analysis shows a significant impact of the latter argument on the outcome of the case, which is (with one exception only<sup>151</sup>) unfavourable 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 other directives). While the former reveal a higher probability of a favourable outcome for the rightholder (although maybe not as high as one could expect from the recitals of that directive), the latter feature a higher predictability and consistency in the

<sup>149</sup> Bengoetxea and Becks n 34 above.

<sup>150</sup> Bengoetxea, McCormick and Moral Soriano, n 37 above, 67.

<sup>151</sup> C-466/12 Svensson and others (ECLI:EU:C:2014:76).

approach. For example, cases of software protection or exhaustion of rights invariably prompt competition arguments (and are ruled 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 show that the ECJ is not biased either towards or against rightholders, as its judgments appear to be distributed between the two outcomes.

## CONCLUSION

We set out to investigate how the Court of Justice of the European Union has dealt with copyright cases against the backdrop of a dramatic and controversial increase in such cases during the last decade. We empirically investigated two claims: (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).

Our two empirical studies introduced various measures to assess each of these claims. To investigate the suspected lack of a coherent copyright jurisprudence we sought to identify specific pre-existing judicial expertise in the area of copyright and related rights. This can be derived from the biographical data about members of the court that are in the public domain. We found that 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. There are no specialists in copyright law, despite the increasing workload of the Court on these matters.

The Court appears to compensate for this lack of specialisation by a subject-specific distribution of the workload among court members, enabling ‘judicial learning’. When testing the allocation of cases to Chambers, Reporting Judges and Advocates General we concluded that the observed pattern of repeat allocations is statistically highly significant, and can only be explained by a deliberate policy by the Court to overcome this lack of pre-existing expertise through the creation of *de facto* specialist chambers.

A further measure for a lack of a coherent jurisprudence may be provided by the identification of unpredictable patterns of reasoning. For example, our content analysis suggests that despite different outcomes in the interpretation of the concept of ‘communication to the public’, according to our data, all the above cases are grounded on a semantic interpretation of the law, confirmed by a teleological interpretation and by a systematic interpretation. When applying quantitative content analysis to the use of arguments within *topoi*, we find that the reasoning of the dominant copyright judge Malenovský (*rapporteur* in twenty-four of forty copyright cases) differs from that of the other judges. This may be an indicator of judicial learning. We acknowledge as a limitation that this finding reflects descriptive statistics on a small sample. However, the same pattern on a larger sample would be significant.

We now turn to the second claim, that the Court has pursued an activist, upwardly harmonising agenda. Measures or indications for such an agenda included the possible prevalence of a teleological interpretation of European law which we sought to capture again through the content analysis of all copyright judgments (the data sample). The data show indeed a clear prevalence of teleological *topoi*, but this finding is tempered by the presence of complex patterns of accumulation (e.g. cumulative use of several approaches without a hierarchical order). This points rather to a more complex explanation, supported by the finding that the outcomes of the judgments do not (systematically) expand copyright protection.

The following table summarises the measures we developed to explore our initial hypotheses:

Hypothesis	Measure	Data	Findings
ECJ lacks coherent copyright jurisprudence	1) Judges and AGs do not have specialist expertise	Biographical background (descriptive statistics)	Confirmed: no prior domain expertise
	2) There are no specialist chambers	Allocation of cases to Chambers, Reporting Judges and AGs (tested for significance)	Rejected: repeat allocations can only be explained by deliberate policy
	3) Reasoning is unpredictable	Content analysis, linking judicial approaches to outcomes	Confirmed, but different approaches found for different judges (not conclusive: small sample limitation)
ECJ pursues activist, upwardly harmonising agenda	1) There is a prevalence of teleological <i>topoi</i>	Content analysis, identifying patterns of reasoning	Confirmed, but complex pattern of cumulation, often combining teleological, systematic and semantic
	2) Outcome of judgments expand copyright protection	Content analysis of outcomes	Rejected

*Table 1 – Hypotheses, Measures, Data and Findings*

In answer to the question posed in the title of this article, ‘Is there a EU copyright jurisprudence?’ our findings paint an intriguing picture. We have identified attempts to create in effect specialist chambers, and we found recurrent patterns of reasoning, but outcomes from that reasoning remain unpredictable, more so for the less experienced members of the Court. So the empirical analysis seems to suggest that while the Court’s jurisprudence is in better shape than critiques suggest, much could be done to improve its legitimacy.

Having diagnosed the state of copyright related judicial reasoning at the ECJ, what policy interventions would assist the Court to form a more coherent copyright jurisprudence? The most straightforward solution might introduce specialised (copyright or intellectual property) professionals into the European Court system in order to increase domain competence and predictability. Short of forming a specialist Court, interventions might include (i) reforming the rules of procedure by making criteria for the assignment of cases more explicit (enabling the systematic allocation of cases to certain chambers where new members might shadow reporting judges that have developed domain specific experience), and (ii) supporting judicial learning when members first join the Court (for example through training of *référéndaires* in specialist domains). Exploring such options seriously would require the Court (and the European institutions that invented its governance) to look in the mirror, hold the gaze and recognise what they see. Empirical reflection may yet improve doctrine.

## APPENDIX I – Sample of Cases

Sample: ECJ Copyright and Database Right references 1992-2012						
Case		Parties	Judgement	Chamber	Rapporteur	AG
<b>COPYRIGHT</b>						
C-466/12	SE	Svensson and others	13/02/2014	Fourth	Malenovský	Sharpston
C-351/12	CZ	OSA – Ochranný svaz autorský pro	27/02/2014	Fourth	Prechal	Sharpston
C-355/12	IT	Nintendo e.a.	23/01/2014	Fourth	Safjan	Sharpston
<b>2012</b>			<b>3</b>			
C-607/11	UK	ITV Broadcasting	07/03/2013	Fourth	Malenovský	Bot
C-457/11	DE	VG Wort	27/06/2013	Fourth	Malenovský	Sharpston
C-5/11	DE	Donner	21/06/2012	Fourth	Schiemann	Jääskinen
C-128/11	DE	UsedSoft	03/07/2012	Grand	Lenaerts	Bot
C-521/11	AT	Amazon.com	11/07/2013	Second	Silva de Lapuerta	Mengozzi
<b>2011</b>			<b>5</b>			
C-406/10	UK	SAS Institute	02/05/2012	Grand	Arestis	Bot
C-510/10	DK	DR and TV2 Danmark	26/04/2012	Third	Malenovský	Trstenjak
C-360/10	BE	SABAM	16/02/2012	Third	Malenovský	Cruz Villalón
C-283/10	RO	Circul Globus București	24/11/2011	Third	Malenovský	Trstenjak
C-277/10	AT	Luksan	09/02/2012	Third	Malenovský	Trstenjak
C-162/10	IE	Phonographic Performance	15/03/2012	Third	Malenovský	Trstenjak
C-145/10	AT	Painer	20/01/2012	Third	Malenovský	Trstenjak
C-135/10	IT	SCF	15/03/2012	Third	Malenovský	Trstenjak
C-70/10	BE	Scarlet Extended	24/11/2011	Third	Malenovský	Cruz Villalón
C-271/10	BE	VEWA	30/06/2011	Third	Malenovský	Trstenjak
C-461/10	SE	Bonnier Audio	19/04/2012	Third	Malenovský	Jääskinen
<b>2010</b>			<b>11</b>			
C-168/09	IT	Flos	27/01/2011	Second	Löhmus	Bot
C-462/09	NL	Stichting de Thuis kopie	16/06/2011	Third	Malenovský	Jääskinen
C-393/09	CZ	Bezpečnostní softwarová	22/12/2010	Third	Arestis	Bot
C-431/09	BE	Airfield and Canal Digitaal	13/10/2011	Third	Malenovský	Jääskinen
<b>2009</b>			<b>4</b>			
C-5/08	DK	Infopaq International	16/07/2009	Fourth	Malenovský	Trstenjak
C-403/08 C-429/08	UK	Football Association Premier League + Murphy	04/10/2011	Grand	Malenovský	Kokott
C-467/08	ES	Padawan	21/10/2010	Third	Malenovský	Trstenjak
C-518/08	FR	Fundación Gala-Salvador Dalí	15/04/2010	Third	Malenovský	Sharpston
<b>2008</b>			<b>4</b>			
C-240/07	DE	Sony Music Entertainment	20/01/2009	Grand	Arestis	Ruiz-Jarabo Colomer
<b>2007</b>			<b>1</b>			
C-456/06	DE	Peek & Cloppenburg	17/04/2008	Fourth	Malenovský	Sharpston
C-275/06	ES	Promusicae	29/01/2008	Grand	Malenovský	Kokott
<b>2006</b>			<b>2</b>			
C-306/05	ES	SGAE	07/12/2006	Third	Malenovský	Sharpston
C-169/05	BE	Uradex	01/06/2006	Third	Malenovský	Ruiz-Jarabo Colomer
<b>2005</b>			<b>2</b>			
C-479/04	DK	Laserdisken	12/09/2006	Grand	Arestis	Sharpston
C-192/04	IT	Lagardère Active Broadcast	14/07/2005	Third	Malenovský	Tizzano
<b>2004</b>			<b>2</b>			
<b>2004-2014</b>						
C-245/00	NL	SENA	06/02/2003	Sixth	Puissochet	Tizzano
C-293/98	ES	Egeda	03/02/2000	Sixth	Kapteyn	La Pergola
C-60/98	IT	Butterfly Music	29/06/1999	n/a	Puissochet	Cosmas
C-61/97	DK	FDV v. Laserdisken	22/09/1998	n/a	Puissochet	La Pergola
C-200/96	DE	Metronome Musik	28/04/1998	n/a	Puissochet	Tesauro
C-92/92	DE	Phil Collins	20/10/1993	n/a	Grévisse	Jacobs
<b>1992-2000</b>			<b>6</b>			
<b>TOTAL</b>			<b>40</b>			
<b>DATABASE RIGHT</b>						
C-202/12	NL	Innoweb		Fifth	von Danwitz	Cruz Villalón
C-173/11	UK	Football Dataco e.a.		Third	Lenaerts	Cruz Villalón
C-604/10	UK	Football Dataco e.a.		Third	Lenaerts	Mengozzi
C-545/07	BG	Apis-Hristovich		Fourth	Lenaerts	Sharpston
C-304/07	DE	Directmedia Publishing		Fourth	Lenaerts	Sharpston
C-444/02	GR	Fixtures Marketing		Grand	Lenaerts	Stix-Hackl
C-338/02	SE	Fixtures Marketing		Grand	Lenaerts	Stix-Hackl
C-203/02	UK	British Horseracing Board		Grand	Lenaerts	Stix-Hackl
C-46/02	FI	Fixtures Marketing		Grand	Lenaerts	Stix-Hackl
<b>TOTAL</b>			<b>9</b>			

## APPENDIX II– Codebook excerpt

### *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
- *outcome*: is the outcome of the judgment favourable to right holders or not?

semantic:

- text of the law interpreted according to its wording. This may also include the context of the wording, drawing for example on the recitals of a directive. ‘Context’ here is still related to the textual analysis, whereas a larger contextualisation of the norm would involve historical or economic considerations. If recitals are cited for objectives, the coding is as teleological.

systematic/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

teleological:

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

## ***Examples of coding***

### **C-466/12 Svensson**

#### JUDGMENT

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)

Outcome (unfavourable to right holder)

Main question: ‘... the referring court asks, in essence, whether Article 3(1) of Directive 2001/29 must be interpreted as meaning that the provision, on a website, of clickable links to protected works available on another website constitutes an act of communication to the public as referred to in that provision, where, on that other site, the works concerned are freely accessible.’ (14)

Ruling: ‘Article 3(1) of Directive 2001/29/EC ... must be interpreted as meaning that the provision on a website of clickable links to works freely available on another website does not constitute an ‘act of communication to the public’, as referred to in that provision.’

### **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)

#### JUDGMENT

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)

Outcome (favourable to right holder)

Main question: 'Must Directive 2001/29/EC ... be interpreted as meaning that an exception disallowing remuneration to authors for the communication of their work by television or radio ... to patients in rooms in a spa establishment which is a business is contrary to Articles 3 and 5 (Article 5(2)(e), (3)(b) and (5))?'

Ruling: 'Article 3(1) of Directive 2001/29/EC ... must be interpreted as precluding national legislation which excludes the right of authors to authorise or prohibit the communication of their works, by a spa establishment which is a business, through the intentional distribution of a signal by means of television or radio sets in the bedrooms of the establishment's patients. Article 5(2)(e), (3)(b) and (5) of that directive is not such as to affect that interpretation.'

### **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)

JUDGMENT

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. (19)

#### 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 (23)

#### Outcome (favourable to right holder)

Main Question: 'Must Article 6 of Directive 2001/29/EC be interpreted... as meaning that the protection of technological protection measures ... may also extend to a system... in which a device is installed in the hardware which is capable of recognising on a separate housing mechanism containing the protected works...?'

Ruling: '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...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'.





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