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The past, present and future of Article 17(2) CFREU

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ECS Annual Conference *“The Constitutional Turn in Copyright Law – From human rights, to competition aspects and fairness concerns”*

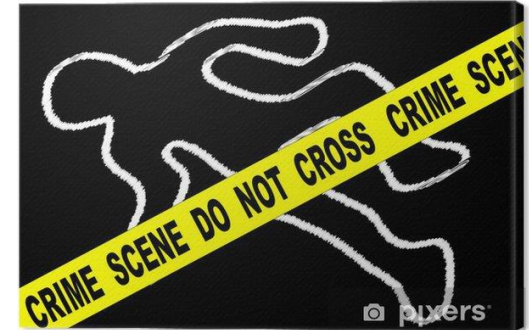
Nottingham – 27 May 2022



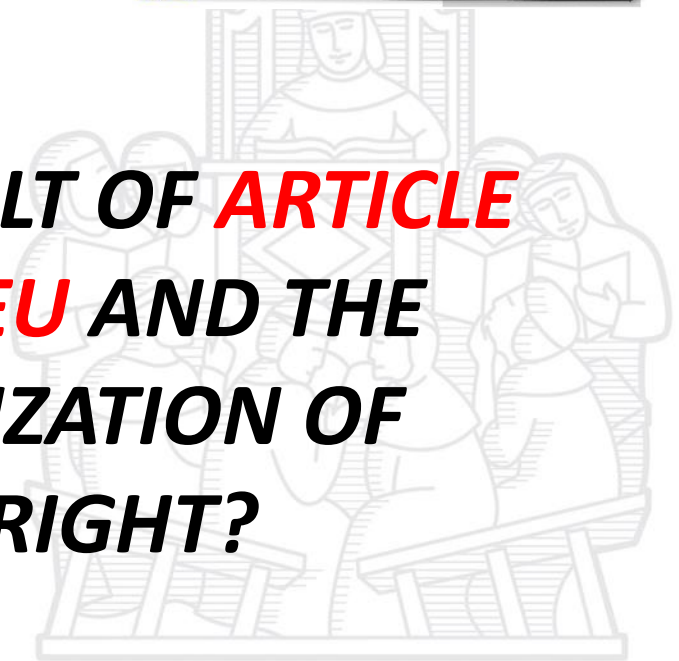
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RIDIGITY AND HEDGING IN THE © BALANCE



**IS IT ALL FAULT OF *ARTICLE
17(2) CFREU* AND THE
PROPERTIZATION OF
COPYRIGHT?**



22 years and counting

History of Art 17(2)

- ECHR and Member States' background
- Hints from the Praesidium
- Art 17(2) and CJEU before the Charter

Past



Article 17(2) and CJEU

- A. Overview
- B. Appraisal of effects & critical analysis vis-à-vis
 - 1) CJEU property case law
 - 2) MSs constitutional IP case law

Present



Some proposals

- To clarify conceptual mistakes
- To make Art 17(2) effective, consistent, pro balanced EU ©

Future



Key findings and claims

FINDINGS

- Limited impact of Art 17(2) CFREU on CJEU decision
- No relevance of propertization
- Lack of clear balancing criteria and standards

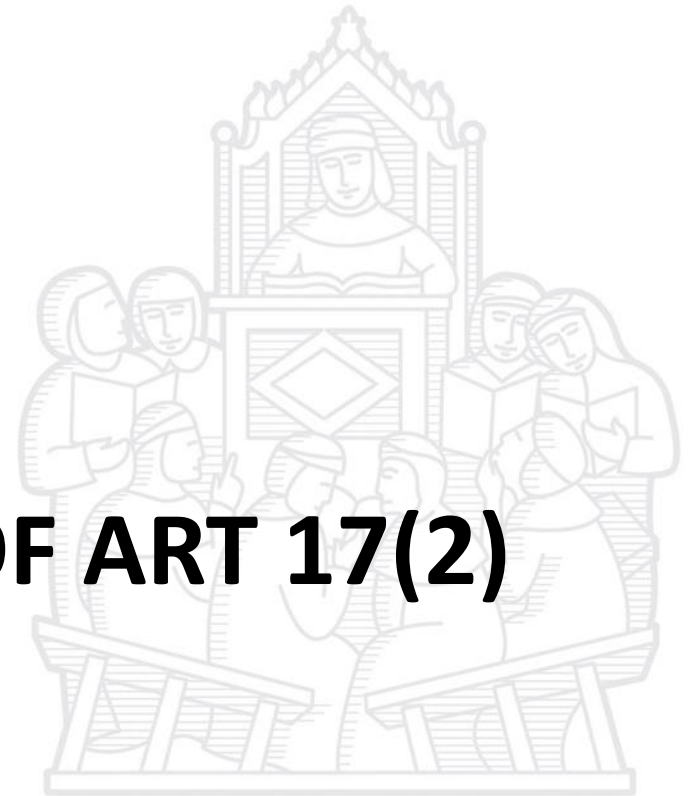
CLAIMS

- Effects linked to qualification of © as fundamental right
- Real propertization may lead to different results, increased legal certainty, systemic sustainability



Part 1 – The past

HISTORY AND ROOTS OF ART 17(2)



ARTICLE 17(2): A NEW, PUZZLING IP CLAUSE IN THE CFREU

1. *Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.*

2. *Intellectual property shall be protected.*

- Based on ECtHR's case law
- Few national precedents, no international references
- Divergent translations (*est, è, wird...*)
- Divided doctrinal interpretations
 - Positive regulatory obligation
 - Institutional (negative) guarantee
 - Separate mention because greater social function, thus more careful balance needed
- Higher, similar or lower degree of protection for copyright as property?

Praesidium's Explanation on Art 17

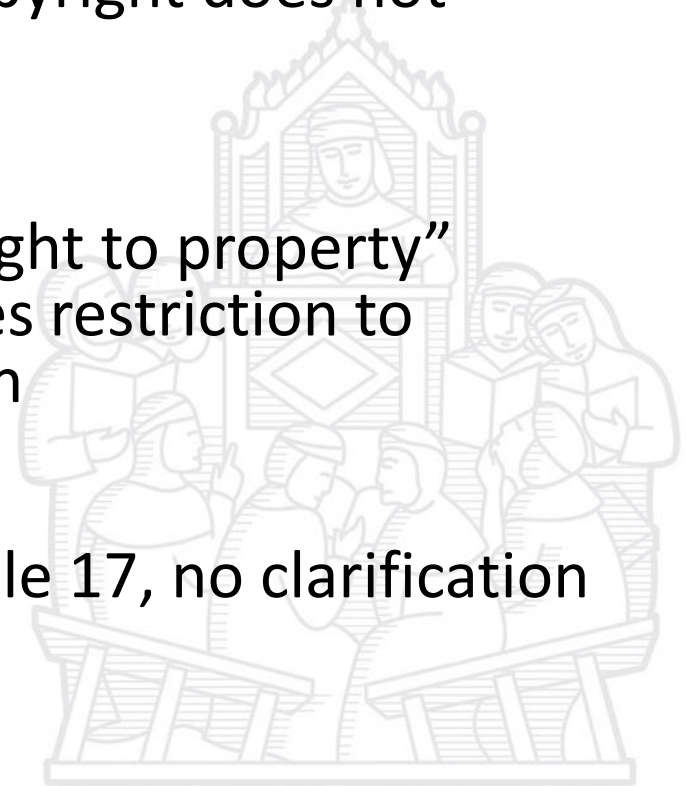
“This Article is **based on Article 1 of the Protocol to the ECHR**”

“This is a fundamental right common to **all national constitutions**. It has been recognised on numerous occasions by the **case-law of the Court of Justice**, initially in *Hauer* judgment ([1979] ECR 3727). The wording has been updated but, in accordance with Article 52(3), **the meaning and scope** of the right are the same as those of the right guaranteed **by the ECHR** and the **limitations may not exceed** those provided for there”

“**Protection of intellectual property, one aspect of the right of property**, is explicitly mentioned in paragraph 2 because of its growing importance in the Community secondary legislation. Intellectual property covers not only literary and artistic property but also *inter alia* patent and trademark rights and associated rights. **The guarantee laid down in paragraph 1 shall apply as appropriate to intellectual property**”.

Before Lisbon

- **Metronome Musik (C-200/96, 1998)**
 - Social function of property = copyright does not enjoy absolute protection
- **Laserdisken (C-479/04, 2006)**
 - Copyright “forms part of the right to property” under Art.1 P1 ECHR → justifies restriction to freedom to receive information
- **Promusicae (C-275/06, 2008)**
 - Only cursory reference to Article 17, no clarification on role and implications



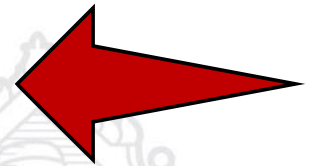
Part 2 – The present

A) ARTICLE 17(2) AND THE CJEU



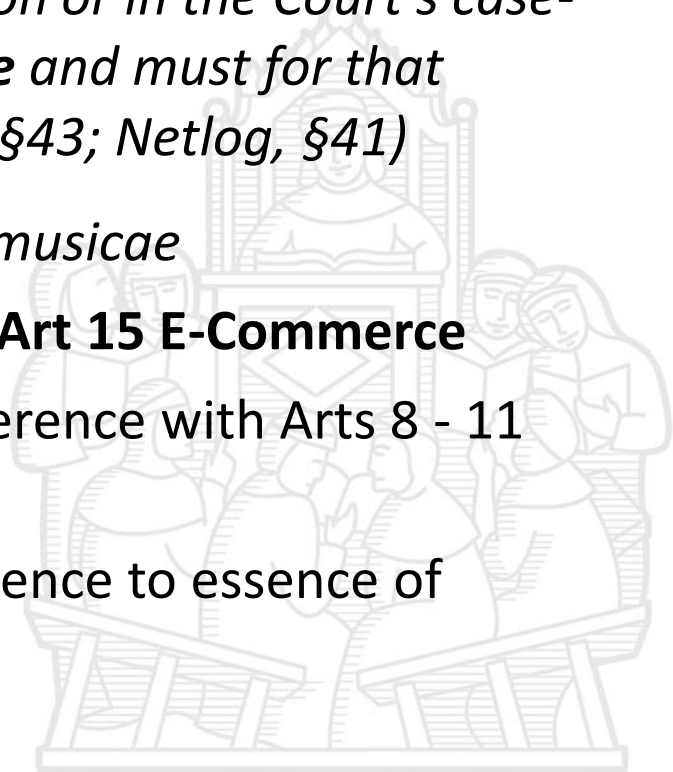
AFTER Lisbon

- **25** copyright cases mention Article 17 CFREU, out of which 17 in connection w/ fair balance
- **BUT** → fair balance copyright-fundamental rights w/o reference to Article 17 in 19 decisions
 - Fair compensation cases (*Padawan* and progeny)
 - Interpretation of exceptions (*Ulmer*, *VOB*, *Deckmyn*, *Painer*, *Austro-Mechana*)
 - Definition of scope of exclusive rights (*CV-Online Latvia*, *Spedidam*)



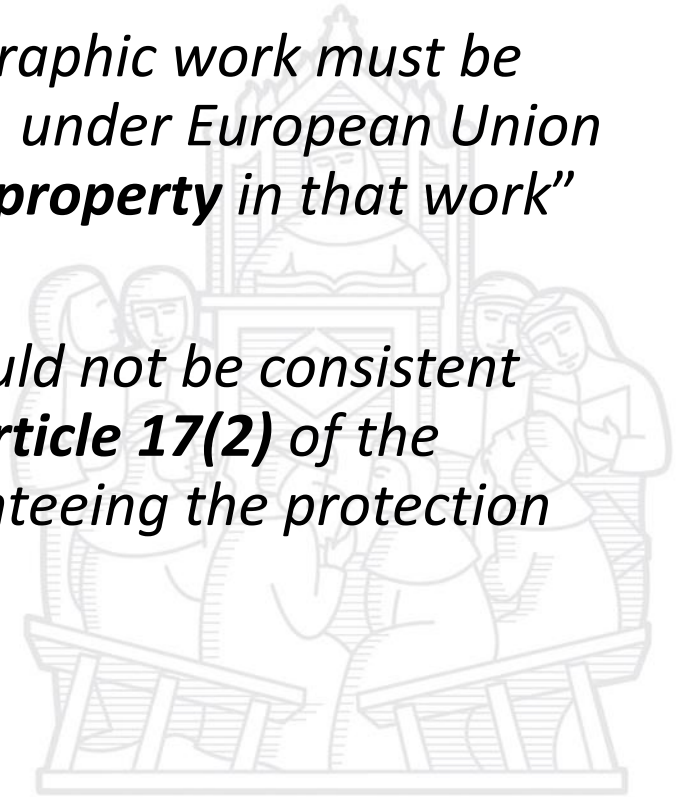
Scarlet Extended (C-70/10) - Netlog (C-360/10)

- *“The protection of the right to intellectual property is indeed enshrined in Article 17(2) [CFREU] (...). There is, however, **nothing whatsoever** in the wording of that provision or in the Court’s case-law **to suggest** that that right **is inviolable** and must for that reason be **absolutely protected**” (Scarlet, §43; Netlog, §41)*
- Introduction to fair balance based on *Promusicae*
- **Injunction already vs Art 3(1) IPRED and Art 15 E-Commerce**
- General assumption of unbalanced interference with Arts 8 - 11 CFREU
- NO proportionality assessment NOR reference to essence of freedoms/rights involved



Luksan (C-277/10)

- Non-recognition of copyright to film director in violation of EU law = deprivation of property under **Article 17(1)** (§68)
- *“The principal director of a cinematographic work must be regarded as **having lawfully acquired**, under European Union law, **the right to own the intellectual property** in that work”* (§69)
- An interpretation to the contrary *“would not be consistent with the requirements flowing from **Article 17(2)** of the Charter of Fundamental Rights guaranteeing the protection of intellectual property”* (§71)
- Fair balance **NOT** linked to Article 17

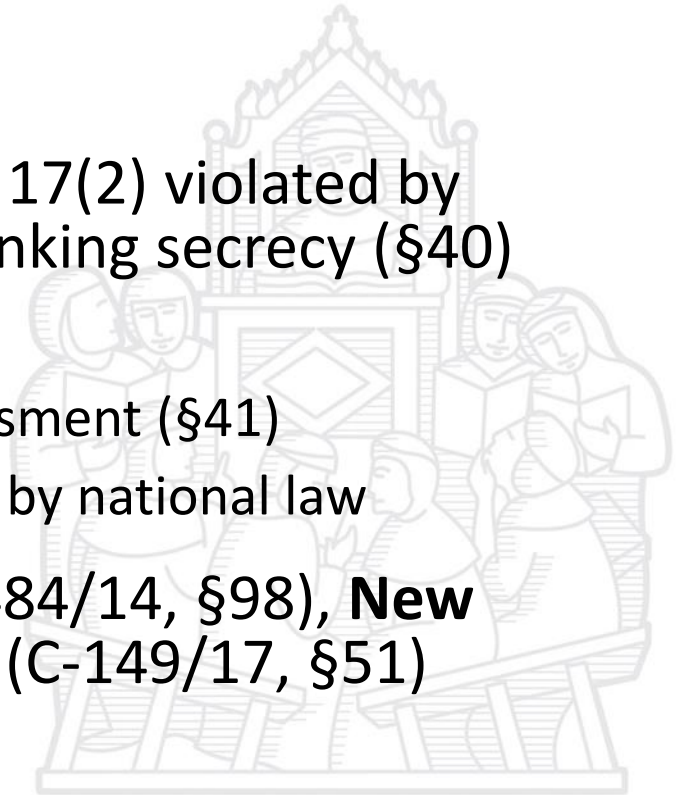


UPC Telekabel (C-314/12)

- Injunction “*makes it necessary to strike a balance, primarily, between (i) copyrights (..) protected under **Article 17(2)** of the Charter, (ii) the freedom to conduct a business (...) and (iii) the freedom of information of internet users (...)*” (§47)
- **Essence** of Article 16 CFREU NOT infringed; Article 11 CFREU to be respected by ISP when selecting measure (§51, §55)
- As in ***Scarlet / Netlog***, Article 17(2) not = absolute protection of inviolable copyright (§61)
- **Effects** → enough if measures are “*reasonable and sufficiently effective*”, no need for complete cessation of infringements (§62)

Coty Germany (C-580/13) and its progeny

- Right to effective remedy (Article 47) and intellectual property (Article 17(2) CFREU) versus right to privacy (Article 8 CFREU)
- Art 52 CFREU as key balancing rule
- Essence of Art 47 and thus of Article 17(2) violated by unlimited authorization to invoke banking secrecy (§40)
- Consequences:
 - no need to perform fair balance assessment (§41)
 - Introduction of remedy NOT provided by national law
- Along the same lines **McFadden** (C-484/14, §98), **New Wave** (C-327/15, §25), **Bastei Lübbe** (C-149/17, §51)

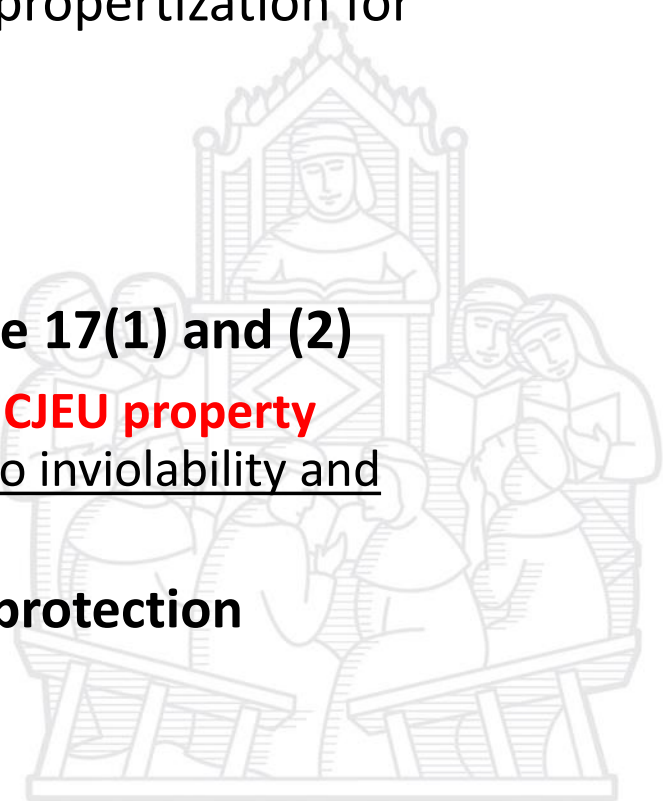


Other fragments

- **GS Media** (C-160/15, §31), **Renckhoff** (C-161/17, §41), **VG Bild-Kunst** (C-392/19, §54)
 - Article 17(2) as one side of fair balance vs FoR;
 - Same in **BY vs CX** (C-637/19, §§32-33, opposite than *Bastei Lübbe*)
- **Spiegel Online** (C-516/17, §57) and **Pelham** (C-476/17, §32) use similar language
- **Funke Medien** (C-469/17, §§42, 56) does the same and adds reference to *Scarlet* on non-absoluteness of copyright
- Several references in **Poland v Commission** (C-401/19)
 - Detailed proportionality/fair balance assessment, citing Art 17(2) C
 - BUT! No difference between fundamental rights

Common traits & “mistakes”

- Article 17(2) used to assert that copyright is FR equal to other FRs in the balance
- No consequences attached specifically to propertization for
 - Definition of essence
 - Outcome of fair balance
- No details on balancing test
- **No details on relationship between Article 17(1) and (2)**
 - But! Vs property logic, **statement echoing CJEU property jurisprudence** → Art 17(2) does not lead to inviolability and absoluteness of IP (*Scarlet*)
- Only rarely link Art 17 < -- > high level of protection
- ... but still powerful tool



RAAP (C-265/19): risk of slippery slope

- **Improper use of Art.17(2) to support specific reading of Art.8(2)**
RLD + max harmonization (§§85-86)

*“That right to a single equitable remuneration constitutes (...) a right related to copyright. It is accordingly an **integral part of the protection of intellectual property** enshrined in Article 17(2) (...). Consequently, pursuant to **Article 52(1)** (...), **any limitation on the exercise** of that right (...) must be **provided for by law**, which implies that the legal basis which permits the interference (...) must itself **define, clearly and precisely, the scope of the limitation on its exercise**”*

- **RISK 1:** If silence on limits, then no limits → Art.17(2) protects **ABSTRACT** rather than specific entitlement
- **RISK 2:** **Wrong reference to Art 52(1)** → it applies also to exclusion of existence, not only to limitations of exercise of existing rights

Part 2 – The present

B) UNVEILING CONCEPTUAL FLAWS

**CONVERGENCES AND DIVERGENCES WITH CJEU PROPERTY CASE LAW
AND MEMBER STATES' CONSTITUTIONAL IP CASE LAW**

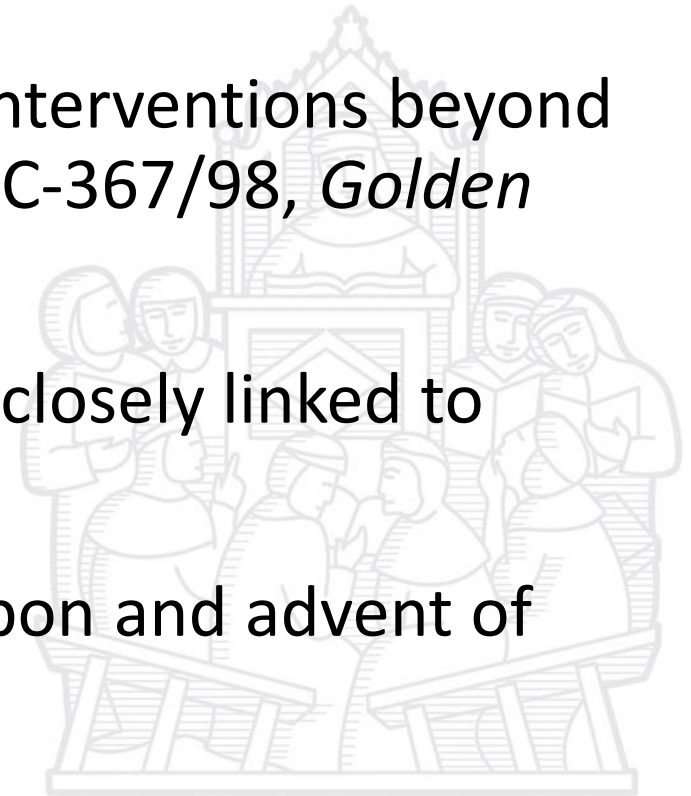


CJEU property case law

- **Nold (C-4/73) and Hauer (C-44/79)**
 - *“the right to property is guaranteed in the Community legal order in accordance with the **ideas common to the constitutions** of the Member States, which are also reflected in the **First Protocol to the European Convention for the Protection of Human Rights**”*
 - *“the rights thereby guaranteed, far from constituting unfettered prerogatives, must be viewed in light of the **social function of property**”*
 - ...which justifies uncompensated restrictions if
 - For objectives of general interest pursued by the Community
 - Not disproportionate and intolerable interference
 - Impinging upon the very substance of the right

CJEU property case law (ii)

- Mostly to justify EU law limitation of national property rights...
- ... and/or uphold EU legislative interventions beyond limits set by Article 345 TEU (eg C-367/98, *Golden Shares*)
- Consequence → social function closely linked to Treaty goals
- Some changes before / after Lisbon and advent of CFREU



CJEU property case law: **BEFORE** Lisbon

- Limitations OR deprivations justified “particularly in the context of a **common organization of the market**”

C-265/87 Schrader, C-5/88 Wachauf, C-170/86 Von Deetzen, C-177/90 Kuhn, C-280/93 Germany v Council, C-306/93 SMW Winzersekt, C-22/94 Irish Farmers Association, The Queen v Minister of Agriculture, Fisheries and Food, C-200/96 Metronome Musik, C-64/00 Booker Aquaculture, T-46/01 Alessandrini, C-120-121/06 FIAMM)

- General reference (but internal market) or **other Treaty goals**

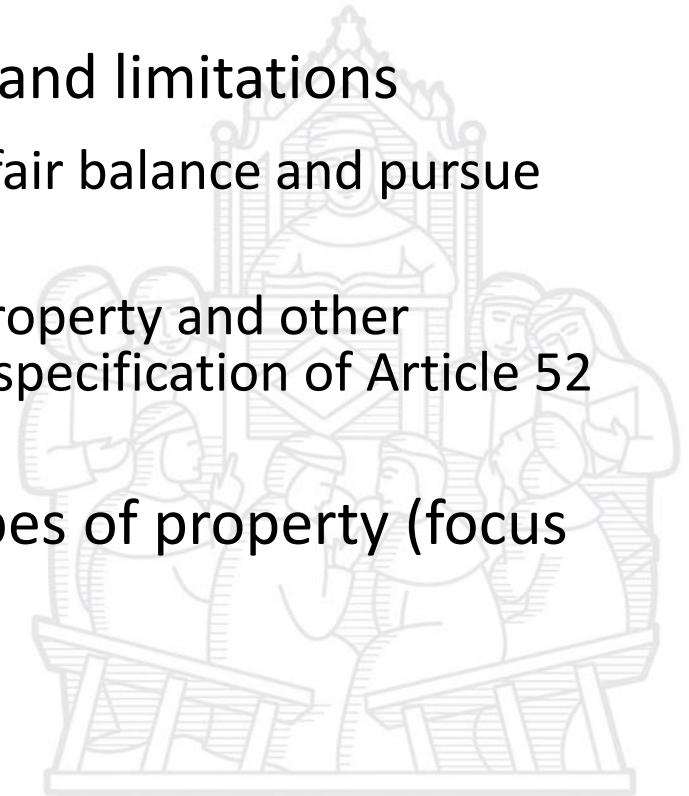
C-402-415/05 *Kadi v Council* (**security et al**), *Alliance for Natural Health* (**health**), C-453/03 *ABNA and Others*, C-347/03 *Regione Friuli Venezia Giulia*, C-184-223/02 *Spain and Finland v Parliament and Council* (**work health and safety**), C-37-38/02 *Di Lenardo*, C-491/01 *British American Tobacco* (**health**), C-293/97 *Standley*

CJEU property case law: **AFTER** Lisbon

- References to **social function remain** despite Art 17 CFREU
C-220/17 *Planta Tabak*, C-530/11 *Commission v United Kingdom*, C-12/11 *McDonagh*, C-501/11 *P Schindler*, C-544/10 *Deutsches Weintor*, C-416/10 *Krizan and others*, C-379-380/08 *ENI and others*
- ...but **not always** → replaced by **Art 52 CFREU**
C-235/17 *Commission v Hungary*, C-235/17 *Commission v Hungary*, C-600/16 *National Iranian Tanker Company*, C-258/14 *Florescu*
- **Same test** to distinguish btw expropriation and uncompensated limitations (essence, necessity, proportionality)
- **Social function = pursuance of Treaty goals**, not only internal market (eg C-59/11, *Kokopelli*)
- ...but **fundamental rights and other public interest goals**
C-220/17 *Planta Tabak* and C-544/10 *Deutsches Weintor* (**health**), C-157/14 *Société Neptune* and C-12/11 *McDonagh* (**protection of consumers**), C-530/11 *Commission v UK*, C-416/10 *Krizan and others* and C-379-380/08 *ENI and others* (**environmental protection**)

Convergences and divergences

- Social function missing
- Much less detailed proportionality assessment
- No distinction between deprivation and limitations
 - Violation of essence used to exclude fair balance and pursue negative harmonization
 - No distinction between intellectual property and other fundamental rights (but Article 17 as specification of Article 52 CFREU)
- No distinction between different types of property (focus on internal function)
- **...while, at a national level....**



Examples of national propertization



- Conseil Constitutionnel 27 July 2006, no. 2006-540 DC
 - Duty to inform on TMPs for interoperability = expropriation
- Conseil Constitutionnel, 10 June 2009, no. 2009-580 DC, **HADOPI**
 - Even if © is objective of general interest, measure to protect should still be proportionate, necessary and subject to judicial scrutiny
- Conseil Constitutionnel, 28 February 2014, no. 2013-370 QPC, **Soulier and Doke**
 - Three-step proportionality test to assess legitimacy of limitations to © in public interest
- Conseil Constitutionnel, 21 November 2014, no. 2014-430 QPC
- Tribunal Supremo, *Megakini v Google*, 3 April 2012, no. 172/2012
 - Social function of property → ius usus inocui to allow harmless use of work to prevent rightholder's abuse of copyright



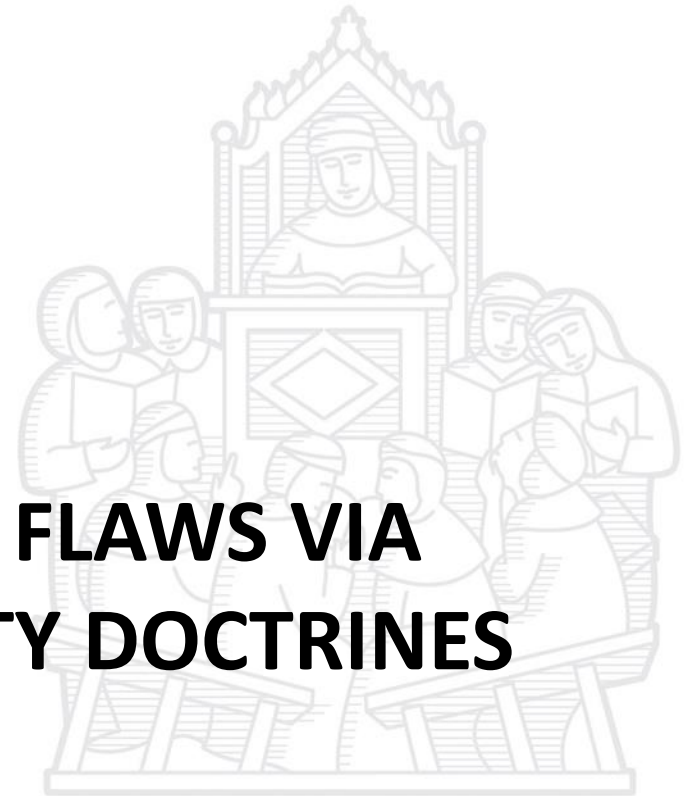
National propertization (ii)

- **Schoolbook** (31 BVerfGE 229 (1971))
 - Legislator should regulate © as to *“guarantee the compatibility of the exploitation of the work with the nature and social relevance of the right”* in pursuance of public good
- **Social function** of copyright justifying copyright exceptions
 - Bibliotheksgroschenentscheidung (49 BVerfGE 382 (1978))
 - Kirkenmusik (49 BVerfGE 382 (1978))
- **Germania 3** (1 BvR 825/98 (2000))
 - The more a work fulfils social role, the more © should be limited for artistic freedom
- **Metall auf Metall** (1 BvR 1585/13 (2016))
 - Interference with exploitation of work not enough to trump freedom of art and public goal of cultural development of the community



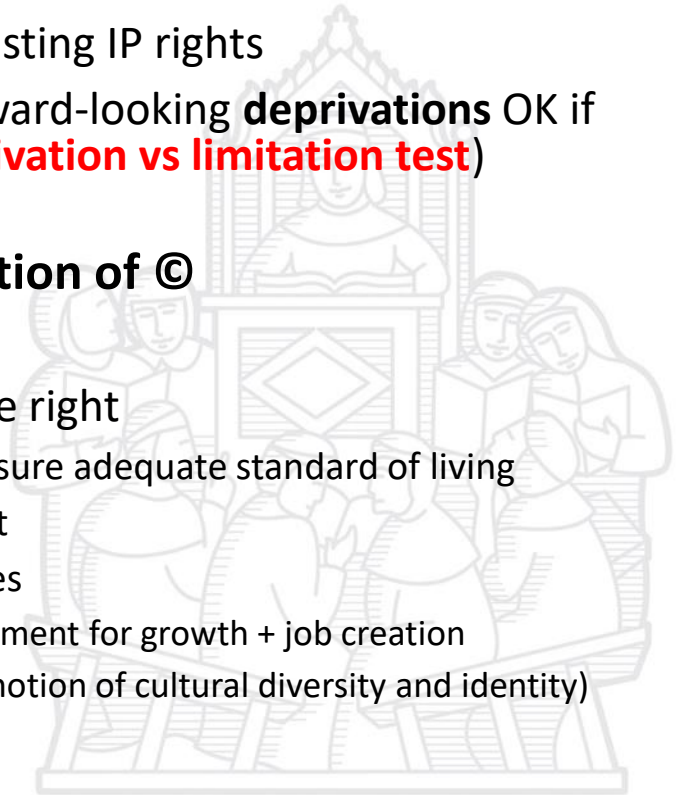
Part 3 – The future

CORRECTING CONCEPTUAL FLAWS VIA CONSTITUTIONAL PROPERTY DOCTRINES



What if we mirror CJEU/MSs CON property doctrines?

- Distinguishing IP as property from other fundamental rights
- **NO pure institutional guarantee**, i.e.
 - No abstract but only concrete protection for existing IP rights
 - Forward-looking **repeals** always possible; backward-looking **deprivations** OK if compensated (**look at CJEU's and ECtHR's deprivation vs limitation test**)
- From social function of property to **social function of ©**
 - **EXTERNAL:** Treaty goals + respect of FRs
 - **INTERNAL:** public interest goals of each exclusive right
 - “**Appropriate remuneration**” to protect dignity and ensure adequate standard of living
 - “**Fair return on investment**” for industrial development
 - Both granted for **broader goals** – two intertwined nodes
 - **ECO** eg sustainable level of creative production/investment for growth + job creation
 - **NON-ECO** (dissemination of w, access to culture, promotion of cultural diversity and identity)



What if we mirror CJEU/MSs CON property doctrines?

OBJECT



- Different treatment of **different works**
 - Social relevance/nature
 - Traditional v informational
 - Personal v commercial
 - Author v industrial RHs

CONTENT



- Consistency and legal certainty in definition of **scope** of rights
- **Specific subject matter** defined on the basis of (essential) social function
 - ✓ **Core**: only acts necessary to reach revenues essential to social f.
 - **Socio-cultural goals** internal to structure → any conduct against them = outside scope of right



What if we mirror CJEU/MSs CON property doctrines?

STRUCTURE

- **Exceptions and limitations** ✓

- No strict reading if vs balancing role/function
- Extension to grey conducts having same purpose

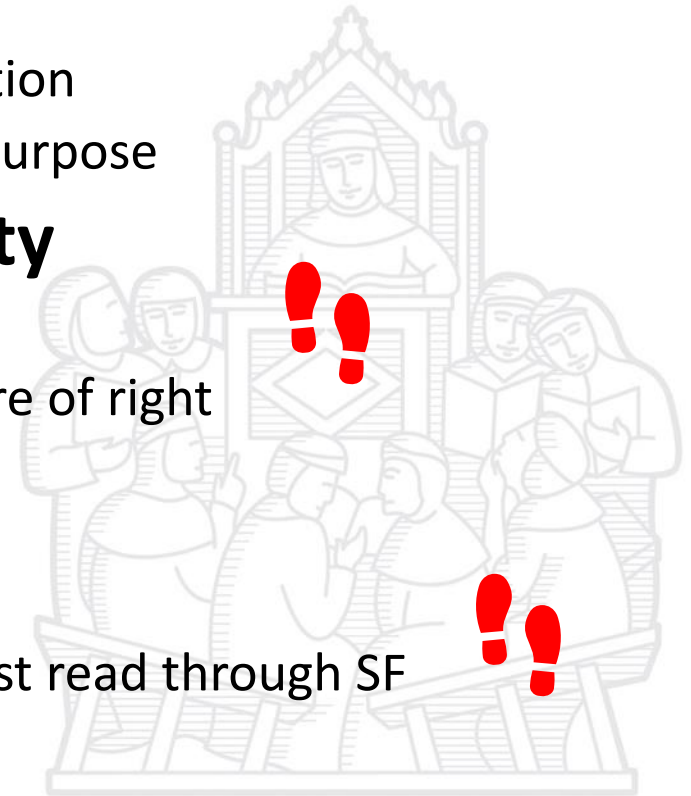
- **Fair balance and proportionality**

- Essence = full deprivation
- Reference not generic entitlement but core of right

- **Abuses and misuses** ! !

- **Three-step-test**

- Normal exploitation and legitimate interest read through SF ! !





Thank you for your attention!

Caterina Sganga

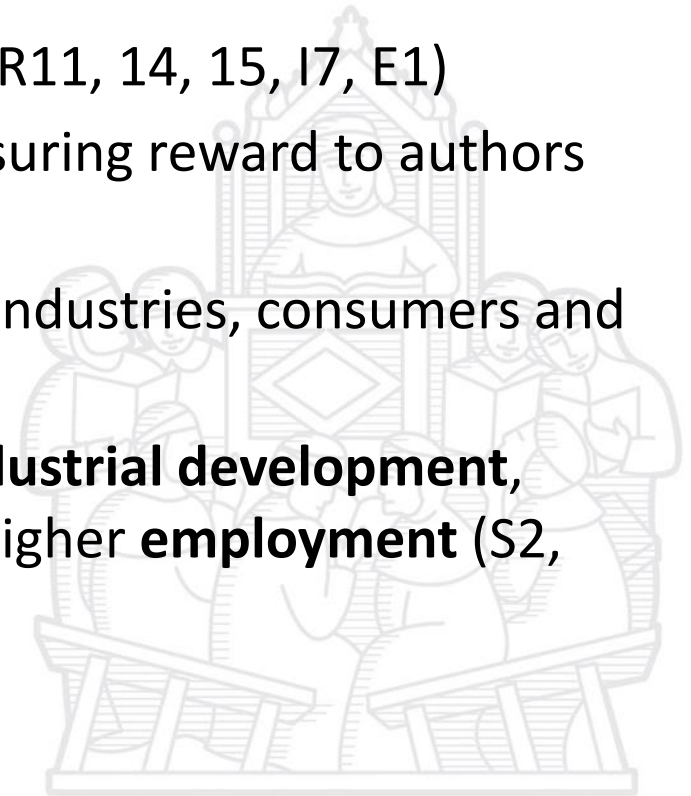
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Copyright functions

- Remove obstacles to **internal market** and/or **free movement** of g&s (S4-5, RL1, D3-4, T2, I6, E1, 3)
- Avoid distortion to **competition** (RL3, T2, R11, 14, 15, I7, E1)
- Foster **creation of cultural product** by ensuring reward to authors (RL5-8, R3, I9-10-11, E2)
- (T10) “In the interest of authors, cultural industries, consumers and society”
- Protect and stimulate **investments for industrial development**, economic growth, **competitiveness** and higher **employment** (S2, D9, D11-13, RL8, R3, 11, 13, I2, 4, E1)



Copyright functions (ii)

- Importance of © from a cultural standpoint (Article 151 TFEU, I12)
- Promote **learning and culture** by protecting copyright (I14)
 - **BUT!** Dissemination of culture not achieved by sacrificing © (I22)
- © gives resources necessary to safeguard **“the independence and dignity”** of artistic creators and performers (I11)
- **“Fair balance”** of opposite interests (I31)
- © is **“economic foundation for the creative industries”** → **“therefore”** mass digitization is tool to protect EU **cultural heritage** (OWD2)
- CMOs as **“promoters of the diversity of cultural expression”** (CMO1)
- **Internal market** goals + **access to knowledge** as basis for harmonization (CDSM1)