

COPYRIGHT LAW AND THE CJEU

A MODERN LAW REVIEW
DOUBLE BILL

WHO IS STEERING THE
JURISPRUDENCE OF THE EUROPEAN
COURT OF JUSTICE? THE INFLUENCE
OF MEMBER STATES SUBMISSIONS ON
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STEPPING INTO THE NORMATIVE VOID:
MLR COMMENT ON 'WHO IS STEERING'

LUKE McDONAGH

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CREATe

Introductory note

The complex and elusive structure we call 'Europe' is the result of multiple cultural, economic, social and political conditions under which Law, and in particular the jurisprudence of the Court of Justice of the European Union (CJEU), is performing a unique integrating role.

This working paper is a joint re-issue of two articles first published in the *Modern Law Review* in 2020. The core is a study I researched with my colleagues Marcella Favale and Paul Torremans, 'Who is steering the jurisprudence of the European Court of Justice? The influence of Member State submissions on copyright law'.

This is a dense paper, presenting complex empirical findings from the examination of 170 documents relating to 42 copyright cases registered between 1998 and 2015, with the aim of assessing the impact of submissions by Member States and the European Commission on the legal interpretation of copyright concepts.

We show that France is the most influential country by some distance, both in terms of the number of interventions (an 'investment' in policy) and in terms of persuasive power (France's arguments – 69% in favour of rightholders – are more often adopted by the Court than any other country's).

The Commission appears to intervene particularly effectively on behalf of user interests, and one of the most effective governments arguing for the interests of copyright users is the United Kingdom. Following Brexit, the departure of the UK from EU litigation (loss of preliminary references and written observations, loss of Advocate General and CJEU Judge) is likely to affect the development of European copyright jurisprudence.

Our study is preceded by a perceptive Comment written by Luke McDonagh addressing (among other issues) the implications of the other major finding of the study, that submissions by the Commission correlate highly with the Court's rulings and that, collectively, the submissions by Member States predict the Court's rulings. This aligns with arguments from the political science literature that the CJEU needs to maintain political legitimacy.

In the Brexit context, it is important to understand that the juridification of the European policy process we identified is highly fragile. The constitutional role of the Court of Justice evolved out of its function as a dispute resolution mechanism. 'Autonomous' concepts of EU law must be interpreted the same throughout the single market. This inevitable loss of national sovereignty in a free trade area (such as the EU single market) is something Brexiteers fear more than

anything. In my view, this is deeply paradoxical, since Britain's past as a global trader involved exporting its own standards without a dispute resolution process, something that is simply no longer available in Britain's post-Imperial world.¹

However, Brexiteers are right to highlight the constitutional framing of dispute resolution. A credible transnational court needs to be independent from governments, and transparently so. The CJEU arguably has insufficient safeguards here. Judges are appointed for a comparatively short term (six years), and re-appointments are based again on government nominations.²

Our study also throws the spotlight on the lack of transparency about actions of Member States (their written observations are not published). Luke McDonagh suggests a more optimistic interpretation that '[i]n light of recent debates about the constitutional role of the CJEU within the EU and national legal orders, the MS observations system may be a pragmatic compromise allowing MS and CJEU to remain in dialogue, without resorting to direct challenges to the CJEU's authority.'

Issuing this double bill now at the end of 2020 hopes to contribute to this important discussion.³

Martin Kretschmer

Glasgow, 21 December 2020

¹ For more on the scope for regulatory divergence post-Brexit, see my Blog for the AHRC Creative Industries Policy & Evidence Centre (PEC): <https://pec.ac.uk/blog/uk-sovereignty-a-challenge-for-the-creative-industries>

² The discussion about the post-Brexit removal of the British Advocate General Eleanor Sharpston highlights some of these issues: <https://verfassungsblog.de/lawful-composition-the-efta-courts-approach/>; <https://verfassungsblog.de/its-urgent-ii/>; <https://verfassungsblog.de/frankensteins-court/>; <https://europeanlawblog.eu/2020/03/18/in-support-of-the-eu-rule-of-law-and-advocate-general-eleanor-sharpston-an-open-letter/>

³ Special thanks to the editors of Modern Law Review for facilitating the re-publication of this double bill as a CREATE working paper. Authoritative versions of both contributions can be found here: M. Favale, M. Kretschmer, P. Torremans, 'Who is steering the jurisprudence of the European Court of Justice? The influence of Member State submissions on copyright law', (2020) 83(4) 831-860: <https://onlinelibrary.wiley.com/doi/full/10.1111/1468-2230.12527>; L. McDonagh, Stepping into the normative void - Comments on M. Favale, M. Kretschmer and P. Torremans: <https://www.modernlawreview.co.uk/mcdonagh-favale-kretschmer-torremans/>

Stepping into the normative void – Comments on M. Favale, M. Kretschmer and P.L.C. Torremans, ‘Who is steering the jurisprudence of the European Court of Justice? The influence of Member State submissions on copyright law’ (2020) 83(4) MLR 831

MLR Forum Comment

Luke McDonaghⁱ

Introduction

Matters of intellectual property (IP) – copyright, patents, trade marks – tend to be of high complexity and low political salience.¹ This is a challenge for legislators, including at the European level, who may struggle to fully comprehend the technical details regarding e.g. the processes involved in hyperlinking, web streams and digital broadcasts. During the legislative process this confers a great deal of power on those with appropriate technocratic expertise – typically those working at the various Directorates-General (DGs) of the European Commission and invited experts to the European Parliament. For example, when I presented my research on patent law to the JURI committee of the European Parliament in 2019 I was struck by the respect afforded to my views, but also by questions from parliamentarians that revealed an understandable lack of technical understanding on the subject at hand.²

Expert guidance is essential to the process because it is at the legislative level that the key concepts of European intellectual property law are outlined. Yet, it is not until these concepts are challenged and interrogated at the judicial level that these notions truly come to life. As a recent article in this *Review* by Favale, Kretschmer and Torremans demonstrates, the Court of Justice of the EU (CJEU) has been tasked with giving flesh to the bare bones of copyright

ⁱ Assistant Professor, London School of Economics.

¹ B. Farrand, ‘Lobbying and Lawmaking in the European Union: The Development of Copyright Law and the Rejection of the Anti-Counterfeiting Trade Agreement’ (2015) 35 *Oxford Journal of Legal Studies* 487.

² L. McDonagh and E. Bonadio, ‘Standard Essential Patents and the Internet of Things’ (2019) European Parliament – [https://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_IDA\(2019\)608854](https://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_IDA(2019)608854)

concepts like ‘communication to the public’ and ‘parody’ (at 831).³ How does the court go about this task? Do the same concerns over a lack of technical expertise at the legislative level also occur when judges at the CJEU do not possess the experience to deal with complex IP matters? Who, apart from the judges, has influence over the process? These questions – on the role of the CJEU in the juridification of EU copyright law – are of concern to Favale, Kretschmer and Torremans. Their article is an important intervention into the debate concerning European copyright jurisprudence. Key to the scope of their piece is the notion that there is a ‘normative void’ at the heart of EU copyright law and it is this which makes CJEU rulings of crucial significance (at 831). How true is this?

Defining the boundaries of European copyright

There is little doubt that EU copyright law is less well integrated into the EU legal order than some other key areas of commercial law. Copyright went unmentioned in the Treaty of Rome, which was instead focused on eliminating barriers to competition; even today European IP law is harmonised unevenly – copyright law (and patent law) are much less integrated into EU law than trade mark law is.⁴

In the case of copyright rather than complete harmonisation there exists a scattered list of directives and regulations relevant to copyright – the most prominent include the Information Society Directive from 2001 (sometimes referred to as ‘InfoSoc’), and the recent Copyright in the Digital Single Market Directive, which was enacted in 2019.⁵

When evaluating these Directives and associated case law there is a need to consider a broader question – one that is, in my view, not answered fully in the authors’ recent article (or in their 2016 article⁶ on EU copyright law): does EU legislation have an ‘intention’ in the field of copyright, and if so is it normative?

Looking at the 2001 Information Society Directive it is clear that ‘harmonisation’ is the overarching legislative intention – the Directive’s title states the aim is ‘harmonisation of

³ See also E. Rosati, ‘Just a laughing matter? Why the decision in Deckmyn is broader than parody’ (2015) 52 *Common Market Law Review* 511.

⁴ L. McDonagh and M. Mimler, ‘Intellectual Property Law and Brexit: A Retreat or a Reaffirmation of Jurisdiction?’ in M. Dougan (Ed.), *The UK after Brexit* (Cambridge, UK: Intersentia, 2017), 159–179.

⁵ 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, OJ L 167/10, 22.06.2001; Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (Text with EEA relevance.), OJ L 130, 17.5.2019.

⁶ M. Favale, M. Kretschmer and P.L.C. Torremans, ‘Is there a EU Copyright Jurisprudence? An empirical analysis of the workings of the European Court of Justice’ (2016) 79 *MLR* 31.

certain aspects of copyright and related rights in the information society'. This is certainly evidence of *intention*, but the reference to '*certain aspects*' makes clear that whatever *is* harmonised by the Directive, it will nevertheless leave a copyright system in place that is not legally 'complete'.

The same Directive's recital states that the economic goals include creating 'an internal market for new products and services' and to 'foster substantial investment in creativity and innovation'. While calling for strong protection of IP rights in the online environment the recital nonetheless acknowledges there must be a fair 'balance' between rightholders and users. The recital (in paragraph 25) also acknowledges the 'legal uncertainty' involved in this field of rapid technological change, while also reverting to the need for harmonisation.⁷

These aspects of the text show the legislative intention is (i) to further the goal of harmonisation and (ii) to provide rightholders with exclusivity over online transmissions (while respecting user rights). This intention is then made substantive by the provision of the exclusive right of 'communication to the public' (mentioned alongside the right of 'making available to the public') in Article 3 of the Directive (2001/29):

Article 3

Right of communication to the public of works and right of making available to the public
other subject-matter

1. Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.

2. Member States shall provide for the exclusive right to authorise or prohibit the making available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them

(a) for performers, of fixations of their performances;

(b) for phonogram producers, of their phonograms;

(c) for the producers of the first fixations of films, of the original and copies of their films;

(d) for broadcasting organisations, of fixations of their broadcasts, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite.

3. The rights referred to in paragraphs 1 and 2 shall not be exhausted by any act of communication to the public or making available to the public as set out in this Article.⁸

The cumulative effect of the above text does, therefore, show a normative intention – but one that is insufficiently detailed to provide adequate normative guidance to national courts. This is,

⁷ Recitals are not intended to contain normative provisions as noted in the Joint practical guide of the European Parliament, the Council and the Commission at <http://eurlex.europa.eu/en/techleg/10.htm>

⁸ 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, OJ L 167/10, 22.06.2001

of course, a deliberate strategy on the part of EU legislators. Directives are favoured (over Regulations) by EU institutions in complex areas precisely because they give normative flexibility, allowing diplomatic compromises between the EU institutions and Member States (MS) (no doubt also taking into account various lobbying efforts at all levels).⁹ Yet, can such compromises ever be stable within the EU legal system? The result is conceptual 'openness' – a lot is left to interpretation at the judicial level.

So what actually happens at the CJEU in copyright cases? Favale, Kretschmer and Torremans argue that in applying EU legislation the CJEU often leads with – and then refers back to – its own case law norms. They argue this circularity is necessary precisely because the EU lacks an 'exhaustive normative system' in the field of copyright law.¹⁰ In other words, the normative meaning of EU copyright law is contested by case parties – and, crucially, as we shall see later on, by EU MS in their case observations submitted to the CJEU.

In developing a normative approach does the CJEU go beyond the legislative intention?

Intellectual property law expertise has typically not been a strength of the majority of appointed CJEU judges.¹¹ At times this has led to concerns that the CJEU may lack the appropriate expertise to interpret and apply copyright law in a measured fashion, and may – perhaps inadvertently – lead the court to go beyond the legislative intention in its zeal to create harmonised norms.¹²

Such fears have been heightened by the fact that core concepts like 'originality' have been interpreted at the CJEU in a way that goes beyond what legislators were likely to have intended.¹³ For example, there was nothing in the Information Society Directive, or other EU legislation, that suggested a uniform concept of originality for *all* copyright works was necessary to harmonise the relevant 'certain aspects' of EU copyright law. Yet when making its substantive ruling in

⁹ M. van Eechoud, P. B. Hugenholtz, S. van Gompel, L. Guibault and N. Helberger, *Harmonizing European Copyright Law: The challenges of better lawmaking* (The Netherlands: Kluwer Law International, 2009), 21.

¹⁰ M. Favale, M. Kretschmer and P.L.C. Torremans, 'Is there a EU Copyright Jurisprudence? An empirical analysis of the workings of the European Court of Justice' (2016) 79 MLR 31, 51.

¹¹ *Ibid.*

¹² J. Griffiths, 'Constitutionalising or harmonising? – the Court of Justice, the right to property and European copyright law' (2013) 38 *European Law Review* 65. See also M. Mimler, 'The Court of Justice of the European Union finds that copyright does not subsist in the taste of cheese spread (Levola Hengelo BV v Smilde Foods BV (Case C-310/17))' (2019) 115 *Intellectual Property Forum* 96.

¹³ L. McDonagh, 'Headlines and hyperlinks: UK copyright law post-Infopaq,' (2011) 1 *Queen Mary Journal of Intellectual Property* 184. See also E. Bonadio and L. McDonagh, 'Artificial Intelligence as Producer and Consumer of Copyright Works: Evaluating the Consequences of Algorithmic Creativity' (2020) *Intellectual Property Quarterly* 112.

the *Infopaq* case – a case decided under the terms of the Information Society Directive – the CJEU did in fact put forward a uniform concept for all works based on ‘intellectual creation’.¹⁴ This decision has had an impact on how originality is assessed by member state national courts. It has relevance in virtually any copyright case where originality is in dispute – even those that would have fallen outside of the scope of the Directive as originally conceived. One recent case that followed in the wake of the *Infopaq* decision concerned whether a new, ‘original’ taste of cheese could be protected by copyright – hardly a matter of interest to the ‘Information Society’.¹⁵

Nonetheless, in their prior (2016) article Favale, Kretschmer and Torremans argue against the notion that the court, due to gaps in the legislation, has routinely overstepped the mark and granted over-broad rights to copyright owners. The authors demonstrate that in general the Court has – as the EU legislators appear to have intended from the text of the 2001 InfoSoc Directive and their enactment of the EU Charter of Fundamental Rights – applied a ‘fair balance’ between the rights of copyright owners and users.¹⁶ Moreover, the CJEU’s approach has not necessarily led to upward harmonisation in all cases; the court has not always taken advantage of an opportunity for harmonisation to expand copyright law in favour of rightholders. Overall, Favale, Kretschmer and Torremans show that about half of the CJEU rulings narrowed, rather than widened, copyright’s scope. This chimes with Husovec’s research on copyright norms – he notes that the CJEU ‘keeps an open mind with respect to their detailed execution and looks at markets and technological developments’.¹⁷ Is there anything else might sway the CJEU?

Can EU Member States influence the development of copyright norms at the CJEU?

One factor not considered by the authors in their 2016 article was the question of *who* – apart from the main case parties – might try to influence the development of copyright norms at the CJEU level. This is the focus of their recently published *Modern Law Review* article. The authors open their piece by expressing the fear that the jurisprudence of the Court is ‘open to capture’ and that ‘national governments may be able to steer the Court to produce policy outcomes that were politically unachievable’ at the legislative stage (at 832).

¹⁴ Case C-5/08 *Infopaq International A/S v Danske Dagblades Forening* ECLI:EU:C:2009:465

(*Infopaq*) and Case C-145/10 *Eva-Maria Painer v Standard VerlagsGmbH and Others* ECLI:EU:C:2011:798.

¹⁵ Case 310/17 *Levola Hengelo BV v Smilde Foods BV* ECLI:EU:C:2018:618. See also J. McCutcheon, ‘Levola Hengelo BV v Smilde Foods BV: The Hard Work of Defining a Copyright Work’ (2019) 82 MLR 936–950.

¹⁶ M. Favale, M. Kretschmer and P.L.C. Torremans, ‘Is there a EU Copyright Jurisprudence? An empirical analysis of the workings of the European Court of Justice’ (2016) 79 MLR 31. See also J. Griffiths and L. McDonagh, ‘Fundamental Rights and European Intellectual Property Law – The Case of Art 17(2) of the EU Charter,’ in C. Geiger (Ed.), *Constructing European IP: Achievements and New Perspectives* (Cheltenham, UK: Edward Elgar, 2013), 75–93.

¹⁷ M. Husovec, ‘Intellectual Property Rights and Integration by Conflict: The Past, Present and Future’ (2016) 18 *Cambridge Yearbook of European Legal Studies* 239, 261.

This fear of a court wide open to conceptual (and in effect regulatory) capture leads inevitably to other crucial questions: in whose interests are Governments acting when they make written observations - rightholders' or users'? And to what extent are Member State (MS) submissions successful at achieving a preferred outcome?

Empirical analysis

In order to investigate these questions the authors examine empirically all 78 copyright cases that took place, via preliminary references, at the European level between 1998 and 2015. Of these they concentrate on 42 cases in which there was a 'recurrence' of the same legal issue (which the authors define as five or more references to the CJEU on the same concept).

For the 42 relevant cases, the authors studied 170 documents - in each case these included the Advocate General's opinion, the CJEU ruling, and, as far as possible, the submissions by the EC and the member states (MS). However, EU MS written observations are not published as part of the official judicial documents. As a result the authors state that it was not always easy to obtain the documentation on MS submissions - freedom of information requests and other methods were used to gather as much info as possible.¹⁸

In analysing their dataset, the authors reveal the five most contested legal concepts in EU Copyright Law:

- 1) Communication to the public
- 2) Copyright exceptions
- 3) Levies (fair compensation for private use)
- 4) Distribution Right
- 5) Liability of Intermediaries.

Of these five, the authors' utilise the first - 'communication to the public' - as the major case study in their article. They do this in part because this is the concept that comes up most frequently and as such it provides the authors with the largest number of documentary materials to examine (judgments, AG opinions, MS observations, etc.). But it is an interesting concept to consider as a case study for another reason - as we shall see the EU legislators did not provide a normatively rich definition of this concept in the legislation, so tracing how the CJEU has developed it over time allows the authors to track MS efforts to influence the concept's definition and application in a range of circumstances (at 839).

¹⁸ Regulation (EC) 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJEC L 145/43 31.05.2001.

The main EU legislative provision covering the exclusive right of communication to the public is found in Article 3 of the 2001 InfoSoc Directive (full text given above).¹⁹ This short provision has led to a remarkable amount of case law and judicial analysis.²⁰ The clear legislative intention is to require payment to authors/rightholders for uses of works in various fields of transmission, including via broadcast on TV/radio, cable/satellite or online. But what may not be apparent to non-copyright scholars is that such licence fee payments must be paid not just by e.g. the BBC when the broadcaster's DJs play music over the radio – but also by commercial businesses such as gyms, bars and restaurants when they play these same radio broadcasts in the background while customers are enjoying the goods/services they provide.

It is in this context that the communication question arose in the mid 2000s concerning digital broadcasting and rebroadcasting. It was not clear under Article 3 of the Directive whether all activities of businesses that involve communications or broadcasts of copyright music or TV programmes would require payments to rightholders e.g. do hotels that distribute a TV signal to their guests/customers in their rooms need to pay a specific licence fee to cover this?²¹ Favale, Kretschmer and Torremans identify the key questions (at 841):

Do these activities involve a new act of communication to the public and is there a new authorisation that needs to be paid for? Or is there, in all or in some of these circumstances, merely one original communication to the public?

Here clearly is a normative gap. The Directive's text in Article 3 does not explain whether the communication right should apply to every single 'broadcast' of copyright works that occurs at a business location or whether e.g. only music played openly in the hotel bar should require a licence (and consequently such licences should not apply to guests receiving a TV signal in the relative privacy of their hotel rooms).

Due to the fact the Directive does not give sufficient guidance, the CJEU has had to fill this normative gap, considering each case in light of each new technological challenge. This opens up a space for the parties and member states to make submissions that aim to push the law in one direction or another (and, crucially, to favour certain interests over others). The authors opine (at 841):

Broadcasters and hotel owners, if we refer only to these by way of example, have opposite interests on this point. A narrow definition of communication to the public would favour the hotels and with them the national government that wants primarily to encourage the

¹⁹ 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, OJ L 167/10, 22.06.2001

²⁰ J. Koo, *The Right of Communication to the Public in EU Copyright Law* (Oxford, UK: Hart, 2019).

²¹ Case C-306/05 *Sociedad General de Autores y Editores de Espana (SGAE) v Rafael Hoteles SA* ECLI:EU:C:2006:764.

tourism industry. Those in favour of the content-providing industry would on the other hand favour a broad interpretation.

Here the CJEU decided that where guests were receiving a signal in their hotel rooms, this did constitute a communication to a 'new' public and thus required a specific licence (since it went beyond the 'initial' public transmission made by the broadcasters to the hotel itself and involved the hotel making an intervention to allow access to the guests).

In the cases that followed the CJEU has emphasised that not all communications count for the purposes of copyright law – key are those that are 'to a public' (requiring a licence fee to be paid to the rightholders); and in the case of re-broadcasting/retransmission, only those to a 'new public' require an additional licence fee.²² Yet, the early CJEU rulings did not always give consistent guidance to national courts: although in the above case the court found that the activities of hotels did involve a communication to a 'new public', in a later case music played in a dentist's waiting room was held not to do so.²³ Favale, Kretschmer and Torremans state that MS have, via their submitted observations, tried to influence the CJEU in such contested matters. In the dentist waiting room case the authors suggest that the submission of the Italian state, which favoured the dentist (and similar business owners), was ultimately more convincing to the court than the French one, which favoured broadcasters.

The above dispute is just one example of many considered by the authors: the key merit of the article lies in its empirical breadth, which illustrates how various MS have attempted to influence the CJEU on a consistent basis, often on specific repeated issues, in a number of cases. Due to the extent of their dataset, the authors are able to make clear and confident statements on precisely which MS have been most successful at influencing European copyright law.

Who is influencing the decisions of the CJEU – and why?

On the concept of communication to the public, the data show that France is the most influential MS by some distance in the field of copyright law, tending to support rightholders' interests (which tend to encompass both the interests of authors/composers and corporate entities such as broadcasters, record companies, film studios, etc.). The authors note (at 855):

France's submissions produced 32 suggested answers (data points), of which 19 (59 per cent) match the Court's ruling. Other frequently intervening countries, such as Germany (14 data points), Ireland (12), Italy (10), and the UK (10) have each produced less than half

²² Case C-607/11 *ITV Broadcasting Ltd and Others v TVCatchUp Ltd* ECLI:EU:C:2013:147; Case C-466/12 *Nils Svensson and Others v Retriever Sverige AB* ECLI:EU:C:2014:76; Case C-325/14 *SBS Belgium NV v Belgische Vereniging van Auteurs, Componisten en Uitgevers (SABAM)* ECLI:EU:C:2015:764.

²³ Case C-135/10 *Societa Consortile Fonografici (SCF) v Marco Del Corso* ECLI:EU:C:2012:140.

the number of submissions of France, and none exceed a match rate of 50 per cent with the Court's ruling.

Though less so than France, Germany is also relatively successful at making convincing submissions to the court – though they tend to be more balanced in their choice of whose interests to support (they do not always favour rightholders). In contrast, Austria and Greece seem to struggle for influence.

The authors emphasise that MS governments' interventions tend to be highly skewed towards specific copyright issues relevant to their own domestic policies. In my view, this is lobbying by another name. On this, the authors uncover a somewhat surprising point: the submissions by the elected MS governments often support rightholders i.e. large IP owners and their representatives, whereas the (unelected and allegedly 'democratically deficient') EU Commission tends to favour user interests, notably the interests of EU citizens, via concerns over competition and consumer protection. The Commission also shows concern about the rights of intermediaries such as the internet service providers (ISPs). Only a small number of EU MS – Portugal, Ireland and the United Kingdom – have regularly advanced the users' (and intermediaries') perspective in their observations.

Conclusions

Is there still a normative void at the heart of EU copyright law? Yes. Even where Directives provide a clear legislative intention – as in the case of the 2001 InfoSoc Directive – it remains too broad to provide answers to difficult questions that involve: (i) the use of copyright content in ever-changing technologies; and (ii) the need to weigh up the rights of copyright owners and users in a proportionate fashion. The dispersal of the macro-level intention of EU Directives into the laws of the various national MS states will always leave many micro-level questions that need to be answered via the preliminary reference procedure.

Can MS influence copyright jurisprudence when such cases arise? The authors' answer is clear (at 859):

Yes'. Copyright is indeed vulnerable to strategic litigation because the tactic creates 'room for alternative policy paths without introducing legislation'; thus, via written observations MS governments can aim to 'steer the Court towards rulings in line with their respective policies.

On the key case study – the development of the concept of 'communication to the public' – the authors note that the CJEU has built up a distinctive body of jurisprudence which has been influenced profoundly by observations from MS governments. MS have expressed different views on what a 'public' is – and although the CJEU sometimes goes its own way, deciding against

both the submissions of MS and of the Commission, in several cases MS observations have affected the outcome. France is the most 'successful' in this regard both in terms of the number of interventions (an 'investment' in policy-making?) and in terms of persuasive power (arguments adopted successfully by the CJEU). This is significant as to the final effect on the conceptualising of 'communication to the public' by the CJEU as France tends to be supportive of rightholders (who, we should remind ourselves, include not just authors but also powerful corporate entities), pushing the law in a direction that could be called 'overprotective'.²⁴

In light of Brexit the authors argue that the loss of the UK as a MS may disrupt the balance between the MS, such as France, that tend to prioritise rightholders, and those that tend to defend user rights and competition (including the UK) (at 860).²⁵ A balanced system may require other MS to step up to fill the gap.

A pertinent question remains worth asking: *should* the MS be able to influence the CJEU in this way? MS observations arguably allow a form of lobbying to occur via the judicial 'back door' that is not always open to public scrutiny and which is, in the case of France, more favourable to IP owners than EU citizens as a whole. Yet perhaps the most plausible answer for why MS should be allowed to do so is provided by the authors with respect to their point about the CJEU's legitimacy. Notably, the authors' data show a correlation between the overall range and tone of MS submissions and the final decisions taken by the CJEU. It may be that the CJEU is attempting to 'walk a tightrope', trying to stay on board with the views of its fellow EU institution (the Commission) while simultaneously maintaining respect for national MS opinions (at 859):

Submissions by the Commission correlate highly with the Court's rulings and the Commission appears to intervene particularly effectively on behalf of user interests. A second important finding is that, collectively, the submissions by Members States are above the influence line, correctly predicting the Court's rulings. This aligns with arguments from the political science literature that the Court needs to maintain political legitimacy.

On this, the authors reveal that in redefining the notions of 'communication' and 'public' over time the CJEU has moved gradually in line with the tone of MS submissions – perhaps reflecting the CJEU's perceived need to stay 'legitimate' in the eyes of MS national governments. In light of recent debates about the constitutional role of the CJEU within the EU and national legal orders,

²⁴ The European Commission (EC), by contrast, is the strongest advocate of user rights.

²⁵ See also L. McDonagh, 'UK Patent Law and Copyright Law after Brexit: Potential Consequences,' in O.E. Fitzgerald and E. Lein (Eds.), *Complexity's Embrace: The International Law Implications of Brexit* (Waterloo, CA: CIGI Press, 2018), 177-190.

the MS observations system may be a pragmatic compromise allowing MS and CJEU to remain in dialogue, without resorting to direct challenges to the CJEU's authority.²⁶

This brings up a further element of the EU law-making process – the link between judicial norm-making and subsequent legislative action. As the consequences of legal decisions become clear at the case level (e.g. based on the 2001 InfoSoc Directive), this then stimulates debates over new legislation (such as the 2019 Copyright in the Digital Single Market Directive) – which also opens the door to new legislative lobbying. This point can be linked back to the authors' earlier article, whether they argue there are two ways to approach EU law-making:

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.²⁷

The author's most recent article provides strong evidence that it is the second (latter) theory that is more accurate – the law-making 'dialogue' between the EU institutions does not end at the legislative stage: it continues into the judicial arena, which in a circular process eventually stimulates further legislation.

Finally, it is worth contemplating the fact that although copyright law can be highly technical, the widespread coverage of the tortuous debates at the European Parliament over the Copyright in the Digital Single Market Directive in 2019 demonstrate that some aspects of copyright law resonate clearly with the public. Fears over online freedom of speech (the 'save our memes' campaign) and concerns that the new Directive would raise costs for ISPs and search engines like Google penetrated the public discourse.²⁸ Eventually, after much lobbying, drafting, and 'horse-trading' the Directive was enacted into law. But many of its concepts remain open to interpretation by the Court of Justice (CJEU). We can expect the CJEU to interpret these principles in line with prior existing EU law including the Charter of Fundamental Rights.²⁹ Favale, Kretschmer and Torremans demonstrate that the upcoming battles over defining the balance

²⁶ P. Inman, 'Jolt to eurozone as German court warns against central bank stimulus' (5 May 2020) *The Guardian* - <https://www.theguardian.com/business/2020/may/05/jolt-to-eurozone-as-german-court-warns-against-central-bank-stimulus>

²⁷ M. Favale, M. Kretschmer and P.L.C. Torremans, 'Is there a EU Copyright Jurisprudence? An empirical analysis of the workings of the European Court of Justice' (2016) 79 *MLR* 31, 35. See also A. Stone Sweet, 'The European Court of Justice and the judicialization of EU governance' (2010) 5 *Living Reviews in European Governance* 1, 5-7.

²⁸ S. Karapapa, *Defences to Copyright Infringement: Creativity, Innovation and Freedom on the Internet* (Oxford, UK: Oxford University Press, 2020).

²⁹ J. Griffiths and L. McDonagh, 'Fundamental Rights and European Intellectual Property Law - The Case of Art 17(2) of the EU Charter,' in C. Geiger (Ed.), *Constructing European IP: Achievements and New Perspectives* (Cheltenham, UK: Edward Elgar, 2013), 75-93.

between the rights of copyright owners, web intermediaries and users of the internet will be fought not just between the parties in question, but will also be influenced by court submissions made by European Union MS. Given that the EU currently lacks successful platforms like YouTube, Google News, Facebook and Twitter, it will be interesting to see which, if any, MS in their observations side with these US platform giants (and, perhaps more importantly, their users in the EU) and which MS will argue for strict enforcement of the rights of the news publishers and content providers (who are meant to benefit from the new Directive's provision in Article 15 that even using small snippets of news articles should require payment by platforms).

The authors' aim with their current piece has been to shine a light on how the law of European copyright comes into being. It is a worthwhile and necessary scholarly activity and is only likely to grow in importance; the significance of MS observations will certainly not lessen in the coming years. One aspect that could prove important in this regard is the role of the public. As noted, debates over the 2019 Directive did resonate within civil society. In upcoming cases if MS observations - most notably, those of France - continue to be skewed towards copyright owners rather than the public, we may see civil society activism at national and EU levels. The conversation over EU copyright law-making may yet become even more multi-faceted and complex.

Who is steering the jurisprudence of the European Court of Justice? The influence of Member State submissions on copyright law

Marcella Favale,* Martin Kretschmer[†]
and Paul L. C. Torremans[‡]

The juridification of the European policy process is increasingly fragile, and little understood. This study develops a novel methodology to investigate the influence of Member States on the rulings of the Court of Justice of the European Union (CJEU). The focus is on the domain of copyright law which has seen a dramatic escalation of preliminary references to the Court, indicating a normative void. Examining 170 documents relating to 42 cases registered between 1998 and 2015, we measure empirically the impact of submissions by Member States and the European Commission on the interpretation of copyright concepts. We show that France is the most influential country by some distance, both in terms of the number of interventions (an ‘investment’ in policy) and in terms of persuasive power (arguments adopted by the Court). The evidence also suggests that the departure of the UK from EU litigation will disturb the delicate balance of CJEU jurisprudence.

INTRODUCTION

The Court of Justice of the European Union (CJEU) plays a role quite unlike any other international court in what has been called ‘a notable juridification of the European policy process’.¹ In a time of potential disintegration, it has become more important than ever to understand how the Court performs its integrating role in a contested political environment. This requires an analysis that does not rely on the assumption of legal autonomy. We need to understand the forces that shape the behaviour of the Court of Justice beyond an analysis of the case law and the Court’s evolving jurisprudence.

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1 R. Dehousse, *The European Court of Justice: The Politics of Judicial Integration* (London: Macmillan, 1998) 177.

Political science treats the possibility of autonomous action of the Court with scepticism, often suggesting that the Court's rulings are determined by the anticipated reactions of national governments.² In this study, we develop an empirical approach that uses the window of Member States' written observations to investigate the influence of governments on the jurisprudence of the Court in one specific subject domain: copyright law.

In her pioneering research on the behaviour of governments before the Court, Marie-Pierre Granger³ argued that carrying out a study to measure the impact of governments' written observations was not feasible. It is certainly true that since 'written observations' are treated as 'confidential', and are no longer published in the Court proceedings, this task can appear daunting. However, in order to make a significant advance in understanding the role of national governments in relation to the Court of Justice, these obstacles need to be overcome.

Our core research question was initially anchored in the fast-moving domain of copyright law because the CJEU seemed to fill a normative void, with a dramatic escalation of cases.⁴ We were concerned with the possibility that the jurisprudence of the Court was open to capture, and that national governments may be able to steer the Court to produce policy outcomes that were politically unachievable.

Even though there are certain limitations to capturing all governments' written observations *verbatim*, we show that it is possible to assemble sufficient data to establish trends and construct a number of possible scenarios. With the assistance of supportive agents before the Court, the Court Registry, and Freedom of Information requests (both under Regulation 1049/2001 and national legislation), we have been able to produce a near comprehensive database of interventions and outcomes in 42 copyright cases before the Court of Justice. This allows a considerable advance in our knowledge (both methodologically and in substance) about the functioning of jurisprudence in the complex and elusive structure we call 'Europe'. For the first time, it is possible to see how Member States and the Commission are nudging the Court in a specific subject domain. Drawing on this picture, we can also simulate different scenarios prompted by Europe's unique geopolitical context, including the departure of the United Kingdom from the European Union.

The research underpinning this study is our previous work on the Court of Justice.⁵ Our earlier study investigated empirically two frequently made claims: first, that the Court failed to develop a coherent copyright jurisprudence

2 C.J. Carrubba, M. Gabel and C. Hankla, 'Judicial Behavior under Political Constraints: Evidence from the European Court of Justice' (2008) 102 *Am Polit Sci Rev* 435.

3 M.P. Granger, 'When governments go to Luxembourg ... the influence of governments on the Court of Justice' (2004) 39 *EL Rev* 1, 1. See also, generally, M.P. Granger, 'Les stratégies contentieuses des Etats devant la Cour' in P. Mbongo and A. Vauchez (eds), *Dans la fabrique du droit européen* (Bruxelles: Bruylant, 2009).

4 Preliminary references increased from six copyright cases filed in the 10 years following the Phil Collins case (C-92/92), six cases in the five years between 2002 and 2006, 21 cases in the five years between 2007 and 2011, to 43 cases between 2012 and 2015.

5 M. Favale, M. Kretschmer, P. Torremans, 'Is there a EU Copyright Jurisprudence? An empirical analysis of the workings of the European Court of Justice' (2016) 79 *MLR* 31.

(lacking domain expertise, copyright specific reasoning, and predictability) and second, that the Court pursued an activist, harmonising agenda (resorting to teleological interpretation of European law). We analysed the allocation of copyright and database right cases by Chambers of the Court, Advocate General (AG) and Reporting Judge, and investigated the biographical background of the Judges and AGs sitting. We also traced patterns of reasoning in the Court's approach through quantitative content analysis. We identified the legal *topoi* that were employed in the opinions and decisions, and then linked the occurrence of these *topoi* to the outcome of each case. The results showed that private law, and in particular intellectual property law expertise was almost entirely missing from the Court. However, we found that the Court had developed a mechanism for enabling judicial learning through the systematic assignment of cases to certain Judges and AGs. We also found that the Court had developed a 'fair balance' *topos* linked to Judge Malenovský (rapporteur on 24 out of then 40 copyright cases 1992–2012) that did not predict an agenda of upward harmonisation, with about half of judgments narrowing rather than widening the scope of copyright protection.

Our earlier study tried to lift the lid on how the CJEU works as a social body making copyright law. The focus of this new research moves from the judiciary to the role of governments in shaping the copyright jurisprudence of the Court.

There are considerable resources available from the political science literature on how to approach this question. In particular, empirical socio-legal research has suggested that while various organisations use strategic litigation (preliminary references) to steer judicial policy,⁶ Member States can use their interventions via written observations for the same purpose.⁷ According to some research, governments use participation in litigation to try to obtain favourable decisions⁸ because they understand that they can influence EU jurisprudence through well-written and well-argued observations.⁹ *A fortiori*, governments have realised that with successful interventions before the Court they can obtain the reversal of European policies that they opposed without success in the EU Council.¹⁰ However, other empirical research has suggested that the European judiciary is constrained in its rulings by fear of overturning or disapplication from the referring Member State, and that it acts accordingly.¹¹

While the present study focusses on copyright case law, its methodological approach can be applied to any area of law before the CJEU. Indeed, the systematic analysis of briefs and submissions before a court is a promising and

6 H. Rasmussen, *On Law and Policy in the European Court of Justice* (Dordrecht: Martinus Nijhoff, 1986) 270.

7 Granger 2004, n 3 above, 1.

8 J.H.H. Weiler, 'The Transformation of Europe' (1991) 100 *Yale Law Journal* 2403.

9 J. Collins, 'Representation of a Member State before the Court of Justice of the European Communities: practice in the United Kingdom' (2002) 27 *EL Rev* 359.

10 Granger 2004, n 3 above, 9.

11 n 2 above, 9. On the same topic of the impact on CJEU decisions of possible Member States non-compliance, see also G. Garrett, R.D. Kelemen, and H. Schulz, 'The European Court of Justice, National Governments, and Legal Integration in the European Union' (1998) 52 *International Organization* 149.

fast developing field of enquiry, opening a new perspective on the workings of the judiciary.¹²

After a brief overview of the copyright literature discussing the normative role of the CJEU and the way it addresses recurrent litigation on particularly controversial topics, the article empirically analyses the Court's copyright jurisprudence, to provide measurable answers to a number of instrumental sub-questions:

1. What are the most contested legal concepts in EU Copyright Law?
2. Who are the Governments interested in shaping copyright jurisprudence and, specifically, on which legal concepts are they intervening?
3. Which interests are Governments supporting (e.g. rightholders' or users')?
4. To what extent are Governments successful in steering the Court towards their interpretation of legal concepts?

The article proceeds as follows. Having set the context, our methodological approach will be explained and justified in the following section. The third section will provide the conceptual framework for analysing the normative role of the Court, using the example of the concept of 'communication to the public' to illustrate the implications. The fourth section will scope the legal concepts that recur most frequently in copyright litigation; this we assume is outlining a normative void. The fifth section identifies the countries that are most active in copyright litigation and the sixth presents and discusses our central empirical findings, quantifying the influence of each country before the Court and their relative position in favour of rightholders or users. The final section offers a conclusion, interpreting the findings for the 'production of Europe'.

METHODOLOGY

This article extends methods used in our previous work and in previous social science research. Marie-Pierre Granger¹³ was first to study the litigation strategies of governments intending to have an impact on the jurisprudence of the Court of Justice. Her dataset includes the number of governments' written observations, the areas of intervention, and the number of interventions in preliminary references filed by a court of the same government in the years

12 Recent studies that reflect the empirical turn in copyright litigation research include H. Kalimo, T. Meyer and T. Mylly, 'Of Values and Legitimacy – Discourse Analytical Insights on the Copyright Case Law of the Court of Justice of the European Union' (2018) 81 *MLR* 282; T. Rendas, 'Copyright, Technology and the CJEU: An Empirical Study' (2018) 49 *IIC – International Review of Intellectual Property and Competition Law* 153; E. Rosati, *Copyright and the Court of Justice of the European Union* (Oxford: OUP, 2019); M. Sag, 'Empirical studies of copyright litigation' in *Research Handbook on the Economics of Intellectual Property Law* (vol ii – analytical methods) (Northampton: Edward Elgar, 2019).

13 Granger 2004, n 3 above.

between 1995 and 1999. Her methods included structured questionnaires and (qualitative) interviews of agents acting for governments.

Carrubba¹⁴ measured the impact of governments' observations on Court of Justice rulings involving the government as a litigator. In particular, the work measured how the threat of non-compliance (in national courts) or overriding (in the Council) influences the Court's decisions. To this end, he employed textual analysis (coding) of legal documents (cases between 1987 and 1997) and statistical analysis, including regression modelling of binary response variables (probit model). The document analysis involved coding the ruling and the written observations by capturing the preference of the government on each individual legal issue.

Cramér and colleagues¹⁵ also use content analysis (coding) of governments' written observations and preliminary reports¹⁶ before the CJEU between 1997 and 2008, and descriptive statistics. Unlike other research¹⁷ they break down the observations into legal arguments. The most interesting finding of this work is that the litigation behaviour of Member States is consistent with their government's economic model and therefore with their mainstream policies. Cramér et al's research also codes the relative position of countries as 'pro EU Integration' or 'pro National Sovereignty'.¹⁸

In our study, we use content analysis of documents (coding), a structured questionnaire recording governments' suggested answers (followed by unstructured feedback from agents and civil servants on our preliminary findings) and basic statistical computation of the data. The research design progressed in the following steps:

First, doctrinal analysis was used to identify groups of preliminary references demanding clarifications from the Court on the same copyright concept (for example, 'communication to the public'). The dataset, consisting of all 78 copyright cases registered between 1998 and 2015 (and concluded before the Court) was clustered on the basis of the main legal concept examined by each preliminary reference. The results show that more than half of all preliminary copyright references were filed on only five concepts, which therefore received more attention from the CJEU, indicating a potentially contested policy direction.

Secondly, the study employed content analysis (coding) on these 42 selected cases dealing with 'recurrent' concepts, to identify the arguments exposed in the written observations from Member States and the EU Commission, and their acceptance or rejection in the final ruling of the Court.

14 n 2 above, 440.

15 P. Cramér et al, 'See You in Luxembourg? EU Governments' Observations Under the Preliminary Reference Procedure' Swedish Institute for European Policy Studies SIEPS 2016:5 at <http://www.sieps.se/en/publications/2016/see-you-in-luxembourg-eu-governments-observations-under-the-preliminary-reference-procedure-20165/> (last accessed 16 August 2018).

16 The preliminary report is an internal court document that is drafted by the Reporting Judge and it is circulated among the members of the chamber before the ruling. It has been published in the Court Repertoire until the year 2012.

17 B.A. Kilroy, *Integration Through Law: ECJ and Governments in the EU* (1999) PhD diss, University of California, Los Angeles.

18 n 15 above, 27.

Thirdly, statistical analysis was deployed to establish relationships between the outcome of the case and the written observations. The analysis captures, first, the interests of governments in a particular legal concept; and second, the correlation of their submissions on the interpretation of individual copyright concepts with the outcome of the Court's decision in each case. Together they produce a measure of influence for each Member State.

To explore possible explanations for the observed patterns, finally, these findings were circulated among court agents and civil servants for feedback. This qualitative element allows a more subtle understanding of behaviour, and shapes the interpretation offered in our conclusions.

Sample construction

Our sample includes only preliminary references, in line with all cited previous research, because these are central to the question of juridification of the European copyright policy process.¹⁹ Within our initial population of all 78 copyright cases registered between 1998 and 2015, we identified 42 cases in which there was a 'recurrence' of the same legal issue (which we defined as five or more references to the CJEU on the same concept). The justification for reducing the sample to cases that dealt with concepts that were subject of repeat references is twofold. Pragmatically, it produced a manageable data set. More pertinently, the prevalence of certain legal issues within copyright law points to a normative void, i.e. a regulatory space within the *acquis communautaire* that stakeholders and governments are trying to fill with diverging policies. This could be seen as an alternative to legislative action, or as an opportunity to correct earlier legislation or case law.²⁰

For these 42 'strategic' cases, 170 case documents were compiled, consisting of the published court documents (Advocate General's Opinion and the Court's Ruling) and the written submissions by the European Commission and Member States that chose to intervene. These are the primary sources of our study.

While the ruling and the AG Opinion for each case are available on the CJEU website,²¹ government and Commission Submissions are not published. We first contacted the Court Registry in order to apply for access to these documents, although aware that the Court was not mentioned among the EU institutions subject to Regulation 1049/2001 regarding public access to official documents.²² We thought we could rely on a number of factors: a) the purpose of

19 Breach proceedings brought by the Commission against allegedly infringing Member States were excluded, n 5 above, 38.

20 See generally on this point, J. Griffiths, 'Constitutionalising or harmonising? – the Court of Justice, the right to property and European copyright law' (2013) 38 EL Rev 65; and M. van Eechoud, 'Along the Road to Uniformity – Diverse Readings of the Court of Justice Judgments on Copyright Works' (2012) 3 JIPITEC 60.

21 <http://curia.europa.eu/>.

22 Regulation (EC) 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJEC L 145/43 31.05.2001.

accessing the documents for scientific research; b) our willingness to enter a non-disclosure agreement; c) the justification for exclusion of judiciary documents in current EU and national regulations (it is central to the CJEU's own case law on Regulation 1049/2001 whether 'proceedings remain pending').²³ The Court Registry responded that they were unable to grant access to the requested documents because government submissions are 'confidential'. While the Registry provided a number of older 'Reports for the Hearing' which are compiled by the Reporting Judge in most cases (including suggested answers to multiple questions posed to the Court for a preliminary ruling), they were not prepared to explore new avenues for accessing 'written observations' by Member States.

We therefore had to employ a cumbersome data collection strategy that relied on obtaining submissions directly from the source. The European Commission is covered by Regulation 1049/2001, and Member States have national freedom of information legislation.²⁴

Our first point of access was through Court Agents (acting on behalf of Member States) and civil servants instructing these agents. Many were extraordinarily helpful, but some were not. Where it was possible, we obtained answers to structured questionnaires recording each government's suggested answers to questions posed to the Court. We supplement these materials with documents received from other researchers²⁵ who kindly shared their own data. We also reverse-engineered references to suggested answers from specific Member States as they appear in the published AG Opinions and Rulings of the Court. Gaps were filled by Freedom of Information requests to the

23 The CJEU considered the excludability of court pleadings from disclosure in *Sweden v API*, and concluded that judicial deeds can be excluded *per se*, because of the need to preserve the 'serenity of judgements' and 'equality of arms' (it cannot be that only one party to the case would be obliged to disclose). See joined cases C-528/07 P and C-532/07 P *Sweden and Others v API and Commission* [2010] ECLI:EU:C:2010:541 at [93], regarding a disclosure of Commission documents under Regulation 1049/2001 (not access to a Government's written observation). This case is interesting because the Court argues the rationale of EU legislation (from Art 255 TFEU to the Regulation) for the exclusion of judiciary deeds ('pleadings') from freedom of access. The CJEU specifies that its documents are rightly excluded from the Regulation 'while those proceedings remain pending'.

24 In EU member states, Freedom of Information Acts (FOIA) or equivalent laws provide for a fundamental freedom to access administrative documents in order to promote citizen participation in the democratic process. These documents normally refer to the deeds of the public administration, and typically provide for a number of exclusions, for example to protect the public interest, trade secrets, or privacy. Judicial proceedings are often excluded not *per se*, but only when the proceedings could be endangered by the disclosure. The British FOIA for example excludes access to administrative documents when justified by the need to preserve the administration of justice (Freedom of Information Act, s 31(1)(c)). The French corresponding law excludes the documents whose disclosure would harm judicial proceedings (Art L 311-5 1(f) III Livre of the Code des relations entre le public et l'administration). While it is arguable that possible harm can only occur during the proceedings, not after, not all FOIAs mention judicial proceedings among the exclusions. Italy, for example, does not include judicial proceedings among the exceptions listed in Art 24, L. n. 241/1990 ('Nuove norme in materia di procedimento amministrativo e di diritto di accesso ai documenti amministrativi' Gazzetta Ufficiale del 18 agosto 1990 n. 192, as modified by L. 15/2005). Other countries, such as the Scandinavians, grant full access to all public documents, including court proceedings, unless a superior interest is endangered.

25 See note * above and our acknowledgements.

European Commission and various Member States.²⁶ The final dataset contains 170 documents, with a total of 584 data points or observations on the selected 42 cases. The complete dataset of suggested answers by Member States, stratified by groups of ‘recurrent concepts’ can be found in Figure 8 below.

THE NORMATIVE ROLE OF THE CJEU IN THE COPYRIGHT LITERATURE

There is consensus in the literature that the Court of Justice is playing an increasingly central role in shaping not only the nuances but the contours of copyright law in Europe. Most academic analysis responds to specific rulings of the Court, often by means of individual case comments focussing on decisions that may be seen as seminal or affect wider sectoral interests. With the dramatic increase in preliminary references since about 2008, the copyright rulings of the Court also become traceable as an emerging body of jurisprudence, inviting transversal and evolutionary treatment across a range of cases. Competition practices have been analysed by Preck²⁷ and Stuyck.²⁸ Charter rights perspectives have been developed by Oliver and Stothers.²⁹ The exclusive right of communication to the public³⁰ has been extensively discussed. Copyright exceptions are explored by a number of authors, in particular, the reproduction for private copy and the related levies to provide fair compensation,³¹ the exception for parody³² and the exception for libraries.³³

26 The lack of transparency about Member States’ and the Commission’s interventions before the Court remains troublesome and will be the subject of a separate article. There should not be a need for freedom of information requests nor subterfuge (such as reconstructing successful interventions from references to written observations in the Opinions of the Advocate General). In our sample of preliminary references, no government was a party, and access to legal submissions after proceedings are concluded cannot be said to weaken the position of parties during the process. In our view, a government’s ‘written observations’ come close to proposals in a legislative process. They should be treated as such.

27 M. Prek and S. Lefèvre, ‘Competition Litigation before the General Court: Quality if not Quantity?’ (2016) 53 *Common Market Law Review* 65.

28 J. Stuyck, ‘The Court of Justice and the Unfair Commercial Practice Directive’ (2015) 52 *Common Market Law Review* 721.

29 P. J. Oliver and C. Stothers, ‘Intellectual Property under the Charter: Are the Court’s scales properly calibrated?’ (2017) 54 *Common Market Law Review* 517.

30 Griffith, n 20 above, 13. See also E. Rosati ‘Towards an EU-wide copyright? (Judicial) pride and (legislative) prejudice’ 1 IPQ (2013) 47 at 11. See also, n 19 above, 74; 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* 559, 569; L. Bentley et al, ‘The Reference to the CJEU in Case C-466/12 Svensson’ University of Cambridge Faculty of Law Legal Studies Research Paper Series, 6/2013 at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2220326 (last accessed 30th of June 2019).

31 M. Kretschmer, *Private Copying and Fair Compensation: An empirical study of copyright levies in Europe* (London: Intellectual Property Office UK, 2011).

32 E. Rosati, ‘Just a laughing matter? Why the decision in Deckmyn is broader than parody’ (2015) 52 *Common Market Law Review* 511. See also The European Copyright Society’s ‘Opinion on the Judgment of the CJEU in Case C-201/13 Deckmyn’ (2015) 37 EIPR 127.

33 E. Linklater, ‘Make me an offer I won’t regret: Offers to license works on acceptable terms cannot block libraries’ ‘right’ to digitize for access on dedicated terminals: Technische Universität Darmstadt’ (2015) 52 *Common Market Law Review* 813.

Some scholars have taken issue with the so-called ‘normative’ role of the CJEU, stepping in when the law is not sufficiently clear or exhaustive.³⁴ In our previous work³⁵ we investigated the claims by this literature that the Court is pursuing a harmonising agenda,³⁶ overstepping its mandate by an excessively teleological interpretation of the law.

These systematic studies of the emerging European Copyright jurisprudence are central to our discourse because they define the doctrinal landscape of copyright which our empirical study seeks to explain. Mireille van Eechoud, Andreas Rahmatian and Eleonora Rosati for example, in separate works, focussed on the originality requirement as defined by the Court in *Infopaq* and as confirmed in the following jurisprudence.³⁷ Jonathan Griffiths and Martin Husovec analysed the role of fundamental rights in key cases addressing the liability of internet intermediaries.³⁸ The most ambitious early analysis of the CJEU’s copyright jurisprudence as a whole is Matthias Leistner’s review of 2014.³⁹

Leistner aims to locate the key issues of law discussed before the court in the full range of copyright cases, which together give shape to a new body of European copyright law. He examines the originality requirement,⁴⁰ the reproduction right,⁴¹ the communication right,⁴² the distribution right,⁴³ digital exhaustion,⁴⁴ copyright exceptions⁴⁵ and fair compensation,⁴⁶ as well as the specific concept of communication to the public.⁴⁷ He recognises both the horizontal range of the autonomous interpretation of copyright concepts and the vertical depth with which these concepts are discussed. The normative role of the Court, in his view, is a necessary complement of a legislative machine that has become more and more cumbersome.⁴⁸ The activist role of the Courts with respect to copyright law should not be discouraged, but even supported by the use of preliminary references by Member States.⁴⁹

The significance of the conceptual developments identified by Leistner is confirmed by our analysis which evidences a disproportionately high concentration of cases on these topics. In Appendix II (see Supporting Information), we have listed the doctrinal pressures chronologically for the five key concepts

34 See generally, Griffiths, n 20 above and van Eechoud, n 20 above.

35 n 5 above, 36.

36 Griffiths, n 20 above, 24; van Eechoud, n 20 above, 77; Leistner, n 30 above, 595.

37 See generally, van Eechoud, *ibid* and Rosati, n 32 above. See also A. Rahmatian, ‘Originality in UK Copyright Law: The Old “Skill and Labour” Doctrine Under Pressure’ (2013) 44 *International Review of Intellectual Property and Competition Law* 4.

38 Griffiths, n 19 above; M. Husovec, *Injunctions Against Intermediaries in the European Union* (Cambridge: CUP, 2017).

39 n 30 above.

40 *ibid*, 564.

41 *ibid*, 569.

42 *ibid*, 569.

43 *ibid*, 574.

44 *ibid*, 574.

45 *ibid*, 584.

46 *ibid*, 586.

47 *ibid*, 592.

48 Leistner argues that the active role of the Court reflects the ‘hydraulics of powers’ under which the EU’s legislative role is waning, *ibid*, 599.

49 *ibid*, 599.

we identified empirically as recurrent. These are: 1) Communication to the public, 2) Copyright exceptions, 3) Levies (fair compensation for private use), 4) Distribution Right, and 5) Liability of Intermediaries. All other legal issues have four or less occurrences within the sample of 78 preliminary references.⁵⁰

Most prominence is given to the concept of ‘communication to the public’, whose evolution through the jurisprudence of the CJEU provides a telling example of the Court’s normative role. In the following section, we use the concept of ‘communication to the public’ in order to elaborate the scope for competing interpretations, and the market effects they might have. This is important in order to understand what is at stake in the potential influence exercised by Member States through their submissions. We selected the concept of ‘communication to the public’ because it is the most frequently appearing copyright issue before the CJEU (it is engaged 15 times in our sample). It is therefore possible to trace the normative concept and its development through a considerable number of cases. Each choice made by the Court will have an impact on the parties concerned, and Member States may have tried to convince the CJEU in their submissions to go down alternative doctrinal paths.

The concept of ‘communication to the public’

The question ‘who steers the development of law’ presupposes that the law is indeterminate or offers sufficient flexibility for jurisprudence to take different directions. These different directions will have both doctrinal and societal consequences. We now illustrate this claim, using the specific example of the concept of ‘communication to the public’. This enables an understanding of the scope for intervention by Member States through submitting so-called ‘written observations’, i.e. a legal analysis with suggested answers to the questions posed to the Court.⁵¹

The main EU provision regarding the exclusive right of communication to the public is found in Article 3 of Directive 2001/29.⁵² Three elements are included in the definition of a communication to the public: (i) it can take place by wire or through wireless means, (ii) including on demand services, and (iii) any communication to the public of the work is included in the exclusive right to authorise such communication to the public that is given to the author. All other elements and questions surrounding the concept of communication to the public and how it applies in a modern setting are left undefined.

⁵⁰ Detailed descriptive statistics can be found in the next section below.

⁵¹ The rules of procedure of the Court of Justice are summarised in Appendix I (see Supporting Information).

⁵² Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society [2001] OJ L 167/10.

The international instruments, such as the Berne Convention⁵³ and the WIPO Copyright Treaty 1996⁵⁴ (which Article 3 is implementing) do not add much detail either. That leaves plenty to play for in the interpretation of the concept. The CJEU was therefore obliged to fill the gaps and make a significant number of choices when it developed the normative framework. Each of these choices is more favourable to the position of one of the parties than to the position of another, and the Member States may have tried to influence these choices. We will now proceed to illustrate this in a non-exhaustive way, before we embark on the systematic analysis of the submissions of the Member States and their impact on the CJEU's copyright case law.

In a digital online environment, there is scope for rebroadcasting of many sorts. Hotels (and spas, clinics, etc) have for years made centrally received broadcasts available in individual hotel rooms and lobbies, but in the same vein it is now possible to pick up a signal and stream it online, in real time or in delayed and edited format. Do these activities involve a new act of communication to the public and is there a new authorisation that needs to be paid for? Or is there, in all or in some of these circumstances, merely one original communication to the public?⁵⁵ Broadcasters and hotel owners, if we refer only to these by way of example, have opposite interests on this point. A narrow definition of communication to the public would favour the hotels and with them the national government that wants primarily to encourage the tourism industry. Those in favour of the content providing industry would on the other hand favour a broad interpretation. And whatever the answer the Court eventually gave, a slight change in (technological) circumstances would mean that parties had an incentive to go back to the Court in the hope of obtaining a different answer that favoured their interests.

Similarly, how do we deal with hypertext links? Does the provision of such a link involve a new communication to the public of the copyright work that is found at the location to which the link directs the user? Parties with very different interests have an incentive to return to the Court to obtain a slightly different answer when new technologies emerge.

So how did the 'communication to the public' case law of the Court take shape? In the view of the Grand Chamber, who dealt with this topic in *Reha Training Gesellschaft für Sport- und Unfallrehabilitation mbH v Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte eV (GEMA)*⁵⁶ (*Reha Training*) (a case concerning the playing of music on TV sets installed in a rehabilitation centre) in the aftermath of various judgments touching upon the topic, there are several complementary criteria, which are not autonomous

53 Berne Convention for the Protection of Literary and Artistic Works 1886 at http://www.wipo.int/wipolex/en/treaties/text.jsp?file_id=283693 (last accessed 2 December 2019).

54 WIPO Copyright Treaty 1996 at <https://wipolex.wipo.int/en/text/295157> (last accessed 2 December 2019).

55 The Austrian and Irish governments submitted in SGAE that the mere installation of equipment in rooms did not constitute an act of communication to the public. Opinion of Advocate General Sharpston in case C-306/05 *Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA* ECLI:EU:C:2006:479 at [26].

56 Case C-117/15 *Reha Training Gesellschaft für Sport- und Unfallrehabilitation mbH v Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte eV (GEMA)* ECLI:EU:C:2016:379.

and which are interdependent. Depending on the circumstances of the case these factors may be present to widely varying degrees. As we shall see, these criteria appeared at different stages in the development of the Court's case law and favour the position of different parties. The Grand Chamber is trying to bring the criteria together in an overall framework, pointing to *Phonographic Performance (Ireland) Limited v Ireland, Attorney General*⁵⁷ (*Phonographic Performance*), where the Court ruled in favour of a (new) communication to the public in the hotel and therefore in favour of the rightholders by using certain of the criteria, whilst on the very same day favouring other criteria in *Società Consortile Fonografici (SCF) v Marco Del Corso*⁵⁸ (*SCF*) (a case concerning the status of music played in a dentist's writing room). In *SCF* the Court held that no communication to the public took place in a dental practice and hence favoured the position of users. This latter *SCF* case shows clearly the attempts of the Member States to use their submissions to have an impact on the normative developments. The French government argued strenuously in favour of there being a communication to the public on the basis of the dentist playing the music and therefore communicating the work to the public and on the basis that eventually there would be enough listeners as patients visit the surgery. The latter point was given less importance in these submissions. Such an approach would, of course, favour rightholders. The CJEU did not accept this submission and held any such communication to be *de minimis*. Here the CJEU was clearly more convinced by the submission of the Italian government that the playing of the music by the dentist was of no economic importance and was not part of his economic activity.⁵⁹ By accepting these submissions and holding that the activity did not amount to a communication to the public the CJEU rather favoured the users of copyright works.

In the argument, the Grand Chamber takes as a starting point that there has to be both an act of communication and the communication of the work has to be to a public. This is illustrated with the *SBS Belgium NV v Belgische Vereniging van Auteurs, Componisten en Uitgevers (SABAM)*⁶⁰ (*SBS Belgium*) case where the scenario of direct injection of broadcasts yielded an act of communication on behalf of the broadcasting stations, but no public. There was also an act of communication (and communication to the public overall) when add-ons that gave access to works without permission were pre-installed on a multimedia player.⁶¹ On this point the Commission had repeatedly made submissions to the CJEU that the act of communication presupposed that the work was communicated to persons that are not present at the place of transmission.⁶² The emphasis on the (pre-)installation of the add-ons, with the assumption that it is likely that a number of buyers will use them and receive access to

57 Case C-162/10 *Phonographic Performance (Ireland) Limited v Ireland, Attorney General* ECLI:EU:C:2012:141.

58 Case C-135/10 *Società Consortile Fonografici (SCF) v Marco Del Corso* ECLI:EU:C:2012:140.

59 Opinion of Advocate General Trstenjak in Case C-135/10 *Società Consortile Fonografici (SCF) v Marco Del Corso* ECLI:EU:C:2011:431 at [49] *et seq.*

60 Case C-325/14 *SBS Belgium NV v Belgische Vereniging van Auteurs, Componisten en Uitgevers (SABAM)* ECLI:EU:C:2015:764.

61 Case C-527/15 *Stichting Brein v Willems* ECLI:EU:C:2017:300.

62 Opinion of Advocate General Trstenjak in *SCF* n 59 above at [49] *et seq.*

the work (thus forming the public), can be seen as the successful result of the repeated submission by the French government emphasising the fact that there is a communication to the public if played or given access to a number of individuals, some of which may eventually take advantage of the option.⁶³ Such a broad approach favours rightholders over users.

An act of communication refers to any transmission of protected works, irrespective of the technical means or process used. Any transmission or retransmission which uses a specific technical means must be separately authorised. Here the Court favours the interests of rightholders. *ITV Broadcasting Ltd and Others v TVCatchUp Ltd*⁶⁴ is a clear example of a case where parties returned to the Court to try and include, or exclude depending on the party concerned, online streaming of a television broadcast from the concept of an act of communication. Retransmission by internet streaming was eventually held to amount to a communication to the public in the latter case.⁶⁵

Secondly, the work must be communicated to the public. From the older cases, such as *Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA*⁶⁶ (SGAE), the Grand Chamber takes the basic idea that the concept of a public involves an indeterminate number of potential recipients and a fairly large number of persons (as submitted in that case by the French and Polish governments⁶⁷), only to qualify that immediately with the teaching of *SCF*⁶⁸ that the work must be made available in any appropriate manner to 'persons in general'. Individuals belonging to a private group can be excluded, as can be small or insignificant groups. The size of the audience is determined in the light of the potential cumulative effect of there being various audiences, either a large group at the same time or individuals or small groups in succession.⁶⁹

The Grand Chamber then also refers to the requirement of there being a new public, i.e. a public not taken into account by the rightholders when they authorised the original communication to the public. This is where the line of cases involving the operators of cafes, restaurants, hotels and spas (and now also rehabilitation clinics) comes in. In each of these cases the Court held that there was a new public, but there was no public in the *SCF* case in dentist Del Corso's waiting room. And neither was there a new public in the leading case in the sub-clusters of internet hypertext link cases, *Nils Svensson and Others v Retriever Sverige AB*⁷⁰ (*Svensson*), that dealt with the inclusion on a company's website of clickable Internet links (hyperlinks) redirecting users to press articles

63 *ibid* at [59].

64 Case C-607/11 *ITV Broadcasting Ltd and Others v TVCatchUp Ltd* ECLI:EU:C:2013:147 (*ITV Broadcasting*).

65 Case C-275/15 *ITV v TV Catchup Ltd* ECLI:EU:C:2017:144 at [23].

66 Case C-306/05 *Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA* ECLI:EU:C:2006:764.

67 Opinion of Advocate General Sharpston in case C-306/05 *Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA* ECLI:EU:C:2006:479 at [33].

68 *Reha Training* n 56 above.

69 On the point of there being a public, see also case C-265/16 *VCAST v RTI SpA* ECLI:EU:C:2017:913.

70 Case C-466/12 *Nils Svensson and Others v Retriever Sverige AB* ECLI:EU:C:2014:76. The analysis was confirmed in case C-301/15 *Soulier and Doke v Ministère de la Culture et de la Communication* ECLI:EU:C:2016:878 at [36].

in which the applicants (Mr Svensson and his colleagues) held the copyright. The work linked had already been communicated to all internet users and the link, whilst involving an act of communication, could not reach a new public. Other cases then followed to see e.g., whether the same logic applied to framing scenarios.⁷¹ That was held to be the case, but on the other hand the posting on one website of a photograph previously posted on another website, without any restriction preventing it from being downloaded and with the consent of the copyright holder, did amount to a communication to the public and was distinguished from the hyperlinking scenario.⁷²

Further criteria highlighted by the Grand Chamber include the profit-making nature of the broadcast or rebroadcast involved and the receptivity of the public. Still, the German government argued successfully that receptivity of the public does not determine the profit making nature of the broadcast. It is merely a relevant factor.⁷³ What becomes clear from the Grand Chamber's attempt to propose a comprehensive approach is that in different cases different criteria will play a vital role.⁷⁴ The emphasis will not only be placed on different points, there is also clear evidence that the Court brought in additional factors as its case law developed. These criteria and their weighing will determine whether in a particular case there is a communication to the public or not and whose interests will eventually prevail. That point was again brought home by the Court's second chamber in *GS Media BV v Sanoma Media Netherlands BV and others (GS Media)*, when the for-profit argument and the knowledge point were emphasised and it was stated that

in order to establish whether the fact of posting, on a website, hyperlinks to protected works, which are freely available on another website without the consent of the copyright holder, constitutes a 'communication to the public' within the meaning of that provision, it is to be determined whether those links are provided without the pursuit of financial gain by a person who did not know or could not reasonably have known the illegal nature of the publication of those works on that other website or whether, on the contrary, those links are provided for such a purpose, a situation in which that knowledge must be presumed.⁷⁵

In this respect the German and Portuguese governments had submitted that there was no communication to the public and that subjective factors should not be taken into account. The French government on the other hand had submitted that there was a communication to the public on the basis that the

71 See the order in case C-348/13 *BestWater International GmbH v Michael Mebes and Stefan Potsch* ECLI:EU:C:2014:2315.

72 As it was, amongst other reasons, not required for the sound operation of the Internet. Case C-161/17 *Land Nordrhein -Westfalen v Dirk Renckhoff* ECLI:EU:C:2018:634.

73 Conclusion of Advocate General Bot in case C-117/15 *Reha Training Gesellschaft für Sport- und Unfallrehabilitation mbH v Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte eV (GEMA)* ECLI:EU:C:2016:109 at [67] and [50] of the judgment at n 56 above.

74 The need for an individual assessment was confirmed in case C-527/15 *Stichting Brein v Willems* ECLI:EU:C:2017:300.

75 Case C-160/15 *GS Media BV v Sanoma Media Netherlands BV and others* ECLI:EU:C:2016:644 at [55].

acts involved facilitated access to the material that was already on the Internet.⁷⁶ This financial gain and knowledge element was also important when the Court held that the operation of a sharing platform that through indexing data gave users access to copyright works amounted to a communication to the public.⁷⁷

The crucial point for this study is that we aim to determine whether the observations submitted by the parties (including their repeat submissions if cases and follow-on cases are brought deliberately) have influenced the development of the Court's case law. This may provide indications of a deliberate strategy to bring cases to steer or alter the evolution of the case law of the Court.

RECURRENT CONCEPTS IN COPYRIGHT LITIGATION

Having demonstrated for one central concept of EU copyright law how reasoning may be shaped, favouring one party or another, we now explain our selection of concepts for detailed empirical investigation. We reduced the complete population of 78 copyright cases (registered between 1998 and 2015) to 42 copyright cases that ruled on concepts that had been referred to the CJEU five times or more (which we term 'recurrent' concepts). We assume that these repeat references are an indication of a contested policy direction or a normative void, i.e. an opportunity by litigators and Member States to steer the evolving jurisprudence of the Court. This section identifies these cases and analyses which Member States appear to intervene on which underlying concepts.

To this end, we have compiled two datasets: one in which we have coded the main issue discussed in each case, and one in which we have captured suggested answers to all questions referred to the Court for a preliminary ruling in each case. The dataset in which each case is coded according to the main issue discussed allows a computation of the number of written observations submitted by each country. This becomes a measure of the interest of Member States in specific legal issues. Combined with the dataset coding suggested answers, this allows establishing a correlation of written observations with the interpretation given in the ruling.

Our empirical analysis of copyright litigation starts with the identification of the most common legal concepts submitted to the attention of the Court. Five clusters of legal issues emerge as dominant in the sample. These are: 1) Communication to the public, 2) Copyright exceptions, 3) Levies (fair compensation for private use), 4) Distribution Rights, 5) Liability of Intermediaries. In grouping legal concepts into these clusters we inevitably brush over doctrinal detail, for example the case law on copyright exceptions (referring to Article 5 InfoSoc Directive⁷⁸) covers such diverse issues as technical network

76 Opinion of Advocate General Wathelet in case C-160/15 *GS Media BV v Sanoma Media Netherlands BV and others* ECLI:EU:C:2016:221 at [22]-[31].

77 Case C-610/15 *Stichting Brein v Ziggo* ECLI:EU:C:2017:456.

78 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, OJ L 167, 22.6.2001, 10-19.

copies (*Infopaq*⁷⁹), library photocopying (*Technische Universität Darmstadt*⁸⁰), and parody (*Deckmyn*⁸¹). However, it is reassuring that the copyright literature reviewed above confirms that the five legal concepts clustered here are indeed those of greatest doctrinal interest.

Figures 1 and 2 offer descriptive statistics identifying the most common legal concepts discussed before the Court. The cases were coded according to all copyright legal issues brought within each case. Cases often discuss multiple concepts. This identifies a total of 51 occurrences of the five ‘recurrent’ concepts within the 42 cases.

Legal Concept as Main Issue	Occurr	%TOT	Subm N	%TOT
A3-A8 Communication to the public	15	19,2%	58	17,6%
A5.2(b) Fair compensation Private Use	9	11,5%	60	18,2%
A5 Exceptions	6	7,7%	20	6,1%
A4 Distribution Right	6	7,7%	17	5,2%
A8 Intermediaries	6	7,7%	30	9,1%
Others	>=3	<5%		
TOT Cases	78			
TOT Cases w Recurrent Concepts (CRC)	42	54%		
TOT Submissions	330			
TOT Submissions in CRC	185	56%		
TOT Average Ref/Sub	0,64			
TOT Cluster Av. Ref/Sub	0,69			

Figure 1: Recurrent Legal Concepts as the Main Issue in CJEU Copyright Preliminary References [Colour figure can be viewed at wileyonlinelibrary.com]

Most Recurrent Legal Concepts	Occurr	%TOT
A3-A8-A2 Communication to the public	17	33,3%
A5 Exceptions	11	21,6%
A5.2(b) Fair compensation Private Use	9	17,6%
A4 Distribution Right	8	15,7%
A8 Intermediaries	6	11,8%
Others	<=4	7,8%
TOT Cases on Copyright	78	
TOT Occurrence of Legal Concepts	51	
TOT Cases with the above Legal Issues	42	

Figure 2: Recurrent Legal Concepts in CJEU Copyright Preliminary References [Colour figure can be viewed at wileyonlinelibrary.com]

The concept of Communication to the public, recalled in discussions surrounding Article 3 of the InfoSoc Directive, Article 8 of the Rental and Lending Rights Directive, and Article 2 of the Satellite Broadcasting Directive, is the most discussed, with 15 cases that refer it as the main issue. The issue of Levies, including discussions on the definition, quantification and sources of the fair compensation for private reproduction (Article 5.2(b) of the InfoSoc Directive) follows with nine cases.

79 C-5/08 *Infopaq International* ECLI:EU:C:2009:465.

80 C-117/13 *Eugen Ulmer* ECLI:EU:C:2014:2196.

81 C-201/13 *Deckmyn* ECLI:EU:C:2014:2132.

However, if we consider the total number of submissions (i.e. attempts to influence the outcome) in cases in which the above two are the main legal concept discussed, we see that Fair compensation leads, followed by Communication to the public. It is also interesting to compare the sum of the submissions elicited by these two legal issues (Communication to the public, and Levies), which outruns the sum of the submissions elicited by the other three legal issues. This indicates that parties to the litigation think most is to be gained from steering the Court on these issues. Moreover, it is notable that while litigation on Copyright Exceptions and the Distribution right has occurred more often than preliminary references on the potential liability of Internet Intermediaries (e.g., filtering or monitoring obligations for service providers) the total number of submission for the latter outnumbers the former by a ratio of 30:17. The stakes appear to be higher.

We need to consider that Member States do not have a say on what cases will be sent before the CJEU, as this is decided by national judiciaries.⁸² However, it is entirely at the governments' discretion to submit written observations in a given case.⁸³ Therefore we assume that the total number of submissions on a given legal concept can serve as one indicator of the interest of Member States in that issue. This figure however needs to be adjusted to other indicators, as the next section shows.

LITIGATION BEHAVIOUR OF MEMBER STATES: REPEAT PLAYERS IN COPYRIGHT

We now shall examine in depth who are the most active governments in submitting legal observations before the Court and explore their interest in specific copyright issues. According to previous research, it is clear that governments use participation in litigation to try to obtain favourable decisions because they understand that they can influence EU jurisprudence through good written observations.⁸⁴ Moreover, governments have realised that with a

82 However, it has been surmised that there may be collusion in some cases being 'pushed' before the court in order to foster discussion on certain subject-matters. See generally O. Amado et al, 'Lobbying at the European Court of Justice? Yes, we can!' paper for Daniel Guéguen's lecture 'Interest groups and Lobbies in the European Union' POLI-O505 (Brussels: Institute for European Studies 2012) at <http://www.pacteurope.eu/pact/wp-content/uploads/2012/06/Lobbying-at-the-European-Court-of-Justice.pdf> (last accessed 25 October 2016).

83 Some Member States intervene routinely in cases where the preliminary reference comes from their own country. The more strategic governments appear to intervene also in cases which do not directly involve their own country. For further discussion of this point, see the next section below.

84 L. Conant, *Justice Contained: Law and Politics in the European Union* (Ithaca, NY: Cornell University Press, 2002) 23; see also, generally, A. Cullen and H. Charlesworth, 'Diplomacy by other means: the use of legal basis litigation as a political strategy by the European Parliament and Member States' (1999) 36 *Common Market Law Review* 1243.

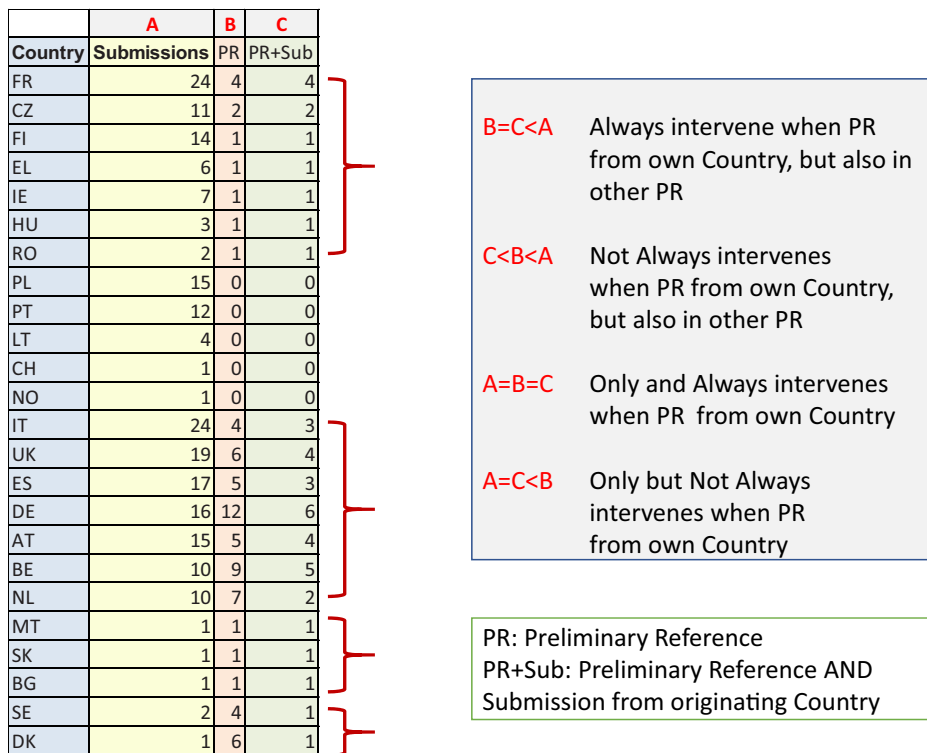


Figure 3: Copyright Repeat Players [Colour figure can be viewed at wileyonlinelibrary.com]

successful written observation before the Court they can obtain the reversal of European acts that they have opposed without success in the EU Council.⁸⁵

At first sight, the number of written observations in preliminary references points to the Member States most invested in copyright litigation before the Court. We have computed these written observations by country, obtaining a ranking of these countries. France and Italy seem the most invested, followed by the UK and then Spain, Poland, Germany, Austria, Finland, Poland, Czech Republic, Belgium and the Netherlands. However, previous research⁸⁶ suggests that in order to identify the most strategic countries we need to control for the number of written observations in their own preliminary references. In fact, some national litigation offices are mandated by the central government to intervene in all preliminary references submitted from their own countries. It is therefore important to understand to what extent governments’ interventions derive from preliminary references originating from their own country. Figure 3 captures the relationship between the number of written observations responding to a country’s own preliminary references and the overall number

85 M.P. Granger, ‘States as Successful Litigants before the European Court of Justice: Lessons from the ‘Repeat Players’ of European Litigation’ (2006) 2 CYELP 27, 33.

86 Granger 2004, n 3 above, 3.

of this country's observations.⁸⁷ Arguably this indicates which countries behave most strategically.

The comparison between a) the number of written observations submitted by one country, b) the number of preliminary references originating from that country, and c) the number of submissions by this country when preliminary references are originating from the same country, produces insights about the propensity to litigation of the various Member States. When for example the number of preliminary references is equal to the number of submissions in their own preliminary references and higher than the submissions in other cases, there is a propensity to litigation which is directly proportional to the number of 'external' submissions. This indicates a likely mandate by this government to intervene in their own country's preliminary references, but it is also invested in litigation irrespective of this mandate. When however, other variables being equal, the number of submissions responding to preliminary references originating from their own country is lower, this indicates that this government is conscious of the effects of preliminary references in its own country, and therefore tends to intervene selectively even if not mandated. We argue that this indicates an investment in litigation according to policy interest, pointing to more strategic behaviour. The more a government intervenes in preliminary references originating from other countries, the more strategic the litigation behaviour.⁸⁸

Control: Total CJEU litigation for the same period

The analysis above needs to be controlled for a number of factors, such as the size of a country's economy (gross domestic product, GDP) and overall propensity to litigate before the Court of Justice. In Figure 4, the number of interventions in all copyright cases (population of 78 cases registered 1998–2015) is displayed next to the GDP of each country. We can observe that the litigation activity of governments is not always proportional to their country's GDP. For example, Germany and the Netherlands display a low number of interventions despite their relatively high wealth. For other countries however the relation between propensity to litigation and size of economy is more evident, for example for France, Italy and the UK.

The overall propensity to litigation on the *acquis communautaire* of copyright needs to be understood within the context of the overall investment in litigation of each member state before the CJEU. Figure 5 compares the overall number of submissions in concluded preliminary references by EU Member States for

87 Tables in this article refer to countries by standardised two letter codes. We follow the European Commission's use (ISO 3166 standard with two variations: EL (not GR) represents Greece; UK (not GB) represents the United Kingdom).

88 EEA (European Economic Area) and EFTA (European Free Trade Association) members such as Norway (EEA and EFTA) and Switzerland (EFTA) have standing to submit written observations to the Court of Justice in some cases (see Appendix I, Supporting Information, on the rules of procedure of the CJEU). However, their own national courts cannot make preliminary references, as they are not members of the European Union. These countries have been omitted from further analysis.

Rank	Country	2016	Rank	Country	Submissions
1	DE	3,494.898	1	IT	24
2	UK	2,649.893	2	FR	24
3	FR	2,488.284	3	UK	19
4	IT	1,852.499	4	ES	17
6	ES	1,252.163	5	PL	15
7	NL	769.930	6	DE	16
11	PL	473.501	7	AT	15
12	BE	465.248	8	FI	14
13	AT	384.799	9	PT	12
16	IE	254.596	10	CZ	11
17	FI	234.578	11	BE	10
18	PT	205.085	12	NL	10
19	EL	194.594	13	EL	6
20	CZ	185.269	14	IE	7
22	HU	117.729	15	HU	3

Figure 4: Ranking of Member States by GDP (US\$ billion) and by number of interventions in Copyright litigation [Colour figure can be viewed at wileyonlinelibrary.com]

the same timeframe as the population of copyright cases (78 cases registered between 1998 and 2015). We observe that some countries are active litigators before the CJEU but do not seem to be focussing specifically on copyright law. This is the case, for example, for France, Italy, and Germany. Conversely, countries with a high ratio between overall litigation and copyright litigation seem to invest specifically on this policy issue. These countries include the

Country	Overall Submissions	Country	Copyright Submissions	Country	Ratio C/O
MT	2	MT	1	MT	50%
CZ	48	CZ	11	CZ	23%
PL	80	PL	15	PL	19%
FI	95	FI	14	FI	15%
IE	58	IE	7	IE	12%
LT	37	LT	4	LT	11%
PT	126	PT	12	PT	10%
FR	503	FR	24	FR	5%
ES	374	ES	17	ES	5%
UK	457	UK	19	UK	4%
EL	146	EL	6	EL	4%
AT	470	AT	15	AT	3%
SK	32	SK	1	SK	3%
HU	121	HU	3	HU	2%
IT	1054	IT	24	IT	2%
BE	529	BE	10	BE	2%
RO	109	RO	2	RO	2%
NL	604	NL	10	NL	2%
SE	121	SE	2	SE	2%
BG	83	BG	1	BG	1%
DE	1478	DE	16	DE	1%
DK	134	DK	1	DK	1%

Figure 5: Control: Overall litigation rates compared to copyright litigation rates [Colour figure can be viewed at wileyonlinelibrary.com]

Czech Republic, Poland and Finland.⁸⁹ Figure 5 illustrates the pattern by calculating for each Member State the ratio of copyright interventions as a share of overall litigation before the Court of Justice.

When we consider the country submissions for each of the clusters identified in the methodology section above, we have another interesting picture. Some countries, despite their overall involvement in EU litigation and their extremely high involvement in copyright litigation, are in fact interested only in a limited number of legal issues. It might be suggested that they intervene only on topics that are relevant for their domestic policy and where they hope to make an impact. Figure 6 shows the copyright submissions from each country broken down by main legal concept in the case.

Comm2thePub	Sub. Nr.	Levies	Sub. Nr.	Distribution Rights	Sub. Nr.	Exceptions	Sub. Nr.	Intermediaries	Sub. Nr.
FR	8	FI	8	PL	3	IT	4	IT	5
IT	5	ES	6	FR	2	AT	2	NL	3
PL	4	AT	5	ET	1	ES	2	UK	3
UK	4	FR	4	UK	1	UK	2	CZ	2
IE	3	IE	3	ES	1	PL	2	BE	2
ES	3	LT	3	CZ	1	DE	1	FI	2
FI	2	PL	3			FI	1	PL	1
EL	2	UK	3			BE	1	SE	1
PT	1	NL	3			NL	1	LV	1
DE	3	DE	2					SL	1
CZ	1	CZ	2						
HU	2	BE	2						
AT	1	PT	2						
		EL	2						
		IT	2						
		NO	1						

Figure 6: Repeat Players on individual Legal Concepts [Colour figure can be viewed at wileyonlinelibrary.com]

If we consider the number of interventions of the top three copyright litigators, France, Italy and the UK, within the five legal copyright issues in our dataset, we observe the following: France appears most interested in Communication to the Public and the Distribution right; it is also invested in Fair compensation for private reproduction (Levies) but not at all in Copyright Exceptions and the responsibility of Intermediaries. Italy, likewise, seems to be interested (and ready to invest) in Communication to the Public, Copyright Exceptions and Intermediaries, while neglecting the other issues. The UK, on the contrary, allocates its investments among all these issues. The behaviour of other countries, carefully picking their interventions, is interesting. See for example the focus on Levies from Finland and Spain.

The brief analysis above suggests that governments’ interventions in European case law is – at least in most cases – strategic; countries tend to invest most in topics relevant for their domestic policies. However, this picture needs to be read in the context of routine intervention of some countries in cases where officials are mandated to intervene in preliminary references originating from their own country.⁹⁰

⁸⁹ The lower the number of interventions, the less reliable the figures. See for example, Malta.

⁹⁰ When we presented this analysis back to the agents and civil servants of Member States who had cooperated with our study, they confirmed the distinction between mandated and strategic interventions. For further details, see qualitative validation exercise at the end of the following section.

THE PERFORMANCE OF GOVERNMENT SUBMISSIONS AND THEIR SUPPORT OF Rightholders OR USERS

Descriptive data

Following the identification of Repeat Players in copyright and their propensity and specific interest in copyright litigation, we now move to the core of this study. Here we aim to analyse the success rate of the written observations of each country and the proximity of their arguments to the positions of rightholders or users. To this end, we have extracted all copyright-related questions asked within preliminary references and the suggested answers proposed by the submissions of the intervening parties.⁹¹

Our sample of 42 cases dealing with the five most contested ('recurrent') copyright issues has been coded by each legal question asked in the preliminary reference to the Court and each suggested answer by the parties, the AG and the intervening third parties. 147 questions were identified, to which a variable number of governments suggested an answer. Most of these answers were coded with a Yes or No. When the suggested answer could not be reduced to a Yes/No answer, it was coded with an X. Only the answers coded with a Yes or No were considered for statistical computation.

Overall, from the sources discussed in detail in the methodology section (AG Opinions, Court Registry, Agents, Freedom of Information requests) we retrieved a total of 584 suggested answers within the sample of 42 cases and excluding the countries that made only one submission (such as Romania, Norway, Sweden, Latvia). In addition to these, the total number of questions not answered with a Yes or No (and therefore coded with an X) is 136.⁹² Figure 7 provides an example of the coding of a case.

Eva-Maria Painer v Standard Verlags GmbH (Painer) was a preliminary reference from Austria (decided by the CJEU in 2012).⁹³ A number of German and Austrian newspapers, magazines and websites had published photographs of a girl who had escaped after being held in captivity for eight years. The photos were taken by Ms Painer (a photographer) while the girl was at nursery school before she was abducted in 1998 (aged 10). She was held captive until she escaped in 2006. This story had high resonance in the media.

In the columns, the following codes were used: OP = Opinion of the Advocate General; JU = Judgement of the Court; Rh = Answer in favour of Rightholder; Us = Answer in favour of User (including Intermediaries). The additional columns refer to Member States' positions, identified by

91 The questions are extracted from the Opinion of the Advocate General (AG) in a way requiring a Yes or No answer. We have chosen to elaborate the questions from the Opinion of the AG and not from the Application because the structure of the questions and answers in the ruling mostly follows the pattern of questions as reorganised by the AG. Also, the suggested answers in the written observations cited by the AG, which forms the basis for this part of the analysis, follow the same structure.

92 There are 30 (=5.8%) missing data points where neither freedom of information requests nor reconstruction from other sources produced sufficient information to code a country's suggested answer to a question.

93 Case C-145/10 *Eva-Maria Painer v Standard Verlags GmbH* ECLI:EU:C:2013:138.

C-145/10 Painer (RH) vs Standard VerlagsGmbH et al (US)								
QUESTION	OP	JU	RH	US	AT	ES	IT	EUComm
Q4 Have portrait photos weaker copyright protection (Art 1&5 InfoSoc and Human Rights?)	N	N	N	X	N	N	N	N
Q3a Does Art 5(3)(e) applies or an official order of publication must come from the authorities(Y)?	N	Y	Y	N	N	Y		N
Q3b Can newspapers decide for themselves whether it is a matter of public security?	N	N	N	Y	N	N		N
Q3c Must the newspaper expressly call for help from the reader for identification?	X	X	Y	N		Y		X
Q2a Is Art 5(3)(d) InfoSoc applicable where the medium in which the quotation can be found is not itself afforded copyright protection?	Y	Y	N	Y	Y	Y	N	Y
Q2b Is Art 5(3)(d) InfoSoc applicable where the author of the published photo is not named in the reports?	N	N	N	Y	N	N	N	N
Suggested answer						5	6	3
Match Ruling						4	5	2
Match RH						3	5	3
Match US						2	1	2
Not Answered								1
Missing Data Points						1		3

Figure 7: Coding example [Colour figure can be viewed at wileyonlinelibrary.com]

country code. The last column codes the suggested answers by the European Commission.

In the bottom six rows, the answers were coded for ‘match with ruling’, i.e. if the suggested answer from a Member State or the European Commission corresponded to the answer given by the Court in the ruling. This allows us to establish a relationship between the variables for the interventions of each third party and the variables for the outcome of each case. In addition, the suggested answers and the rulings by the Court were coded for ‘match with Rightholder’ and ‘match with User’ (which we defined widely to include Intermediaries). Users and Intermediaries have been grouped together because both end-users and intermediaries (such as platforms) oppose the expansion of rights. Where the scope of rights is at issue, jurisprudentially this is clearest way to capture the position of the intervening third parties (Member States and Commission). Binary coding also has the additional benefit of producing larger sample sizes for statistical analysis.

In the following master table (Figure 8), which consolidates all data points, these matches have been ordered by legal concept under discussion. The table identifies the number of matches with the Ruling, with the Rightholder and with the User/Intermediary. The percentages give the ratio between ‘matches with ruling’ and ‘number of submitted answers’. The ratio also reflects the suggested answers that did not match with the ruling. Therefore, in order to assess the performance of each government the percentages are the key indicators, not the absolute numbers.⁹⁴

94 Where there are low numbers of interventions or a lack of data points, percentages need to be treated with caution (see for example the case of Hungary). Since the numbers in the dataset

Communication to the Public (Art 3–Art 8 InfoSoc)	AT	BE	CZ	DE	EL	ES	FI	FR	HU	IE	IT	NL	PL	UK	PT	LT	EUCom	Ruling
Match with Ruling	63%		64%	50%	0%	29%	67%	59%	100%	42%	60%		60%	50%	38%			48%
Match with Right Holder	75%		73%	50%	0%	43%	83%	72%	75%	8%	50%		80%	70%	13%			36%
Match with User	38%		27%	43%	100%	29%	17%	25%	25%	92%	40%		20%	20%	88%			56%
Match with Ruling	5	0	7	7	0	2	4	19	4	5	6	0	3	5	3	0		24
Match with Right Holder	6	0	8	7	0	3	5	23	3	1	5	0	4	7	1	0		18
Match with User	3	0	3	6	5	2	1	8	1	11	4	0	1	2	7	0		28
Data Points	8	0	11	14	5	7	6	32	4	12	10	0	5	10	8	0		50
Cases	2		2	3	2	3	2	9	2	3	4		3	4	2			15
Fair compensation (private copy) (A5.2(b) InfoSoc)																		
Match with Ruling	37%	20%	33%	50%	33%	38%	64%	68%		100%	100%	58%	0%	63%	100%	63%		81%
Match with Right Holder	84%	60%	67%	70%	50%	33%	45%	58%		0%	0%	50%	0%	13%	0%	25%		30%
Match with User	26%	20%	33%	20%	50%	48%	50%	58%		50%	100%	50%	0%	88%	88%	75%		70%
Match with Ruling	7	1	1	5	2	8	14	13	0	2	3	7	2	5	8	5		22
Match with Right Holder	16	3	2	7	3	7	10	11	0	0	6	5	1	0	2	8		13
Match with User	5	1	1	2	3	10	11	11	0	1	3	6	1	7	7	6		19
Data Points	19	5	3	10	6	21	22	19	0	2	3	12	7	8	8	8		27
Cases	7	2	2	2	2	5	7	4		2	2	3	2	3	3	3		9
Distribution Rights (Dist2thePub) (Art 4 InfoSoc)																		
Match with Ruling			100%			100%		100%					17%	0%				78%
Match with Right Holder			100%			100%		100%					67%	0%				56%
Match with User			0%			0%		0%					33%	100%				44%
Match with Ruling	0	0	1	0	0	1	0	3	0	0	0	0	1	0	0	0		7
Match with Right Holder	0	0	1	0	0	1	0	3	0	0	0	0	4	0	0	0		5
Match with User	0	0	0	0	0	0	0	0	0	0	0	0	2	2	0	0		4
Data Points	0	0	1	0	0	1	0	3	0	0	0	0	6	2	0	0		9
Cases			1			1		2					3	1				6
Copyright Exceptions (Art 5 InfoSoc)																		
Match with Ruling	35%	100%		100%		33%	75%				71%		100%	100%				64%
Match with Right Holder	29%	20%		50%		100%	50%				57%		0%	0%				54%
Match with User	71%	80%		50%		0%	50%				71%		100%	100%				39%
Match with Ruling	6	5	0	4	0	1	3	0	0	0	5	0	3	1	0	0		18
Match with Right Holder	5	1	0	2	0	3	2	0	0	0	4	0	0	0	0	0		15
Match with User	12	4	0	2	0	0	2	0	0	0	5	0	3	1	0	0		11
Data Points	17	5	0	4	0	3	4	0	0	0	7	0	3	1	0	0		28
Cases	2	1		1		2	1				4		2	1				6
Intermediaries (Art 8 Enforcement Directive)																		
Match with Ruling	33%	100%	100%				50%				60%	60%	100%	60%				80%
Match with Right Holder	###	0%	33%				50%				80%	40%	50%	60%				50%
Match with User	0%	100%	33%				50%				40%	40%	50%	40%				50%
Match with Ruling	1	2	3	0	0	0	1	0	0	0	3	3	4	3	0	0		8
Match with Right Holder	3	0	1	0	0	0	1	0	0	0	4	2	2	3	0	0		5
Match with User	0	2	1	0	0	0	1	0	0	0	2	2	2	2	0	0		5
Data Points	3	2	3	0	0	0	2	0	0	0	5	5	4	5	0	0		10
Cases	1	2	2				2				5	3	2	3				6
TOTAL	AT	BE	CZ	DE	EL	ES	FI	FR	HU	IE	IT	NL	PL	UK	PT	LT	EUCom	Ruling
Match with Ruling/Data Points	40%	67%	67%	57%	18%	38%	65%	65%	100%	50%	68%	59%	52%	54%	69%	63%		60%
Match with Right Holder/Data Points	64%	33%	67%	57%	27%	44%	53%	69%	75%	7%	52%	47%	60%	42%	6%	25%		41%
Match with User/Data Points	43%	58%	28%	36%	73%	38%	44%	35%	25%	86%	56%	47%	36%	54%	88%	75%		54%
Match with Ruling	10	1	8	10	1	9	10	25	2	2	7	2	7	4	0	0		37
Match with Right Holder	5	6	3	6	1	6	11	12	1	1	7	2	6	9	6	6		35
Match with User	19	8	12	16	2	12	22	35	4	7	17	10	13	14	11	5		75
Data Points	30	4	12	16	3	14	18	37	3	1	13	8	15	11	1	2		51
Cases	20	7	5	10	8	12	15	19	1	12	14	8	9	14	14	6		67
Data Points	47	12	18	28	11	32	34	54	4	14	25	17	25	26	16	8		124
Cases	12	5	7	6	4	11	12	15	2	5	15	6	12	12	5	3		42

Figure 8: Government submissions’ match with Rightholder or User interests and CJEU Ruling (sample of 42 cases, discussing five ‘recurrent’ legal issues) [Colour figure can be viewed at wileyonlinelibrary.com]

Analysis

The following analysis focusses on general trends that emerge for the juridification of the European policy process regarding the five ‘recurrent’ legal

are too low to test for statistical significance, we address this issue by constructing a Cartesian diagram. See Figure 9 below.

issues (which mark a normative void in copyright law). A fuller doctrinal context for each the five legal issues, and of the interests at the heart of individual Government submissions is given in Appendix II (see Supporting Information).

The issue of Communication to the public is particularly contentious. Consensus among Member States' observations is rare, and it is limited to particularly simple features of this concept (*acte clair*). For example, it is uncontroversial that installation of TV sets in hotel rooms does not amount to Communication to the public, and that Internet Service Providers (ISPs) are intermediaries in the light of Article 8 of the InfoSoc Directive. On most nuances surrounding the interpretation of the concept of Communication to the public, the written observations of governments and EU Commission disagree. *SGAE*, *Phonographic Performance* and *GS Media* are among the most notable examples of this disagreement. The position of France, among the submitting governments, is to be noted as being often in disagreement with the others. However, this is not as to say that the other countries agree among themselves on every point. The impact of governments' observations on the rulings on this specific topic is also erratic and difficult to pin down. Sometimes the Court follows the opinion of the majority (as for example in *SCF*); on other occasions the ruling follows the minority (as for example in *GS Media*). This indicates that the influence of a Member State does not necessarily depend on the number of its allies. The number of submissions from a given government on a given topic, combined with its success rate (number of matches between its suggested answers and the ruling) gives a more reliable indicator.

In the case of Communication to the public, the figures computed in Figure 8 reveal France as the most influential country by some distance. France's submissions produced 32 suggested answers (data points), of which 19 (59 per cent) match the Court's ruling. Other frequently intervening countries, such as Germany (14 data points), Ireland (12), Italy (10), and the UK (10) have each produced less than half the number of submissions of France, and none exceed a match rate of 50 per cent with the Court's ruling. Intervening countries sometimes take the same stance, and they tend to succeed mostly when they reach critical mass (e.g., when they coordinate their efforts: see *SCF*) or when the question is not particularly controversial (and France does not intervene).

The legal issue of Fair compensation (levies) is the one that received the highest attention from Member States, with the highest total number of submissions (60) in our sample, each containing multiple suggested answers (144 data points). Finland (22 data points), Spain (21), France (19) and Austria (11), among these countries, are the most active. Their success before the Court is not consistent. Generally, Spain pushes for broader country self-determination and more flexibility in choosing the features of the levy systems, whereas Finland vouches for a narrower interpretation of the directive, for example by supporting compensation only for 'personal' copies. Overall the Court favours this latter interpretation. Other countries, such as Germany (nine data points) and the UK (eight data points), rarely intervene on this legal concept, but when they do so their suggested answers are often accepted by the Court (Germany: 59 per cent match with ruling; UK: 63 per cent). France keeps an intermediate stance between Spain and Finland: it normally pushes for a strong protection of

the rightholder, and it often succeeds in convincing the Court of its arguments (68 per cent match).

With respect to the Distribution right, Article 4 of the InfoSoc Directive is broadly interpreted by the Court, which protects the exclusive right of the European owner against infringement coming from non-EU countries. There seems to be a consensus on the point that international exhaustion does not apply and works sold or offered on foreign web sites are infringing, as well as works manufactured in countries with temporary exemption from copyright protection.⁹⁵ With the exception of Poland (six data points), which seldom manages to convince the Court (17 per cent match), and the UK (only two data points, no match), other submitting countries suggest answers that are in line both with the Ruling and the Opinion (100 per cent match for Czech Republic, Spain and France).

On Exceptions, we can detect a rather balanced approach of the Court (as confirmed by our previous research⁹⁶) with a number of broad interpretations (11, coded as favouring users) offset by a slightly larger number (14) of narrow interpretations. The data on the submitting countries is insufficient to determine with a degree of reliability which country favours a broad interpretation and which country supports a narrow position. The observable pattern suggests that the majority of the countries are for a narrow interpretation of copyright exceptions, but their degree of success in front of the Court appears erratic. Italy (four submissions, seven data points) and Austria (two submissions, 17 data points) are the most active Member States, achieving a match rate of 35 per cent (Austria) and 71 per cent (Italy).

Finally, the case law on Intermediaries (Article 8, Enforcement Directive) is very limited in the sample, with only 20 submissions from Member States in total, making it difficult to identify patterns.

Given that the numbers of observations in our sample are generally too small for further statistical analysis, we now explore the Cartesian diagram (Figure 9) as a visualisation technique for the data set as a whole.⁹⁷ For constructing the diagram, the Yes/No coding has been translated into numerical values. Each 'match with ruling' was assigned a value of 1, whereas to each suggested answer not matched in the ruling the value of -1 was assigned. Likewise, to each 'match with the rightholder' the value of 1 was assigned and to each position unfavourable to the rightholder (i.e. supporting user or intermediary positions) the value of -1 was assigned. These latter numbers differ slightly from those presented in Figure 8 because the cases in which rightholders and users held the same position (very few occurrences) were not computed. The Cartesian diagram enables an overview of the relative position of the Member States and the Commission to each other, and of their performance even in the cases of low numbers of observations. The 'investment' in copyright litigation is

95 See the case of overlapping design and copyright protection as in C-168/09 *Flos* ECLI:EU:C:2011:29. See generally L. Bently, 'The return of industrial copyright?' (2012) 34 EIPR 654.

96 n 5 above, 58.

97 The authors are grateful to the economist Moritz Mosenhauer who suggested the Cartesian diagram as a visualisation of our data.

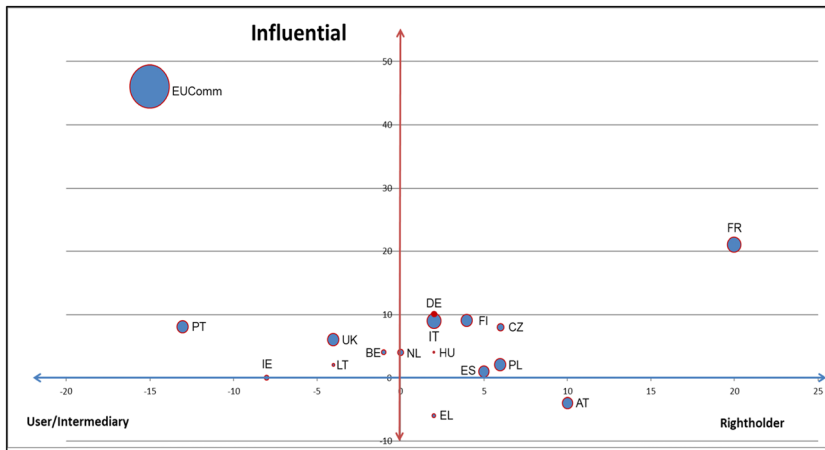


Figure 9: Cartesian diagram illustrating Member State/Commission influence and promotion of Rightholder or User/Intermediary interests [Colour figure can be viewed at wileyonlinelibrary.com]

conveyed by proxy with the number of written observations for each country, displayed in the graph by the size of the circles (Figure 9).

The most striking feature exposed by this diagram is the closeness of the Commission to the Court. Submissions by the Commission correlate highly with the Court's rulings and the Commission appears to intervene particularly effectively on behalf of user interests.⁹⁸ A second important finding is that, collectively, the submissions by Members States are above the influence line, correctly predicting the Court's rulings. This aligns with arguments from the political science literature that the Court needs to maintain political legitimacy.⁹⁹

France stands out for its high matches with the Court's decisions (indicating potentially a superior level of influence) and for its support for rightholders. Finland is also very effective, but more balanced in its choice of support, as is Germany. Austria and Greece appear to be the least successful countries. Interesting is the effective performance of some other players such as the Czech Republic and Portugal. As for the balance between rightholders and users, the evidence here suggests a prevalence of rightholder support, counterbalanced by the strong presence of the EU Commission in favour of user interests. Few countries, among them Portugal, Ireland and the United Kingdom, regularly advance the users' (and intermediaries') perspective.

This analysis is particularly relevant in the current exceptional European context, which will exclude from this picture the participation of the United Kingdom.¹⁰⁰ While the above scenario, as it stands, shows an overall – yet

98 This has been further investigated in research funded by the International Federation of the Phonographic Industry (IFPI): E. Rosati, 'What Does the European Commission Make of the EU Copyright Acquis When It Pleads Before the CJEU? The Legal Service's Observations in Digital/Online Cases' *European Law Review* (forthcoming).

99 n 2 above; n 11 above.

100 R. Arnold, L. Bently, E. Derclaye and G. Dinwoodie, 'The Legal Consequences of Brexit Through the Lens of IP Law' (2017) 101 *Judicature* 65.

delicate – balance, the disappearance of the United Kingdom’s voice before the Court is likely to have consequences for the recognition of interests of copyright users and intermediaries.

Qualitative validation

Following completion of the dataset, we offered the tables of interventions and matches, and the analytic perspective of the Cartesian diagram back to the Court Agents and Civil Servants we had contacted during the study. We received responses from nine countries: Czech Republic, France, Germany, Ireland, The Netherlands, Poland, Portugal, Spain and Sweden. All indicated that they recognised the patterns we had identified, and many found the analytic approach extremely interesting and recommended wide dissemination to facilitate discussion.

We received some indications about the underlying reasons for decisions to intervene in cases before Court of Justice. As expected, providing resources to intervene is indeed seen as a cost that needs to be justified in terms of national policy priorities. For example, it was observed that a relatively low number of preliminary references originating from their own country ‘could sometimes limit our ability to shape the Court jurisprudence’. This however could be compensated by ‘a strong commitment to be playing an important role in these debates’. Member States do make decisions if and how to steer the Court.

The feedback from France disagreed with the distinction between Rightholders and Users (as including Intermediaries) we employed for analysing if an intervention matched the Court’s ruling. France suggested that the interests of online platforms are not aligned with those of users. The position of France on the side of rightholders should not be understood as targeting users. Rather France was attempting to strike a balance between the rights of the copyright owner and the economic advantages gained by the intermediaries (while vesting the interests of users).¹⁰¹ Mindful of this argument, we argue above that the binary coding (Rightholders vs Users) is a pragmatic simplification to achieve a workable sample size but also compelling in the specific context of copyright law where the scope of rights is at issue. Coding a decision as permitting behaviour that may otherwise fall under the control of copyright owners is simply a negative descriptor. It does not imply that the outcome serves only one set of interests, nor that the interests of users and intermediaries are the same.

CONCLUSION

Our series of studies on the CJEU’s copyright jurisprudence was initially motivated by a specific normative void that seemed to be filled by judicial policy

101 Feedback from France, on file with the authors.

making. But when we lifted the lid in our underpinning study¹⁰² revealing the workings of the Court, it became clear that the empirical approach would have much wider theoretical implications.

The production of a dataset that tracks the influence of Member States on the evolution of jurisprudence in a specific subject domain opens a new perspective on the making of transnational law. Our method makes it possible to construct influence rankings, quantifying the relationship between Member States, the European Commission and the Court of Justice in the juridification of policy. This is extendable to other areas of law and enables a potentially transformative advance in the understanding of the ‘production of Europe’.

In the specific area of copyright law, the study allowed us to target the forces moving CJEU jurisprudence. We found that copyright interventions revolve mainly around the concepts of Communication to the public and Copyright levies (fair compensation for private copying), with Exceptions, the Distribution right and Intermediaries also attracting considerable attention. The analysis of recurrent legal issues before the Court of Justice confirms that there are areas of copyright law vulnerable to strategic litigation, arguably because there is room for alternative policy paths without introducing legislation.

We found that through written observations, governments aim to steer the Court towards rulings in line with their respective policies. Member States most invested in copyright law are the dominant litigators of the *acquis communautaire* in general (France: 15 out of 42 cases in our sample, Italy: 15 cases, the UK: 12 cases), although there are other Member States that invest disproportionately in shaping the evolution of copyright law (Czech Republic: seven cases, The Netherlands: six, Portugal: five, Belgium: five).

Some governments’ interventions are highly skewed, addressing repeatedly very specific copyright issues, which are presumably relevant for their own domestic policies. France for example seems to be particularly interested in the concept of Communication to the public, and in Fair compensation for private copying (Levies). Italy appears particularly interested in Exceptions and Intermediaries, while the UK allocates its investment in litigation across all copyright policy areas. Germany intervenes rarely (only in six cases in our sample) but is often successful when it does.

The impact of a written observation on the ruling of the Court is not only determined by critical mass, such as the number of submissions or the size of the country. More important appears to be the quality of the legal reasoning, as the relative success of smaller Repeat Players suggests (for example, Finland and Portugal). In this context, it is interesting to note the relative lack of success of certain governments that specifically invested in copyright litigation but who are seldom rewarded by the Court, such as Greece, Austria, Spain and Poland. Poland’s written observations are often ignored both by the Advocate General and the Court for unclear reasons. Among avenues for future research, the reasons behind the copyright policy priorities of Member States

102 n 5 above.

and their success or failure translating these into juridical strategies warrant further scrutiny. Who is steering the policy of Member States?

Finally, it is tempting to read the above findings in the light of the political scenario predicting the loss of the United Kingdom as a strong litigator. Our evidence suggests that the UK carries weight in advancing the perspective of copyright users before the Court of Justice. There are not sufficient data points at this stage to test for statistical significance, but the pattern we identify points to a potential disturbance in the delicate balance between the interests of rightholders and users before the Court.

Viewed as a whole, the findings in the domain of copyright law are striking. The extraordinary closeness of the Commission to the Court of Justice stands out, as does the apparent desire by the Court to maintain legitimacy by moving with Member States' interventions (collectively understood). The Court is not free 'to produce Europe'.

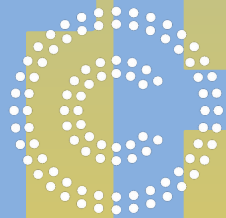
SUPPORTING INFORMATION

Additional supporting information may be found online in the Supporting Information section at the end of the article.

APPENDIX I: Written Observations, and the Rules of Procedure of the Court of Justice of the European Union.

APPENDIX II: Member States' position on five key ('recurrent') copyright concepts.

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