

# Judicialization and the Copyright War

Balancing Conflicting Interests through the Court of Justice  
of the European Union

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# Abstract

The last few decades have witnessed the expansion of the role of the Court of Justice of the European Union in the policy-making process, a phenomenon referred to as “judicialization”. This shift of legislative power from the legislators to the judges inevitably has consequences for all the different interests involved. The aim of the thesis is to study the phenomenon of judicialization in the EU in order to identify its impact on the interests of the stakeholders in a given policy area. This is achieved by conducting a case study on EU copyright law, a policy field that has undergone this process of judicialization, with a focus on copyright protection and enforcement in the digital environment. The paper firstly examines the current legal framework on copyright and identifies the main stakeholders in the copyright debate, and then analyzes all the relevant cases of the Court of Justice. The analysis of the cases shows that the judicialization of copyright law is gradually leading to a change in the conflict between the two main groups that are concerned with online copyright, as the fundamental rights of internet users are increasingly gaining importance, while the right to the protection of intellectual property of the rightholders is losing its status as an absolute and inviolable right. Judicialization is thus leading to a more balanced approach in the conflict, where different kinds of fundamental rights are treated equally.

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# 1 Introduction

Imagine you're taken to court by a record label and fined for embedding a YouTube video of your favourite artist in your blog. Or imagine your internet activity being closely watched by your internet service provider, although your actions online are far from suspicious or illegal. A few years ago, these kinds of situations would not be very far from reality. This, however, is now gradually changing, but it is not the legislators that are bringing this change. Your online privacy and activity are being safeguarded by another actor: the Court of Justice of the European Union.

Political systems are based on the idea of the separation of powers. For the effective functioning of the political system, three different branches have to co-exist: the legislative, the executive and the judicial. The design of a political system has to ensure that each branch has a distinct and independent role with its own powers and responsibilities, so as not to interfere with the activities of the others, but also to make sure that each branch has the ability to check and balance the powers of the other two in order to avoid the concentration of power into one particular branch.

The executive branch is responsible for enforcing the law; the legislative branch is concerned with the formation of law; and the role of the judicial branch is to interpret and apply the law. However, over the last few decades, there has been a trend of increasing judicial activity, which has resulted in judicial bodies acquiring an additional role of participating in the policy-making process, which is traditionally exclusive to the legislative bodies. Some scholars call this process "judicialization", which can be defined as "the shift of power from legislative institutions towards the courts" (Ferejohn, 2002, p.41).

By looking at the political system of the European Union and its development over time, one can establish that this process of judicialization is taking place. The Court of Justice has expanded its role from an interpreter of EU law to an institution whose case law can have a decisive impact on the legislative process. Indeed, the Court is often accredited as the main institution that has facilitated the process of harmonizing common rules in different policy areas across the EU. The main effects of the Court's expanding role are thus often considered to be further harmonization and further European integration. But what can other effects of judicialization be? What can be the impact of judicialization on the different interests in a given policy area?

This thesis will study the phenomenon of judicialization in the EU by looking at one specific field where this process has occurred and where we can identify a big clash between different interests. The policy area that has been selected is copyright law and more specifically the rules on copyright protection and enforcement online, an area of special interest due to the challenges and prospects

brought by technology and the internet, which have intensified the conflict between copyright holders and users. The primary aim is therefore to study what effects the judicialization of copyright law has on the conflict between the two main groups involved in online copyright law. The main finding is that there seems to be a small and gradual but identifiable shift in this unbalanced conflict, as the Court is trying to find a middle ground between the competing interests. Judicialization can thus lead to a more balanced approach in a conflict between different groups, as the Court requests that all rights are treated equally.

The paper will proceed with the following steps: Part two will discuss the theoretical framework and the previous research on judicialization, followed by a presentation of the methodology in part three. Part four is devoted to the existing EU legislation on copyright and how it is reflected through the various competing interests that are involved in the copyright debate, and also includes a discussion on the judicialization of EU copyright law. In part five the author describes and analyzes the cases of the Court of Justice that are related to online copyright and discusses the consequences of these cases for copyright law. The paper concludes with a summary of the main findings concerning copyright law and with some conclusions about the phenomenon of judicialization in the EU.

## 2 Literature Review and Theoretical Framework

The aim of this paper is to study the consequences of judicialization for the different groups involved in a certain policy area, by looking at the role of the Court in resolving the conflicts between the competing interests. This chapter will start with the theoretical framework on judicialization and look at the literature that deals with the role of courts, their relationship with the legislative institutions, the issues of neutrality and autonomy and the process of judicial balancing. This is followed by a presentation of the literature on judicialization in the EU and the Court of Justice. Subsequently, there is a section on the role of interest groups that are involved in the judicial process. After examining these aspects the chapter concludes with a summary of the main features of judicialization and the theoretical ambition of the paper.

### 2.1 The Court as an Arbiter

Stone Sweet (1999; 2000) looked at the role of courts in dispute resolution through the development of a theory of governance. In this theoretical model, he firstly introduces the “dyad”, which is the most basic social institution whose foundation is reciprocity. If a dispute arises, the two disputants have to try to settle the dispute on their own. If they fail to resolve the dispute by themselves, they delegate the issue to a third party. This “triad”, which consists of the two disputants and the dispute resolver, is a “primal technique of organizing social authority, and therefore, of governing” (1999, p.149). The introduction of a third actor in a dyadic relationship guarantees the reciprocity of the relationship but also its continuation. The purpose of what he calls “triadic dispute resolution” is to regulate the behaviour of actors and maintain social cohesion, which is facilitated by the establishment of rules and norms (p.150-151).

The dispute resolver is expected to be impartial. However, the dispute resolver’s reputation of neutrality is often compromised by its duty to decide which party is wrong and which one is right (p.155). In order to maintain the legitimacy of the process, the third party has to justify and defend its decisions based on the existing normative structure (i.e. the existing rules and norms) and be able to predict the reaction (incompliance) of the disputants that are affected by its decisions.

Both legislative and judicial bodies are examples of triadic dispute resolution and the relationship between them is one of interdependence (p.162). Legislative

institutions have a dispute resolution function because through the general laws they create they can prevent disputes from taking place or facilitate the resolution of arising conflicts. However, the primary dispute resolvers are the courts. The judgements of judicial institutions are more specific to the case and might not be able to be generalized, but may often require the amendment of existing laws made by the legislators. In other words, the laws of the legislators are used and defended by the courts but may also be altered to suit a specific case; and the new or reformed rules created by the courts are perpetuated by being established as precedent for future cases but also adopted by the legislators. Thus, the legislative institutions share rule-making powers with judicial institutions (p.162).

The result of this process of triadic dispute resolution through judicial means is judicialization. The judicialization of politics for Stone Sweet is the “process by which triadic lawmaking progressively shapes the strategic behaviour of political actors engaged in interactions with one another” (p.164). The aim of the dispute resolver is to balance the competing demands of the two parties and create a precedent to justify future decisions. As Stone Sweet argues, this process of rule-making “will gradually reconfigure normative structure and, in so doing, reconstruct social relations” (p.164).

Stone Sweet however points out that the parties that are involved in triadic dispute resolution cannot really control the outcome of the process (p.179-180). Since the case law of the court may often overshadow or change existing legislation, depending on the case, the results might not be entirely predictable, the preferences of the actors might not be satisfied and the positions of certain actors can be undermined. Nevertheless, individuals or groups turn to the courts and thus judicialize the policy-making process in order to change policy outcomes to suit their preferences (p.140). They can pursue litigation if the benefits gained by the process are expected to outweigh the costs (financial or other). Winning the case means establishing their preferences as authoritative law. Thus, this increase of conflicts ending up in court shows that groups find the judicial process to be a useful option to defend their interests.

## 2.2 Autonomy and Neutrality

Judicial autonomy can be conceived in two ways. Firstly, judicial bodies are autonomous in the sense that they are free to modify existing laws or introduce new ones. Secondly, as laws are normative constructs, judges are expected to resolve disputes through “a process or reasoning about the nature, content and applicability of legal rules” (Stone Sweet, 2000, p.27), which means that they are autonomous from their own preferences but also external influence. However, this autonomy of judicial bodies is ambiguous; some consider the legal process to be entirely “insular and self-referential”, but others also point out that courts don’t act in a vacuum – socio-political context can also play a role and thus have an impact on this autonomy (p.28).

Nevertheless, as a judicial body, a court is expected to be neutral and unbiased. The independence and impartiality of the judges are essential characteristics of the judicial system. The laws made by judges are the result of rational reasoning, independent of external influences, which provides their decisions with a sense of authority and legitimacy. Courts portray their decision-making as a “pure exercise in logic” (p.143), which implies that the judges go through a complex and comprehensive process of deliberation on the interests involved and come up with decisions that are the most appropriate, based on the existing normative structure and the facts of the cases. They are required to justify their rulings in order to prove that they act based on existing rules and normative reasoning and do not take decisions arbitrarily (p.144). This however, can be exceptionally difficult when equivalent principles clash.

## 2.3 The Law of Balancing

The protection of rights has become very important for courts and the task of resolving a dispute between competing rights of equal value can be a big challenge (Stone Sweet, 2000, p.30). Thus, courts have to resort to a kind of decision-making called “balancing”. This entails a process of deliberation on the limits of a right of an individual or group against the right of another individual or group (p.97). The judges first try to interpret the existing legal structure based on the notion that it is already harmonious and that the conflict is only superficial and due to bad interpretation. However, if the opposition between the two rights is clear and cannot be eliminated through correct interpretation of the legislation, the judges have to balance these rights by deciding whether and to what extent one right has to take precedence over another right. This can then be determined by a proportionality test (p.97-98).

Alexy’s “Law of Balancing” states that “the greater the degree of non-satisfaction of, or detriment to, one principle, the greater the importance of satisfying the other” (2003, p.136). This law has three stages: first, the degree of non-satisfaction of the first principle; second, the importance of satisfying the opposing principle; and third, the assessment of whether the significance of satisfying the second principle justifies the non-satisfaction of the first principle (p.136). According to this theory, in situations where two principles or rights clash, what matters is not the rights’ value or weight, but the seriousness of the conflict and the importance of each right in “realizing a general interest” (de Vries, 2013, p.170). This essentially implies that no right and no interest is absolute and the court should assess how and to what extent one right can undermine another and give a rational explanation for its decision. Critics argue that balancing constitutes a threat for rights, because it reduces their value and leads to “irrational”, subjective and arbitrary decisions (Alexy, p.134). Nevertheless, balancing competing interests is often unavoidable and necessary, and Alexy argues the balancing exercise actually provides protection to these rights.



Courts therefore avoid declaring clear winners and losers; instead, they acknowledge that both sides have legitimate interests and they try to deliver “partial victories” (Stone Sweet, 2000, p.142). Balancing thus helps the court to resolve a conflict of two rights that have equal status or value. It also strengthens the position of the court, as it gives it a great deal of discretion and allows it to adopt a legislative style to its decision-making (p.98). Furthermore, not declaring one side and one interest as a winner provides the court with room to manoeuvre, because in future cases where the same interests might conflict, the decision of the court might be different, depending on the circumstances of each case (p.142).

## 2.4 Judicialization and the Court of Justice of the EU

Courts have acquired a new and important role, through which they are able to limit and regulate the power of legislative institutions, create substantive policies and set “standards of acceptable behavior” for political officials, political parties and interest groups (Ferejohn, p.41). This increased involvement of courts in policy-making means that political actors and interest groups have to pay close attention to what the judiciary decides because its decisions can have a significant impact on the legislation. In addition, they can also consider using the courts as a way to pursue their own aims (Stone Sweet, 2010, p.26).

Courts can create laws in both a negative and positive sense: they can limit the activity of the legislature but they can also fill the gaps of the legislature (Ferejohn, p.51). Their decisions can therefore have extensive consequences for legislative institutions, as they can put constraints on their decision-making. As Stone Sweet points out, policy-makers in the EU “must learn to accept the authority of the Court [...] and adapt their decision-making, at least in part, to the Court’s case law” (2010, p.20). The case law of the Court of Justice therefore has a spillover effect on subsequent policy-making, as the EU’s legislative institutions have to take decisions that implement the case law of the Court (p.25-26).

The Court of Justice has therefore become an important venue in the complex multi-level system of the EU where individuals and interest groups can turn to in order to influence a policy. The Court is responsible for providing interpretations of EU law and ensuring the correct and uniform implementation of EU law, as well as settling disputes between institutions, governments, individuals and organizations. Citizens and groups can access the Court with the preliminary ruling procedure, which enables national courts to refer a case to the Court and ask the Court to provide an interpretation of an aspect of EU law (Eising, 2008, p.13). Taking into consideration the supremacy and direct effect of EU law, interest groups hope that the Court’s rulings can overturn unfavourable domestic laws or clarify ambiguities of EU law, and therefore influence existing and future legislation. This is supported by Bouwen and McCown (2007) who argue that “interest groups that successfully litigate in order to shape EU policy not only effect the removal of national rules, on the basis of EU law, but also shape the form of future legislation” (p.426).

Literature on judicialization suggests that this phenomenon has appeared for two reasons. Firstly, due to the political fragmentation of power, when the political institutions are ineffective and slow to act, interest groups will use other ways to solve their conflicts, and courts appear to be the institutions that can take decisive action and provide effective solutions (Ferejohn, p.55-59; Bouwen & McCown, p.423; 432). As Kelemen says, political fragmentation can lead to a legislative gridlock, and this makes a judicial solution even more attractive (p.58). Therefore, the institutional landscape in the EU, with its “extremely indecisive political institutions” (Ferejohn, p.60) has provided freedom of action to the Court of Justice and has allowed it to expand its role significantly over the last decades. As a result, “judicial processes have become sites of policy-making that supplement, and at times rival, the legislature” (Stone Sweet, 2000, p.199).

A second reason is the notion that (constitutional) courts are more likely to protect individual rights and liberties from political abuse (Ferejohn, p.55). Eising notes that the Court of Justice has a tendency to view “EU legal provisions as creating rights for individuals” (p.19), whereas Kelemen also points out that judicialization, or what he calls “Eurolegalism”, promotes “the rise of a rights discourse as more and more policies are framed in terms of individual rights that private parties are themselves entitled to enforce in court” (p.66). With the entry into force of the Lisbon Treaty in 2009, the Charter of Fundamental Rights acquired legal status and as a result, the Court is bound to protect fundamental human rights and is thus expected to decide cases differently than before, adopting a more rights-based approach (Stone Sweet, 2010, p.37).

## 2.5 Interest Groups and Litigation

Even though interest groups are not the focus of this paper, they are very important actors in the EU and play a significant role in the process of judicialization, as they are those who often turn to the courts and instigate policy change. Thus, the author finds it necessary to include some information on the role of interest groups and their relationship with the Court of Justice.

The purpose of an interest group is to influence political actors in order to produce decisions that are as close to their preferences as possible. The multi-level system that exists in the EU provides multiple points of access both at the national and supranational level for interest groups and the increased powers that have been delegated to the three supranational institutions of the EU – the Commission, the Parliament and the Court of Justice – have increased these institutions’ importance for the representation of interests (Eising, p.10).

Most of the literature that studies interest groups focuses on their lobbying activities. Lobbying legislative institutions and political actors is the most common activity of interest groups, and is thought to be the most successful one. Some groups are more successful in influencing legislation than other groups and studying the factors that contribute to this success is an important part of the literature on interest groups. Scholars argue that the institutional context, the

characteristics of the issue and the characteristics and strategies of the interest groups determine the extent of their influence (Bouwen, 2002; Mahoney, 2007; Dür, 2008).

Even though lobbying is regarded as the most successful way to influence policy-making, interest groups also employ litigation to change EU policies. This activity of interest groups is a less researched topic than lobbying, but some scholars have attempted to study the litigation strategies of interest groups to explain how and why they resort to courts to achieve their aims (Bouwen and McCown, 2007; Rubin, Curran & Curran, 2001). In general, scholars argue that litigation is less used by interest groups, that it is effective only when combined with direct lobbying and that it can have drawbacks due to increased political and economic costs. Coen argues that litigation is usually avoided due to a “strong cultural bias towards consultation rather than conflict in lobbying” (p.340). Bouwen and McCown argue that the choice between lobbying and litigation is dependent on the resources that they have at their disposal, their organizational form and the (in)efficiency of the legislative and judicial institutions in the EU (p.427-430).

With their focus on the lobbying of legislative institutions, scholars that study interest groups have not paid much attention to the way these groups use the courts. Obviously, interest groups are not able to influence courts in the same way as they influence legislative institutions and therefore cannot use the same strategies they use during lobbying. Litigants are unable to overturn the rulings of the courts and cannot influence or pressure judges to take a specific decision (Ferejohn, p.50). This makes the judicial process seem inflexible and the outcomes highly uncertain, and it is possible that the process might not lead to the expected results. In addition, increased financial costs and the length of the judicial process make it a less attractive option for interest groups (Eising, p.13). Therefore, one expects that resorting to a court would only be a rare phenomenon. Still, over the last few decades there has been a remarkable increase of cases ending up in the Court of Justice.

The relationship between interest groups and the Court of Justice can thus be studied in two ways: first, as a matter of access given by the Court to interest groups to resolve conflicts, and secondly, litigation as a strategy employed by the interest groups when they are not able to achieve their aims through lobbying legislative institutions. Considering that the Court’s case law sets a precedent upon which future cases and future legislation is based, an interest group’s use of judicial means to resolve an issue is a way to change unfavourable existing legislation or an indirect way to influence future legislation. Litigation can thus be a good option for interest groups to bring policy change that will accommodate their interests. But judicializing the policy-process does not necessarily mean that interest groups will always get what they want (Stone Sweet, p.35). What happens when the Court rules against the group that started the case? Can the Court’s involvement turn to be problematic for some interest groups?

## 2.6 Summary and Theoretical Aim

Based on the theoretical framework and literature review presented above, we can conclude that judicialization in the EU takes place if the following features exist:

- A flawed or outdated legislative framework and a slow and complex process of reform that does not solve timely and efficiently the problems that arise, thus leading actors to pursue their aims through the Court.
- The increasing number of cases ending up in the Court of Justice, thus the increased involvement of the Court in solving conflicts.
- The impact of the Court's case law on existing and future legislation, which has the result of the Court indirectly sharing legislative power with the legislative institutions.

The thesis will study a contested policy area that underwent heavy lobbying in the past, but due to the problems of the legislation and the slow process of reform, interest groups and individuals turned to the Court to defend their rights and initiate policy change. This has resulted in the judicialization of the policy area, due to the impact of the case law on the legislation. The Court's expanded role through this process of judicialization can have extensive consequences for the different interests that are involved.

Most of the literature on judicialization in the EU tends to focus on how it facilitates harmonization and leads to further European integration (Weiler, 1991; Stone Sweet, 2000) or on its implications for the legislative process and the legitimacy of the EU (Scharpf, 2009; Kelemen, 2012). Although some of these issues will be mentioned in the empirical part, they are not the focus of the paper. Instead, the aim is to study how judicialization affects the conflict between different interests in a policy area. After studying the existing literature on the topic, the author believes that this aspect of judicialization in the EU has not really been looked at so far. Therefore, in addition to testing the general ideas of the theoretical framework on courts and judicialization, the paper has the ambition to contribute more specifically to the literature on judicialization in the EU, and to a lesser extent, the literature on interest groups and litigation in the EU, by studying the consequences that judicialization has on the competing interests in a specific EU policy field.

## 3 Research Design and Methodology

Judicialization is a widely acknowledged and well-established phenomenon that has been taking place in the EU over the last few decades. Due to the gaps of existing legislation and the slow pace of the legislative process, individuals and groups turn to the courts to resolve disputes and pursue policy change, thus judicializing the policy-making process. As a result, the position of the Court has been strengthened significantly and it has acquired a new role by indirectly participating in the legislative process. The aim of the thesis is to study what are the effects of judicialization on the conflict between competing interests by looking at the role of the Court of Justice and the way it tries to resolve disputes.

The general research question for the thesis is:

*How does judicialization affect the conflict between competing interests in EU legislation?*

### 3.1 Research Design

The topic will be studied by conducting a single-case study on an EU policy field that has been judicialized to some degree over the last few years. The policy area selected for the case study is copyright law, and more specifically the protection and enforcement of copyright in the digital environment. Online copyright law will therefore be used to illustrate the judicialization of the policy area of copyright and identify the effects that it has on the conflict between opposing interests in the digital environment.

Thus, a more specific version of the aforementioned research question is:

*How does the judicialization of copyright law affect the conflict between the different interests in this policy area?*

By looking at this specific area that has undergone judicialization, the conclusions that are drawn will help to make some general conclusions about the impact of judicialization in the EU.

## 3.2 Case Selection

Copyright is one type of intellectual property right, a policy issue where there was significant involvement of the Court of Justice in the 1970s and 1980s. Due to the slow legislative process and ineffective legislation, many interest groups pursued litigation to initiate policy change (Bouwen & McCown, p.434-435). As will be shown in the next chapter, there seems to be a similar pattern in regard to copyright law, and especially copyright protection and enforcement online, in the last five to ten years. Since the EU's legislation regarding copyright rules online has many gaps and is unable to tackle the challenges posed by technological advancements, the Court of Justice is called to step up and resolve the conflicts that arise, thus leading to further judicialization of the policy area of copyright.

Many policy areas in the EU have experienced some degree of judicialization, due to the overall strengthened position of the Court. However, this particular issue of copyright online is relatively new and has concerned legislators only in the last fifteen to twenty years, and the first cases concerning copyright online that reached the Court of Justice started to appear in the late 2000s. Therefore, due to the fact that it is a recent issue, there has been limited research on this specific topic in relation to the involvement of the Court of Justice. This however, appears to also be a limitation for the study, as the cases that are presented, although important, are rather limited in number.

Most importantly, online copyright law is a field worth studying as it is an area where we can identify a big clash between two opposing camps: on the one side are the copyright holders, and on the other side are the internet users. These two groups hold significantly different views on copyright law and the fast pace of technology in conjunction with the slow process of the legislative reform makes the problems related to this conflict appear even bigger. It is therefore interesting to study the Court's approach in trying to resolve the conflict between copyright holders and users.

Most literature on copyright issues in the EU comes from the field of law as it is a primarily legal matter; thus the aim of the thesis is to contribute to the scholarly literature on copyright by looking at the topic through a political science perspective and study copyright issues in terms of the competing interests involved in copyright law and the consequences of the involvement of the Court of Justice. In the age of the internet, copyright affects all individuals in their everyday lives in one way or another, whether they are creators or users. Therefore, the case law of the Court and the legislation on copyright is important to study in order to be aware of the rules that apply to the material that is created and used.

### 3.3 Method

In order to study the judicialization of copyright law and its effects, the thesis will look at the position of the Court of Justice when trying to resolve a case and understand the implications it has for the different interests involved. The ultimate goal is to identify whether the judicialization of copyright law has brought some kind of shift in the conflict between the different interests in relation to copyright issues online. The main part of the study will thus rely on an analysis of court cases in order to identify how the Court tries to resolve the conflict. The court cases that are analyzed in the paper have been chosen based on their relevance to the specific issue and the legislation that is referred to the Court for interpretation. Based on these two criteria, the author has found eight cases from 2008 until 2014 that deal with the issue of copyright infringement online and concern the interpretation of two specific Directives.

The thesis will conduct a thorough examination of the related court cases by looking at the decisions of the Court of Justice, study how the Court has interpreted existing legislation, how it justifies its decision in each case and then make conclusions about the impact of each case. The outcome of each case and the justifications of the Court will determine the importance that the case has for the conflict. After the analysis of all the cases, if most cases tend to favour one group over the other or the judgements introduce new aspects in the interpretation of the existing legislation that changes the status quo in the copyright conflict, then it will be possible to identify whether judicialization has had some kind of effect on the clash and the different interests.

This case study will thus go through five steps. The first step is to study the existing legislation, and especially the two most important Directives that are related to online copyright protection and enforcement, as well as study the literature that discusses the legislation, the process of harmonization of copyright rules, and the main problems of the legislation, which have partly caused the judicialization of this policy area. The second step is to identify the main groups that are concerned with online copyright and assess which group is the dominant one in this conflict; in other words, which group's interests are satisfied through the existing legislation. Thirdly, the relevant case law of the Court of Justice is studied to identify the position of the Court in the conflicts and the justifications it provides. The fourth step is to identify whether there has been some kind of shift in the conflict between the different sides after these cases. Finally, through this analysis, it should be possible to draw conclusions about the consequences of judicialization on the competing interests as well as the impact of judicialization in the EU.

## 4 Copyright in the EU

Before looking at the Court's involvement in the copyright debate, it is first necessary to study the existing legislative framework on copyright. This section will make a brief reference to the foundations of copyright law, before delving into the harmonization of the EU's legislation on copyright with a focus on the two most important and most relevant legislative acts regarding online copyright. This will be followed by an outline of some of the problems of the legislation and a presentation of the conflicting interests in the copyright debate, whose positions reflect the state of the legislative framework. The chapter will end with a discussion on the involvement of the Court of Justice in this policy field, as a preamble to the subsequent analysis of all the relevant cases in the following chapter.

### 4.1 Foundations of Copyright Law

Copyright is based first and foremost on the idea that culture should be protected, and therefore, there is a moral and financial obligation "of rewarding those who enrich the cultural heritage of mankind" (Keeling, 2004, p.266). However, scholars argue that the current copyright laws are largely based on neoliberal economics, characterized by a support for strong private property rights and a view of creativity firstly as an industrial product rather than a cultural product. Daly & Farrand (2014) argue that "for copyright policy, the increased commodification of creativity [...] represents both the best way of ensuring further creativity and wealth production, and of distributing that product to the paying public" (p.29). Copyright is therefore viewed as a form of property that is equivalent to property in land, which results in the "acceptance of an absolute ownership of a copyrighted work" (p.31). This conception of copyright as a form of private property has been an important tool for various interest groups that have tried to incorporate this notion into the legislation through their involvement in the policy-making process and their efforts to influence the legislation to suit their interests and needs (p.31).

Moreover, some scholars argue that legislation on intellectual property in general seems to view copyright as an end in itself, rather than a means for further creativity. Peukert (2011) for example argues that the legislation in the EU has adopted a "self-sufficient property logic" (p.67): firstly, it mentions only the positive effects of copyright and makes no reference to the potential negative effects of excessive copyright protection; secondly, it stresses the need for a high level of protection of intellectual rights which should increase and expand when



necessary; thirdly, it is based on the Charter of Fundamental Rights which in Article 17(2) states that “intellectual property shall be protected”, without mentioning exceptions in case of conflict with other fundamental rights or freedoms (p.68-69). By “idealizing” copyright and regarding it as an end in itself, rather as an instrument to achieve other aims, copyright laws have been “immunised against critique” and have fostered the idea that the higher the protection and enforcement of copyright, the better it is for everyone (p.71).

The roots of the current legislation on copyright in the EU can be traced to the international agreements on intellectual property, which are generally acknowledged to have been formed by the bigger companies and corporations in the world, who have adopted the aforementioned neoliberal conception of intellectual property (Daly & Farrand, p.5-6). One of these is the TRIPS agreement (Agreement on Trade-Related Aspects of Intellectual Property Rights), a multi-national intellectual property agreement that was passed in 1986 and established minimum standards of protection and enforcement for all kinds of intellectual property, including copyright, but without any regard to the emerging internet world (Bates, p.238). A pair of international treaties was later adopted in 1996, the “WIPO Copyright Treaty” and the “WIPO Performances and Phonograms Treaty”, which were created to expand the standards that were set by previous agreements in order to ensure the international protection of copyright and combat piracy. However, it has to be pointed out, that online piracy was not as widespread at the time; therefore the measures that were taken could not address or predict future uses of copyrighted material online (Rantou, 2012, p.3).

Following these international agreements, the policy area of intellectual property rights in the EU has witnessed an extensive legislative activity in the last twenty years. The legislation’s aim has been to respond to problems that arise concerning the functioning of the internal market and the appearance of new technologies, and to achieve the harmonization of copyright rules across the Union, since copyright has been based on the principle of territoriality and thus each member state has had different rules concerning the protection of copyrighted material (Kur & Dreier, 2013, p.243-244). Harmonization of copyright law in the EU has been achieved through different methods and has thus been divided into three phases: harmonization by directive in the 1990s; harmonization mainly through soft law in the 2000s; and harmonization through case law since the late 2000s (Hugenholtz, 2013). The following section will present the process of harmonization in the EU loosely based on these three phases, while focusing on the two most important Directives that are relevant to copyright protection and enforcement online.

## 4.2 Harmonization of Copyright Law

The first period of copyright harmonization in the EU was from 1991 to 2001, and saw the adoption of seven different Directives on copyright: the Computer Programs Directive, the Rental Right Directive, the Satellite and Cable Directive,

the Term Directive, the Database Directive, the Copyright Directive and the Resale Right Directive. This period is considered remarkably productive and ambitious, as the appearance of new technologies and especially of the internet gave the Commission the opportunity to regulate a field where there were no firmly established national rules or case law that would obstruct harmonization (Hugenholtz, p.506-507), but also posed a challenge that had to be faced urgently in order to prevent the creation of problems in the single market (p.509).

The main EU legislative document that regulates online copyright law is the Directive on the harmonization of certain aspects of copyright and related rights in the information society (Copyright Directive), adopted in 2001. The Directive is perhaps the most important of all legislative acts on copyright that have been adopted over the last fifteen years, partly because it is the most comprehensive Directive on copyright in the EU so far and the first to fully address the regulation of copyright in the digital environment. The Directive was largely based on pre-existing rules and principles laid out by former Directives and international agreements on intellectual property, albeit adapted to the technological climate of that time (Directive 2001/29/EC, recital 20). The aim was the harmonization of the member states' legal framework on copyright in order to ensure the smooth functioning of the internal market, increase legal certainty and provide a high level of protection of intellectual property (recital 4-7).

The Directive recognises copyright as an “integral part of property” and stresses the need for a high protection of copyright in order to safeguard the artistic and creative work of authors and performers as well as the financing of their work by those who produce it (recital 9-12). It recognises three kinds of rights for the copyright holders: the right of reproduction, which gives them the “exclusive right to authorize or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form” (article 2); the right of communication to the public, which provides them with “the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means” (article 3); and the distribution right, which gives them “the exclusive right to authorise or prohibit any form of distribution to the public by sale or otherwise” (article 4). The Directive also contains an exhaustive list of exceptions and limitations to the right of reproduction and the right of communication to the public, such as for educational or scientific purposes or for non-commercial private use, which must always be accompanied by a “fair compensation” (article 5). The Directive often makes references to technological developments or the new electronic environment as important factors that have to be taken into consideration when applying the exceptions and limitations, while also mentioning that this process should be compatible with international obligations. In addition, the Directive states that when exceptions and limitations are permitted, they “may not be applied in a way which prejudices the legitimate interests of the rightholder or which conflicts with the normal exploitation of his work or other subject-matter” (recital 44). Finally, the Directive also includes sections about the technological measures that are adopted to restrict access and use of material, the provision of legal protection and the implementation of sanctions and remedies against illegal and infringing activities.

The second period of copyright harmonization in the EU, which starts after the implementation of the Copyright Directive in 2001 up to 2008-9, was much less productive. Only one Directive was adopted during this period, the Directive on the enforcement of intellectual property rights (Enforcement Directive), whereas three of the Directives that were adopted in the 1990s were partly updated. Hugenholtz argues that the slow pace of legislative activity during this period can be partly due to the enlargement of the EU, as it made policy-making much more complex and the new member states were reluctant to support the expansion of copyright (p.511). The Commission thus changed its approach towards copyright, and attempted to harmonize this area by issuing several soft legislative instruments, such as recommendations, communications and policy papers.

The aforementioned Enforcement Directive was adopted in 2004 and stipulates the measures, procedures and remedies that are necessary for the protection of intellectual property rights from counterfeiting and piracy. The Directive stresses the need for the protection of intellectual property in order to safeguard the functioning of the internal market, as it promotes creativity and innovation, as well as employment and competitiveness (Directive 2004/48/EC, recital 1). It also warns about the dangers of the internet, which enables the distribution of copyrighted material illegally, hence the aim of the Directive is to create a strong and homogeneous system of rules of protection across the Union so that copyright holders can enforce their rights (recital 9-10). The Directive applies to “any infringement of intellectual property rights” (article 2) and offers significant discretion to member states, especially when it comes to the role of internet service providers.

The current third period of harmonization which started around the year 2008 has seen the adoption of two Directives related to copyright: the 2012 Directive on the online use of orphan works and the 2014 Directive on collective rights management and multi-territorial licensing of rights in musical works for online uses. Furthermore, the EU has tried to regulate copyright by trying to pass the Anti-Counterfeiting Trade Agreement (ACTA), a controversial international agreement that gathered considerable public attention and was eventually rejected by the European Parliament in 2012. In addition, following a number of studies and a public consultation on the review of the current copyright rules, the 2001 Copyright Directive is currently undergoing a process of reform as part of the Commission’s objective to establish a Single Digital Market. The Commission is expected to publish its proposals for the copyright reform in the autumn of 2015.

This period of harmonization, however, which started in the late 2000s, can be considered as the period of harmonization through case law, as the task to harmonize this policy field has shifted from the legislative institutions to the Court of Justice through the interpretation of the existing directives (Dur & Dreier, p.246). Hugenholtz argues that the Court is pursuing an “activist agenda of harmonization by interpretation” (p.513), firstly exhibited in the *Infopaq* case (Case C-5/08), which concerned the reproduction of parts of newspaper articles without authorisation by a news alert service. This case, and many others that followed it, have resulted in the harmonization of areas of copyright that had not

been dealt with in the Directives (Hugenholtz, p.516). They have therefore highlighted the important role of the Court in harmonization and provided a basis for the Commission's future legislative initiatives. The Court's case law has managed to change the copyright laws of many member states, and as a result has managed to craft a 'truly communautaire copyright' (Derclaye, 2014, p.716).

The main cause for the increased judicial activity in EU copyright law is the 2001 Copyright Directive. Most of the cases referred to the Court of Justice deal with the interpretation of certain provisions of this particular Directive, as it contains many ambiguities and creates conflicts between national and EU law that need to be solved (Kur & Dreier, p.290). Indeed, if we observe the Court's case law on copyright, we can see that it was very small in the beginning of the 2000s; however, it gradually started to grow approximately five years after the enactment of the Copyright Directive, a period during which member states started to implement the Directive and the first copyright-related cases started to appear in national courts (Leistner, 2014, p.599). As will be shown later in the paper, in the last seven years or so, there has been an important increase in cases related to the interpretation of this Directive reaching the Court of Justice, especially regarding copyright online. As Leistner himself argues, the Copyright Directive has become "the catalyst for an explosive development" (p.560) of the Court's copyright case law and by interpreting it the Court has managed to effectively harmonize important aspects of copyright law within a brief period of time.

### 4.3 Problems of Copyright Legislation

Concerning copyright in general, one of the main problems with the legislation is that technological advancements are so fast, especially in the digital environment, that it is sometimes difficult for the legislation to keep up. While internet users are quick to adapt to changes that take place on the internet and create new ways to spread information and material online, those who are in charge of creating the rules to regulate online activities are often unable to completely understand how the online world works and act in a timely and effective manner. As a result, the legislation that is adopted is often very ineffective, contains very vague provisions, and by the time it is adopted it is already outdated (Rantou, p.2). The two aforementioned Directives on copyright law are a testament to this phenomenon: The Copyright Directive will be fourteen years old this year, while the Enforcement Directive will be eleven years old. Although other pieces of legislation related to copyright have undergone some kind of revision, neither of these two legislative acts has been properly reviewed by the Commission up until now. Taking into consideration the fast pace of technology, in the age of the internet a decade alone is a very long time; hence, anything related to the electronic environment that is over ten years can only be considered as obsolete.

Furthermore, the EU's legal framework on copyright and intellectual property in general is rather fragmented. That is because there are different Directives that separately deal with different aspects of copyright, without them necessarily being

connected to each other, thus making the legislation seem rather disjointed, which is also reflected through the national legislation of the member states (Rantou, p.3-5). An effort was made with the 2001 Copyright Directive to provide a general legal background for copyright rules; however, the Directive has many flaws and has led to the adoption of divergent national rules across the EU.

The Copyright Directive has been criticized for its inefficiencies and ambiguities. One of its early critics was Bernt Hugenholtz (2000), who argued that the Directive was “a badly drafted, compromise-ridden, ambiguous piece of legislation” (p.500) which failed to achieve its two main goals: legal certainty and harmonization. He argued that the vague and sometimes “unintelligible” language resulted in the creation of more uncertainties, whereas the non-mandatory nature of the list of exceptions meant that member states could choose which exceptions to include in their legislation and which not to include, thus maintaining their national laws and not moving towards harmonization (p.500-502). Leistner (2009) is another scholar that agreed with the view that the Directive has been unsuccessful in harmonizing the exceptions to copyright, and argued that it has merely led to “virtual harmonization” (p.851) as the exceptions are optional for member states and therefore lead to different solutions being adopted.

Furthermore, Hugenholtz argued that the list of limitations and exceptions was in itself a flawed idea because the rigid and inflexible rules set by the Directive could not be easily reconciled with the rapid technological advances brought by the internet (p.502). As a result, ordinary online behaviour would not be covered by the legislation and would thus be deemed illegal under certain circumstances. In addition, he predicted that it would require a considerable amount of time until a reform of the legislation was adopted that would include rules that were suitable for the new and ever-changing digital environment. This coincides with Leistner’s view that the Directive’s list of exceptions had “frozen” copyright law because it did not include a general or broad exception that could apply to future developments and uses, especially in the online environment (p.852). Finally, Hugenholtz’ observations led him to predict that, due to the Directive’s flaws, the Court of Justice would eventually be involved and would “have to finish the job left largely undone by the European legislature” (p.502).

The Copyright Directive has also been criticized for failing to secure a balanced protection of the different interests and rights, despite claiming to do so. This is due to the strong copyright protection measures that were put in place as well as the weakness of the copyright exceptions, which favoured the interests of the copyright holders (Favale, 2008, p.687; 696). This imbalance was accentuated by the aforementioned failure of the Directive to harmonize effectively the copyright rules, as its implementation at the national level resulted in many divergences between the member states. Considering the cross-border nature of the internet, the Directive possibly led to the creation of more problems rather than solutions.

The Enforcement Directive has also been the target of some criticism. Due to the fact that the Directive applies to any kind of infringement, it does not make a clear distinction between commercial and non-commercial or unintentional infringement. It only tries to ensure that copyright protection is protected at the

highest level possible and that strict sanctions are put in place to combat piracy. The Directive has thus been criticized for being rather harsh and for providing the creative industries with the necessary tools to “attack” users while offering no protection to consumers (Bates, p.240-241).

The criticism towards the existing legislative framework on copyright and the measures taken towards copyright infringement is increasingly becoming bigger, with many different groups with their own individual interests asking for changes to the legislation in order to adapt to the electronic environment. Criticism has even come from within the Commission itself; the former Commission Vice-President and Digital Agenda Commissioner, Neelie Kroes, has on different occasions questioned the effectiveness of the current copyright legislation in achieving the goals it had set out, namely combating piracy and rewarding the creators. Furthermore she has stated that: “citizens increasingly hear the word copyright and hate what is behind it. Sadly, many see the current system as a tool to punish and withhold, not a tool to recognise and reward” (2011, p.2).

Kroes has also criticized the domination of the interests of certain groups, arguing that the internet revolution has showed that their firm views in the copyright debate are “unsustainable” and that they risk to be “sidelined if they do not adapt to the needs of both creators and consumers of cultural goods” (2010, p.2). She has called for a change in the legal framework, which has given more power to intermediaries rather than artists and has framed the debate on copyright “in moralistic terms that merely demonise millions of citizens”, and she has suggested that the legislation should instead “look beyond national and corporatist self-interest to establish a new approach to copyright” (p.3-4). Kroes has called for more creativity, flexibility and out-of-the-box thinking in the legislative framework, and for the use of technology in order to help creators get the rewards they deserve, while making sure that users’ needs are also satisfied. For Kroes, the effective use of technology and the creation of flexible and adaptable legislation are the keys for nurturing creativity and innovation, thus resulting in economic and social growth in the EU (2011, p.3).

## 4.4 Competing Interests in Copyright Law

In order to assess the impact of judicialization on the different interests in the copyright debate, it is necessary to first identify what these interests really are and which groups represent these interests and rights. In addition, it is important to examine which interests are satisfied through the existing legislation, which will then help to determine whether judicialization has brought any kind of change in the conflict between the different interests.

The two broad groups that have opposing interests when it comes to copyright can be categorized as those who *own* copyrighted material and those who *use* copyrighted material. However, these two groups can consist of different subgroups that have their own individual demands and interests.

On the one side of the spectrum are the copyright holders or copyright owners, which can be divided into three subgroups: the creators of works, which can be writers, composers, journalists or architects; the performers, such as musicians or actors; and those who invest in the work of the creators and publish, license and distribute their work, such as record companies, producers, publishers, broadcasters, as well as collective rights management organizations, who represent the interests of the creative industries. Creators have four objectives: the reproduction and distribution of their work, receiving credit for their work, earning a financial reward for their work and the creative engagement with other works (Kretchmer, p.9). The investors or producers only have one objective: the exclusivity and transferability of the rights, in order to gain a profit from their investment (p.10). Based on Article 17(2) of the Charter of Fundamental Rights (EUR-Lex, 2012) which states that “intellectual property shall be protected”, this group supports strong copyright rules because they are considered to promote the creativity and innovation of the creators by providing financial incentives to continue producing their work, while also securing the financial profit of the companies and associations that represent and invest in the creators.

On the other side of the spectrum are those who use the copyrighted material, who are the individual users or consumers and those who represent them (i.e. consumer associations). However, these two terms can have different meanings. The term “consumer” implies a passive consumption of the material; whereas the term “user” (which is the one that is mostly used in copyright legislation and case law) implies some kind of active engagement with the material, whether for teaching purposes, for review, parody etc, which makes the user a potential creator (Helberger & Guibault, 2012, p.28). This group considers strong copyright protection as problematic, as it hinders the creative use of copyrighted material, and argues that the rules on copyright enforcement are a threat to their fundamental rights. These rights, which are included in the Chart of Fundamental Rights, are the respect for private life (Article 7), the protection of personal data (Article 8), and the right to freedom of expression and information (article 11), and can often come in conflict with the right to copyright protection.

There are also other groups that are involved in the copyright debate and have their own interests. These include: institutional users, such as libraries, museums, archives and universities who use copyrighted material for education and research purposes or for the public interest; internet service providers; different kinds of online businesses that offer cross-border services; social networking services and other similar websites; and non-governmental organizations. Each group has its own concerns and demands in regard to copyright and its position within this spectrum of the two extremes can vary depending on the alignment of its interests.

Looking at the arguments of the two main sides regarding copyright, and more specifically copyright in the digital environment, it is easy to identify that the two main groups hold diverging views, have very different perceptions of the existing legislation and the problems it creates, and suggest different solutions to improve the legislation. An example of one of the thorniest issues between the different groups is the cross-border access to online content: while consumers, institutional users and companies often report having problems accessing content

online due to the territoriality of copyright (what is called “geo-blocking”) and call for more cross-border availability of services (European Commission, 2014, p.6-7), copyright holders argue that there are no such problems and that there is no demand for cross-border services (p.7-10). Another issue that illustrates the big disagreement between the groups is the issue of hyperlinks and browsing. While users/consumers and service providers argue that these activities should not be subject to authorization by the copyright holders, copyright holders believe that authorization is always necessary (p.16-19).

Regarding the enforcement of copyright, users are not in favour of further strengthening of enforcement and are against the involvement of intermediaries such as internet service providers, which could implement filtering systems to monitor online activity. Furthermore, users argue that the legislative framework does not ensure a fair balance between the protection of copyright and other fundamental rights, especially privacy and personal data, and that it is biased towards the interests of the copyright holders (p.83). Copyright holders on the other hand argue that the existing system of copyright enforcement fails to adequately protect their rights and that stronger enforcement action is necessary. For copyright holders, internet service providers are key actors that have to be more actively involved in order to stop copyright infringement. Furthermore, some copyright holders consider that the current legislation and case law offer enough safeguards for the protection of the fundamental rights of the users; whereas others argue that the current legislation is strongly biased in favour of the protection of personal data, which prevents them from enforcing their rights (p.84-87).

Users and copyright holders seem to disagree on almost every single issue that concerns copyright. Other key issues which show the differences between the two camps are: the length of the term of copyright protection (currently set to 70 years after the death of the creator); the harmonization, extension and flexibility of exceptions and limitations; the access to content in libraries and archives; the use of copyrighted works for teaching and research purposes; the distribution of pre-existing or user-generated content on the internet; and private copying. In general, users hold the view that the legislative framework is in urgent need of an extensive reform that will be up to date, clear and efficient, whereas copyright holders are not very keen on any reforms of the copyright rules and appear to be particularly opposed to any kind of radical changes, such as introducing more and broader exceptions to copyright (p. 29-33). Within the copyright holders’ group, it can be seen that those who have the stronger opinions on the protection of copyright are not always the creators themselves, but rather those who represent them, such as collective rights societies or the so-called investors (publishers, record companies etc). This is because these groups’ own existence essentially depends on the preservation of the current model of copyright.

As mentioned earlier, the international treaties upon which the EU’s copyright legislation is largely based on is considered to have been significantly shaped by companies and organizations that represent the interests of the copyright holders. In addition, it is generally recognised that the holders of intellectual property rights have been very successful in influencing the policy-



making process in the EU which has resulted in strict regulations and the expansion of copyright protection (Coudert & Werkers, 2008, p.50). Hugenholtz argued that the 2001 Directive underwent “unprecedented lobbying” (p.499), and that it mainly satisfied the interests of the “main players” in the industry, such as producers, publishers and broadcasters, and failed to protect the creators and performers (p.503). Kretschmer also made remarks about the high level of lobbying for the Directive, which reflected the “industry’s right to say NO in the on-line environment” (p.2). The measures included in the Enforcement Directive also displayed the perception of copyright as an absolute right and showed the big influence of lobby groups in the legislation (Daly & Farrand, p.33-34). Coudert & Werkers argued that the copyright holders’ biggest success was in fact the 2004 Enforcement Directive (p.51), with its imposition of strict measures, procedures and remedies against those that infringe intellectual property rights. As a result, protections for individual internet users have “eroded to the point of virtual nonexistence” in the legislative framework (Bates, 2004, p.249).

It should also be noted that at the time of the creation and implementation of the Copyright Directive, companies that provided internet access were not as many as today, while websites and internet services that are widely popular to users such as Google, Facebook and YouTube did not exist or were still in their very early stages of development. Moreover, internet use in the early 2000s was considerably low in relation to the number of internet users today. Thus, internet companies and lobby groups that represented users and consumers had minimal power at the time to be able to influence the legislation, which means that their position in the legislative framework is rather weak.

It is thus safe to assume that the rightholders hold the hegemony in copyright law, which they have achieved through extensive lobbying of legislative institutions at the national, the EU and the international level. The two Directives under scrutiny in this paper are thus essentially satisfying the interests of this group. However, in spite of the domination of this group, the increased public salience of copyright issues, especially after ACTA, has indicated the rise of the group of users and consumers in the copyright debate. As Daly and Farrand argue, “the increased public consciousness of individual rights and freedoms, and of the protection and dissemination of culture puts legislative copyright absolutism to much more scrutiny by a wider section of the general public and civil society” (p.40). As the internet has increasingly become more important in people’s lives, strict rules on copyright enforcement have started to become even less acceptable, especially if they consistently satisfy the sole interests of copyright holders, the majority of whom are corporations. Since the current legislative framework cannot reconcile the differences between the competing interests and the legislative process is too slow to introduce new reforms that address these problems, it is now up to the Court of Justice to solve the conflicts that arise.

## 4.5 Judicializing Copyright Law

As presented in the second section of this chapter, the EU has experienced a remarkable degree of harmonization of many important aspects of copyright in the last two decades, through legislative and judicial means. The Court of Justice case law has complemented the existing legislative framework and has alleviated the weaknesses of the Directives (Hugenholtz, 2013, p.518). One of these weaknesses is the length and complexity of the legislative process in the EU, as it can take several years for a directive to complete from its first proposal up to its final adoption, and is then followed by another long process of transposition into national law (p.518). This big time gap makes the Court a relevant actor which can provide solutions to conflicts.

Another weakness of the Directives is that they create short-term legal uncertainty for member states, due to the new and additional legal rules that they introduce that have to be interpreted at the national level. Furthermore, due to political compromise, Directives often tend to be vague and can provide a lot of discretion for member states, which results in different rules being adopted, thus hampering harmonization (p.520). The Court of Justice therefore gains an important role by interpreting and clarifying EU law for the member states and providing legal certainty for complex and controversial issues. Directives can also be problematic due to the lack of transparency, as the policy-making process in the EU provides many possibilities for lobbying or rent-seeking (p.520). Thus, the Court, as a neutral actor in the EU's political system that is not prone to external influence, can provide more balanced solutions to challenges that arise.

For these reasons, the period since the late 2000s has seen an increased judicial activity in copyright law, which confirms that judicialization is indeed taking place in copyright law. If the features of judicialization, presented in the theoretical part of the paper, are applied to copyright law, it can be argued that:

- The legislative framework on copyright (mainly the 2001 Copyright Directive) is increasingly becoming outdated and produces many problems, and the process of reform of the EU rules on copyright is slow and complex, which leads the interested parties to pursue their aims through the Court of Justice.
- As a result of the former, there has been an increasing number of cases related to copyright law referred to the Court of Justice, where it is asked to interpret EU legislation related to copyright in order to solve disputes; thus, its position is becoming more significant in the copyright debate.
- The Court's case law has an impact on existing legislation, because its interpretation of different legislative acts can potentially lead to different results than those that the original legislation was aiming for. However, it can also have an impact on future legislation, because the decisions of the Court have to be taken into consideration when making new rules or updating existing ones. Thus, the Court indirectly shares legislative power with the Commission, as well as the Council and the Parliament.

The Court has been criticized for being interventionist and integrationist, that it has a harmonization 'agenda' and that its case law is inconsistent and thus creates unpredictability and legal uncertainty (Derclaye, p.721-722). However, these inconsistencies can be attributed firstly to the fact that the legislation itself that the Court has to interpret is often ambiguous and its role is strictly limited to answering the questions that are referred to it by the national courts; secondly, that the EU's copyright law and case law is still relatively small and underdeveloped; and thirdly, that the Court always tries to give a good and just solution to each specific case depending on the circumstances, which allows the Court to have some flexibility when interpreting EU law. Nevertheless, the impact of the Court's judgements has been significant and the Court has gained an important role in harmonizing copyright law.

Judicialization of copyright law is the direct result of the need of copyright holders to protect their rights in any way possible (Kur & Dreier, p.290). In spite of the strong protection of copyright in the legislation, copyright holders believe that they are not sufficiently protected, especially since the distribution and downloading of copyrighted material online has become more widespread over the years. In order to protect their rights and commercial interests against online copyright infringement, copyright holders have become more willing over the years to resort to the Court and try to bring legal actions against peer-to-peer networks and their users. However, physically tracing the users that infringe copyrighted material is not easy, because acquiring their IP addresses is not enough to identify them (Baraliuc et al, 2012, p.95). They therefore demand internet service providers to provide them with the information of the users that are involved in infringement activities, or request that they take measures to prevent copyright infringement by filtering the traffic or blocking copyrighted content. An example of the latter is the so-called 'graduated response', where the service provider sends warnings to the users to stop uploading or downloading copyrighted material illegally, and after three warnings, imposes restrictions on the use of the internet connection or suspends the service (p. 98). However, if the service providers refuse to comply in any way with the copyright holders' demands, the rightholders take legal actions against the access providers, while also demanding for further legislative measures to be taken at both the national and European level (Coudert & Werkers, p.51-52; Rantou, 2012, p.2). As will be shown in the analysis of the cases, in spite of the strong position that copyright holders occupy in the legislation, their demands can often be in conflict with other kinds of legislation and fundamental rights.

## 5 Case Law of the Court of Justice

The case law of the Court of Justice on copyright has increased significantly since the mid-2000s, however, the cases related to copyright online are still relatively few, with the first major case appearing in 2008. Although the type of actors involved and the specific issue that sparks the conflict may vary from case to case, there is a common thread to the cases that are analysed here: firstly, they all deal with instances of potential copyright infringement on the internet and secondly, the copyright legislation that is referred to the Court for interpretation is the 2001 Copyright Directive or the 2004 Enforcement Directive (or both). Some cases involve a conflict between the protection of copyright versus the protection of other fundamental rights, and more specifically the protection of personal data, whereas other cases concern ordinary internet uses that have not been included in the legislation or the case law up until now. Nevertheless, all the cases are expected to have consequences for all the stakeholders involved and they will facilitate our understanding of the effects that judicialization can have on the different interests and its impact in the EU in general.

### 5.1 Court Cases

#### 5.1.1 *Promusicae v Telefónica* (2008)

The case was between Productores de Música de España (Promusicae), an organization that represents the interests of the majority of the Spanish recorded music industry, and Telefónica de España SAU, a Spanish internet service provider. The conflict surfaced in 2005, when Promusicae demanded from Telefónica to hand over the personal data (meaning the identities and physical addresses) of certain persons to whom it provided internet access, because these persons used KaZaA, a peer-to-peer file-sharing program which provided access to material whose copyright was held by members of Promusicae (Case C-275/06, paras 29-30). Promusicae took the conflict to the Commercial Court in Madrid, claiming that the users were “engaging in unfair competition and infringing intellectual property rights” (para 31) and demanded their information in order to bring civil proceedings against them. The case resulted in the national court agreeing with Promusicae and ordering the disclosure of the data. However, Telefónica appealed against the order, arguing that the communication of the data was not applicable in the case of civil proceedings and thus the order was not consistent with national and European law, which led the national court to refer the case to the Court of Justice.

The question referred to the Court was whether EU law can be interpreted as requiring member states to put an obligation on internet service providers to disclose the personal data of their customers if they are involved in infringement activities, which will allow the copyright holders to proceed to civil actions against them (para 41). The national court referred four different kinds of directives: the 2001 Copyright Directive, the 2004 Enforcement Directive, the 2000 Directive on the free movement of internet services and the 2002 Directive on the processing of personal data and the protection of privacy online. By interpreting these Directives, the Court concluded that the Directives on personal data do not exclude such an obligation, but also that the Directives on copyright do not require such an obligation, and thus it is up to the members states to judge whether such an obligation is necessary, based on the principle of proportionality.

When referring the question to the Court of Justice, the national court also made a reference to the Charter of Fundamental Rights and specifically the article on the protection of the right to property, which includes intellectual property, and the article on the right to seek effective judicial protection. However, the Court noted that there was another equally important fundamental right that was at stake in this case, which was the protection of personal data and private life (paras 61-65). Thus, in its judgment, the Court stated that when transposing these directives, member states should make sure that their interpretations of the Directives allow for “a fair balance to be struck between the various fundamental rights protected by the Community legal order” (para 68; emphasis my own). The Court also stated that when applying and interpreting national legislation, national courts should make sure that their interpretations respect the Directives and do not conflict with these fundamental rights or other general principles of EU law.

*Promusicae* is the first case that dealt with a conflict between the enforcement of intellectual rights and the right to data protection, and thus highlighted the conflict between two different kinds of fundamental rights and the need to strike a balance between them (Coudert & Werkers, p.51; Rantou, p.8). Involving the concept of fundamental rights into the interpretation of the secondary law on copyright is a remarkable development of the Court which provided a “general foundation for future ‘value guided’ and balanced interpretation” of the Copyright Directive (Leistner, 2009, p.873). This case thus acknowledged and established the importance of the protection of the rights of the users and paved the way for the future case law that dealt with similar issues to take into consideration the fundamental rights of the users and not only focus on the rights of the copyright holders.

*Promusicae* was also the first case where the role of internet service providers in copyright infringement was looked at. Internet service providers are an important group in the copyright debate, as their position is critical in such cases due to the information they hold and their ability to track the activity of their users. However, this particular judgement did not clarify the position of the internet service providers in cases of copyright infringement, which led to the increase of divergences that already existed in the interpretations and case law that was adopted in the member states (Leistner, p.873). As a result, more cases ended

up in the Court dealing with the role of internet service providers in the protection of copyright.

Overall, the case was regarded as a defeat for copyright holders, and left internet service providers and internet users satisfied. However, the Court's judgement is actually the result of a compromise; the Court did not make a decision but adopted a more cautious and ambiguous stance, by not recommending any practical ways to achieve the balance between the conflicting groups and leaving the decision to be taken by the member states (Rantou, p.9). Although this provided the Court with flexibility and gave considerable discretion to the member states to deal with the matter as they saw fit, it also resulted in some uncertainty and inconsistency across the EU.

### 5.1.2 *LSG v Tele2* (2009)

A similar case appeared in Austria, between LSG-Gesellschaft zur Wahrnehmung von Leistungsschutzrechten GmbH, a collecting society that represents the rights of recorded music producers and artists, and Tele2 Telecommunication GmbH, an internet service provider. LSG demanded from Tele2 the names and addresses of persons to whom it provided internet access that engaged in copyright infringement, something that Tele2 refused. The Commercial court in Vienna sided with LSG and argued that Tele2, as an internet service provider, is considered an "intermediary" and thus it is obliged to provide this kind of information. The case was subsequently taken to two other Austrian courts, with the Supreme Court referring two questions for a preliminary ruling to the Court of Justice. The Supreme Court asked for the interpretation of the 2001 Copyright Directive, the 2004 Enforcement Directive and the 2002 Directive on the processing of personal data, in order to answer whether an internet access provider such as Tele2 can be considered an intermediary and whether the Directives allow the disclosure of personal data to third parties to use them for civil proceedings against individuals that have committed copyright infringement.

The Court of Justice answered the two questions by making references to the *Promusicae* case, albeit leading to a different outcome. Firstly, it judged that access providers should be considered as intermediaries, even if they do not offer any other services apart from internet access and they do not have any control over the activity of the users, because they are the only services that are able to identify users that infringe copyright (Case C-557/07, paras 43-46). For the second question, the Court stated that the Directives do not preclude (thus, they can allow) the imposition of an obligation to provide personal data to third parties in order to bring civil proceedings against those who engage in copyright infringement. However, in line with the *Promusicae* case, the Court also stressed that when transposing the Directives into national law, member states should make sure that the interpretation strikes a fair balance between the various fundamental interests (paras 24-29). The *LSG* case thus continued on the same path as the *Promusicae* case, by stressing the importance of balancing the different rights.

### 5.1.3 *Scarlet v SABAM* (2011)

The case concerned a conflict between Scarlet Extended SA, a Belgian internet service provider and Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM), a Belgian management company that represents authors, composers and editors of musical works and authorizes the use by third parties of their copyrighted material. The conflict arose in 2004 due to Scarlet's refusal to install a system that would filter communications online that used file-sharing software.

SABAM took Scarlet to the Court of Appeal in Brussels, and argued that Scarlet's customers had downloaded their copyrighted material illegally through peer-to-peer networks. It argued that Scarlet ought to take measures that would stop the copyright infringement activities of its customers (Case C-70/10, paras 17-20). The national court found that copyright had indeed been infringed, and after taking into consideration an expert report on whether the technical measures that were proposed were feasible, it ordered Scarlet to take action against the copyright infringement of its customers (paras 21-23). However Scarlet appealed against the decision, arguing that filtering and blocking content would be impossible to achieve for practical reasons and that the decision was not consistent with EU law regarding the obligations of internet service providers and the protection of personal data (paras 24-26).

The national court thus made a reference for a preliminary ruling to the Court of Justice for the interpretation of the 2001 Copyright Directive, the 2004 Enforcement Directive, the 2000 Directive on electronic commerce and the 1995 and 2002 Directives on the processing of personal data. The question asked was whether these Directives allow a national court to order an internet service provider to introduce a system that would filter all electronic communications of its customers in order to identify whether they engage in copyright infringement and block their file-sharing activities. The Court answered that the Directives should be interpreted as not allowing the enforcement of such an obligation on the internet service provider.

First of all, the Court argued that the filtering system would conduct general monitoring of all electronic communications of the customers, which is prohibited by the 2000 Directive on electronic commerce. Furthermore, the measures that were suggested in order to detect and prevent copyright infringement would infringe the internet service provider's right to conduct a business because it would require the installation of a "complicated, costly, permanent computer system at its own expense" (para 48) for the sole interest of the rightholders, thus not satisfying the requirement to strike a fair balance between the protection of copyright and the freedom to conduct a business.

According to the Court, the installation of the filtering system would not only affect negatively the service provider. The judgment also made a reference to the *Promusicae* case, reminding the request for a balance between copyright and the fundamental rights of the users (paras 44-45). It argued that this measure would infringe the users' right to protection of their personal data and their freedom to receive and impart information, rights that are included in the Charter. This is because the system would monitor all electronic communications of all of its

customers and would analyse, collect and identify the IP addresses of the users, which are regarded as protected personal data. Furthermore, the system would not be able to distinguish between lawful and unlawful content, thus potentially leading to the blocking of lawful content (para 52). Therefore, due to the failure in striking the balance between the different rights, the Court did not find the filtering system as an appropriate and acceptable measure to combat copyright infringement.

An important observation made by the Court in this case was that although it acknowledged that the protection of intellectual property is included in Article 17(2) of the Charter of Fundamental Rights, it argued that there is “nothing whatsoever in the wording of that provision or in the Court’s case-law to suggest that that right is inviolable and must for that reason be absolutely protected” (para 43). This is the first time where the Court, although recognising that intellectual property is a fundamental right, openly and clearly stated that it is not inviolable and should not be subject to absolute protection (Daly & Farrand, p.27). It should therefore be balanced against other rights, such as the right to conduct a business, the right to the protection of personal data and the freedom to receive and impart information. The case thus represents a “turning of the tide on the absolutism of copyright protection and enforcement and it brings user concerns and rights into the limelight” (p. 28).

Although the role of internet service providers was looked at in the previous cases, it was in the *Scarlet* case where this interest group was really put into the spotlight. In this judgement, the Court showed that internet service providers have their own rights that should be respected in the same way as other kinds of rights. Moreover, considering the critical role of these providers in the copyright debate, this decision had a positive consequence for the rights of the users. The protection of the rights of the internet service providers indirectly leads to the protection of the rights of the users, because it ultimately prohibits the disclosure of the information of the users and the blocking of content. Thus, in this case, the interests of the internet service providers aligned with those of the users, thus creating some sort of ‘coalition’ between the two groups to ensure the protection of their rights.

Ultimately, the case made the position of the users, as well as the internet service providers, even stronger in the copyright debate, as it followed and reinforced previous case law on the need to balance conflicting interests and clarified what it means by “fair balance”. By counterbalancing the four different kinds of rights involved (copyright protection, freedom to conduct a business, freedom of information, personal data protection) the Court showed that copyright is no longer an absolute right and that the solutions that are adopted should also respect other fundamental rights. *Scarlet* was thus another victory for the users, and brought a significant change in the interpretation of copyright legislation.



#### 5.1.4 *Netlog v SABAM* (2012)

This case was a conflict between the aforementioned Belgian management company SABAM, and Netlog NV, an online social networking platform. The conflict arose in 2009 after SABAM demanded from Netlog to install a system to filter information in its website in order to track and prevent file-sharing.

SABAM argued that Netlog's networking platform gave its users the opportunity to have access to and use material whose copyright belonged to SABAM without authorisation and without Netlog paying any fee. SABAM took Netlog to the Court of First Instance in Brussels, demanding Netlog to stop making available SABAM's copyrighted material without authorization on its website and pay a fine of EUR 1000 for each day of delay in complying with the order (Case C-360/10, paras 19-21). Netlog submitted that this obligation did not comply with EU and national law, because it would oblige it to monitor the content of all of its customers, at its own cost and for an unspecified period.

The Belgian court referred the case to the Court of Justice for the interpretation of the same Directives that were used in the *Scarlet* case. The question referred to the Court was whether the Directives can be interpreted as allowing a national court to order a hosting service provider to install a filtering system that would indiscriminately monitor the information that is stored in its servers by its users, at its expense, for an unspecified period of time, in order to trace and prevent the unauthorised use of copyrighted content. The Court answered that the hosting service provider in this case should not be obliged to install such a system.

The Court justified its position firstly by arguing that the general monitoring of all the data and information of its users, which was required by the filtering system in order to prevent copyright infringement, was prohibited by two different Directives (paras 33-38). Furthermore, it repeated the argument that was used in the *Scarlet* case that copyright, although a fundamental right, is not inviolable and it does not always have to be "absolutely protected" (paras 40-41). It also repeated the requirement of balancing the protection of the fundamental right to property, which includes copyright, with the protection of other fundamental rights, first mentioned in the *Promusicae* case (paras 42-43), as well as the requirement to balance the protection of copyright with the freedom to conduct a business, a right enjoyed by a hosting service provider such as Netlog (para 44). The Court thus concluded that the installation of such a system was not acceptable because it would lead to indiscriminate monitoring of all the information of all of its users, without a specific timeframe and without distinguishing between lawful and unlawful content. It would thus infringe Netlog's freedom to conduct a business, as well as infringe the users' right to the protection of personal data and the freedom to receive and impart information (paras 46-48).

The Court's judgement in *Netlog* was thus consistent with its judgement in the *Scarlet* case, as it followed the same reasoning and reached the same conclusions regarding the balancing of the different interests involved, thus leading to the reinforcement of the protection of the rights of the users.

### 5.1.5 *Bonnier and others v Perfect Communication* (2012)

This Swedish case was between, on the one side, Bonnier Audio AB, Earbooks AB, Norstedts Förlagsgrupp AB, Piratförlaget AB and Storyside AB, which are publishing companies that hold the exclusive rights of a number of audio books, and on the other side, Perfect Communication Sweden AB (also called ePhone), an internet service provider. It concerned ePhone's opposition to an order that required the disclosure of data to the publishing companies.

The five publishing companies argued that their rights had been infringed due to the public distribution of their material online without their consent through file-sharing. They argued that this illegal file exchange took place through ePhone, and thus demanded that ePhone provided the names and addresses of the persons whose IP addresses were assumed to have been engaged in this illegal exchange. The case went through two other Swedish courts, before ending up in the Court of Justice.

Sweden's Supreme Court asked the Court for an interpretation of the 2004 Directive on copyright enforcement and the 2006 Directive on the retention of data in order to clarify whether an internet service provider is allowed to provide a specific IP address to a copyright holder to identify the user that engaged in copyright infringement. The Court of Justice in this case answered that the Directives do not restrict member states from imposing an obligation on internet service providers to share the data to the copyright holders, as long as certain conditions are satisfied, one of which is the weighing of the conflicting interests that are involved. The Court also made a reference to the *Promusicae* and *LSG* cases reminding the need to interpret Directives by making sure that there is a fair balance between the various fundamental rights that are protected by the EU's legal order (Case C-461/10, para 56). Although the case was not as groundbreaking as the previous cases, it more or less followed the same line of reasoning in terms of the need to balance conflicting rights.

### 5.1.6 *Svensson and others v Retriever Sverige* (2014)

The *Svensson* case involved four Swedish journalists (Nils Svensson, Sten Sjögren, Madelaine Sahlman, Pia Gadd) whose articles were published and freely available in Göteborgs-Posten newspaper and website, and Retriever Sverige AB, a website that provided its clients with clickable internet links (hyperlinks) to articles published by other websites. The journalists argued that Retriever Sverige made available to its clients without authorization certain articles that were written by them and thus infringed their exclusive right to the communication of their work to the public, for which they demanded compensation. Retriever Sverige argued that providing links to material that was already available on another website did not affect their copyright, and that its role was only to indicate to its clients the websites where they could find articles that would interest them (Case C-466/12, para 8-12).

The Svea Court of Appeal referred four different questions to the Court of Justice, which in essence sought a reply as to whether the act of a website to provide links to copyrighted material that is available and freely accessible on another website constitutes an act of communication, and should therefore be authorised by the copyright holder. Based on its interpretation of the 2001 Copyright Directive, the Court judged that a website that contains hyperlinks to content that is freely available on another website cannot be considered as an act of communication to the public, because there is no *new* public when the content is freely and lawfully available online (para 42).

In simple terms, the Court confirmed that hyperlinking is lawful and does not lead to copyright infringement. Therefore, in this case, the authorization of the copyright holders was not required. The importance of the case is that it legalised an ordinary internet activity used by many users and marked another defeat for copyright holders, who had strong views regarding the provision of links to copyrighted material.

#### 5.1.7 *PRCA v NLA* (2014)

The case was between Public Relations Consultants Association (PRCA), an association of public relations professionals, and Newspaper Licensing Agency Ltd and Others (NLA), a body of newspaper publishers that provide collective licensing of newspaper content. The PRCA used a media monitoring service offered by the company Meltwater which provided them with reports on press articles that were published online. NLA argued that the PRCA should obtain the authorization of the copyright holders before viewing the monitoring reports on Meltwater's website, because viewing the website created temporary copies on the users' computer screen and in the internet cache of the computer's hard disk.

The UK's Supreme Court asked the Court of Justice for an interpretation of the 2001 Copyright Directive that would answer the question whether users that view websites are actually committing copyright infringement because of the on-screen and cached copies that are created during browsing without the authorization of the copyright holders. The Court argued that the on-screen copies and the cached copies fulfil the criteria of being temporary, transient or incidental in nature and constitute "an integral and essential part of a technological process" (Case C-360/13, para 63), which means that they are exempt from the right to reproduction and therefore the users do not need to obtain authorization from the copyright holders when viewing content online.

Browsing is an internet activity that is essential for the way the internet works today and for that reason it is taken for granted by most users. It is therefore somewhat of a surprise that it was not included in the legislation all these years and it had to be taken to the Court of Justice to become officially legal. This case, as well as the aforementioned and the following case, show how outdated the legislative framework is and how copyright holders can take advantage of this gap between legislation and technology to protect their rights even against everyday internet activities.

### 5.1.8 *BestWater International v Michael Mebes and Stefan Potsch* (2014)

This case was a dispute between BestWater International, a water filtering company, and two commercial agents (Michael Mebes and Stefan Potsch) that were working for a competitor. BestWater considered that the two agents had infringed copyright by embedding on their website a movie which was made by BestWater, but had been uploaded on YouTube without BestWater's consent. The main question referred to the EU's Court of Justice by Germany's Federal Court of Justice was whether the action of a person to embed another person's work on his/her website can be considered as communication to the public (which is included in the 2001 Copyright Directive) and thus constitutes infringement of copyright. The Court based its decision on the *Svensson* case and answered that embedding of copyrighted material is not considered communication to the public, if the material is already freely available online, because it is not communicated to a new public (Case C-348/13). Thus, internet users are protected from liability when they post video links, as embedding without the authorization of the copyright holder does not lead to copyright infringement.

Embedding videos online is another activity that many internet users do on a daily basis when they communicate online, but it was only in the last year that this internet norm was confirmed as being lawful and became part of the case law. The judgement was warmly received by users, while the court was heralded as "the Court of Common Sense" (Copyright for Creativity, 2014). By legalizing everyday internet uses and activities, this case, as well as the aforementioned two cases, represent a major victory for internet users and are expected to have a decisive impact on future copyright cases in the EU.

## 5.2 Consequences of the Cases

Although it is perhaps a bit premature to make definite conclusions about the extent of the impact that these cases have for copyright law in the EU, it is indisputable that the cases are gradually introducing some kind of shift in the copyright debate. As mentioned earlier in the thesis, copyright holders have been at the helm of the copyright legislation for many years, as they have been able to influence the copyright rules in the EU, by defending copyright as being an absolute right, and hence, many of their interests have been satisfied through the legislation. However, the judicialization of copyright law is gradually leading to the erosion of this monopoly of copyright holders by elevating the status of the users in the copyright debate so as to achieve a balance between the rights of these two groups.

*Promusicae* is considered as a landmark case in copyright case law, as it highlighted the importance of protecting the right to personal data and therefore the private life of the users. The case thus paved the way for the reinforcement of the rights of the users, a path that was followed in subsequent cases, with the two

SABAM cases (*Scarlet* and *Netlog*) being two other significant cases that established the existence of this right. In contrast however to *Promusicae*, where the Court took a more neutral stance and gave a more general ruling, leaving the responsibility to balance the conflicting rights to the national courts, in the *Scarlet* and *Netlog* cases the Court took a stronger and clearer position, highlighting the absence of this balance in those two occasions. In other words, while in *Promusicae* the Court concluded that it is up to the national court to take the final decision regarding the disclosure of the personal information of the users, in the *Scarlet* and *Netlog* cases it was the Court itself that took the final decision, arguing that the measures that were requested were not acceptable in both cases (Fuster, 2012, p.42-43).

Prior to this series of cases, the Court had not paid significant attention to the right to privacy and had not openly recognised it. With the recent case law, however, the Court has acknowledged and safeguarded the existence of the right to the protection of personal data and has thus raised its importance in copyright law and other relevant legislation. The Court now appears to be very reluctant to restrict the freedoms and privacy rights of the users and tries to avoid becoming “the over-regulator” of the internet by adopting a more “privacy-friendly” approach (Rantou, p.12). It thus tries to interpret the legislation in a balanced way in order to ensure the highest possible protection of the fundamental rights of individuals or tries to keep the scope of the legislation as wide as possible. Considering the fact that in 2009 the Charter of Fundamental Rights acquired binding legal status that is equivalent to the EU Treaties, the Court is responsible to safeguard all fundamental rights included in the Charter.

However, the fact that the Court has to take into consideration all fundamental rights means that it cannot regard them as absolute. Through these judgements, and especially *Scarlet* and *Netlog*, the Court has acknowledged that copyright is not an end in itself, but is only one right among others and should not always be placed above other kinds of rights. The Court is thus gradually moving away from the logic of property when it comes to copyright. The equal consideration of the fundamental rights of the copyright holders and the users in the judgements is a very important development in the case law on copyright infringement, which has the result of gradually putting users on an equal footing with copyright holders.

These cases have also drawn attention to the role of the internet service providers, which are very important actors in the copyright debate. Internet service providers comprise a legitimate interest group that has its own views and interests and since this group does not belong to the group of rightholders or the group of users, its position can be critical when it comes to copyright issues. These companies in general consider monitoring the data of internet users as a costly and burdensome method that does not have any benefits for them, and therefore oppose the imposition of any such measures upon them. Their interests therefore currently seem to coincide with those of the internet users, although they are different in nature. This coincidence of interests however could potentially change and there could be occasions where the interests of the internet service providers would oblige them to side with the copyright holders (Daly & Farrand, p.39-40). The ‘battle’ between users and copyright holders thus passes through the

internet service providers, whose role as intermediaries between the two groups that hold a significant position in the regulation of the flow of information online, can be crucial in how this balancing act is achieved.

The cases also showcase that the different Directives adopted by the EU sometimes inevitably contradict each other. More specifically, it has been showed that, although some of the provisions of the copyright-related Directives are closely related to some of the provisions on other Directives which deal with electronic commerce in the internal market or the processing of personal data, these Directives are also sometimes incompatible with each other. This is especially the case when it comes to the role of the internet service providers and their obligations in cases of infringement by their customers (Rantou, p.4). We therefore see the existence of conflicting legislation, which makes the role of the Court even more crucial, as it is in charge of defining the scope of the provisions of the different Directives and deciding whether one takes precedence over the other. By interpreting the Directives and solving the conflicts that are brought before it, the Court creates a policy of its own concerning online copyright (Rantou, p.7), that ideally complements or improves the existing legislative framework; it thus judicializes the policy-making process.

Finally, the Court's case law, and especially the three recent cases concerning hyperlinks, browsing and embedding (*Svensson, PRCA v NLA* and *BestWater* respectively) have led to the modernization of the EU legal framework on copyright; in other words, they have brought copyright legislation that was formed in the late 1990s to the 21<sup>st</sup> century. Everyday internet activities that were taken for granted by internet users but were not included in any of the copyright-related Directives have now become legal after the Court's involvement. This is significant because it proves one of the arguments for the appearance of judicialization: The outdated and ineffective legislative framework – which in these cases was the 2001 Copyright Directive – and the slow process of reform of the legislation lead to an increase of cases taken to the Court of Justice, whose judgement can have a decisive impact on the existing legislation. It should be pointed out however, that the judicial process is not always quick and easy; in some cases, obtaining a preliminary ruling for the interpretation of a Directive can take many years, which can also be very problematic if the case deals with technology and the internet which is constantly changing and developing. Nevertheless, for the time being, the Court seems to be the most appropriate and effective actor that can solve the problems that arise, hence the increasing number of cases regarding copyright.

Although its balanced approach, especially in *Promusicae* and the two SABAM cases, currently seems to mostly benefit the interests of the users, this does not necessarily mean that the Court is biased towards the side of the users or that it does not support the rights of copyright holders. It rather signifies a new era where copyright is not regarded as an absolute right anymore but has to be counterbalanced with other kinds of rights, thus showing that different rights have equal value and should be taken into consideration in the same way. However, it is not unlikely that the Court's stance towards these issues may change, depending on the circumstances of each case (Rantou, p.12).

In summary, what are the consequences of the judicialization of EU copyright law for the different interests? First of all, judicialization has had the result of clarifying ambiguous legislation, but also modernizing and reforming parts of the legislation that were anachronistic and ineffective so that the legislative framework is more in tune with the digital environment. Secondly, the judicialization of this policy area has resulted in the reinforcement of fundamental rights, and especially the right to privacy and protection of personal data, and the decline of the notion that copyright is an absolute right that should be protected at all costs. Thirdly, and as a result of the former, the status quo in the copyright debate is gradually changing; the Court's constant concern over the need to take into consideration all the interests involved and the repeated requests in each case to strike a fair balance between the different rights has had the result of gradually strengthening the protection of the rights of users vis-à-vis the rights of copyright holders and thus reinforcing their overall position in the copyright debate. The judicialization of copyright law is thus an example of how judicialization can lead to a more balanced and perhaps more 'fair' legislative framework, showing that the demands of all stakeholders have to be respected equally.

Freedom is an essential principle upon which the internet is based on – and this freedom is fervently defended by internet users as well as internet service providers and other groups. However, this online freedom also facilitates illegal activities online, which includes the dissemination of copyrighted material online without authorization and without compensation. The challenge is to find a way to maintain and secure the online freedom of internet users as much as possible, while also making sure that the creators of the original works are rewarded for their efforts. Until then, the two main groups in the copyright debate, as well as other intermediaries, will have to fight each other either through legislative or judicial means to secure their interests. The Court's position in this battle is thus vital, as it has acquired a role with which it is able to decide how this fight can be resolved.

## 5.3 Impact of Judicialization

Judicialization takes place in a political system as a response to the inadequacies of the legislative process. If the legislative framework is problematic, and the process of reform is too slow to address efficiently the problems that arise, stakeholders turn to the courts to solve their conflicts. The increased number of court cases results in a bigger role for the court, whose judgements have a big impact on the existing and future legislation.

Apart from updating and improving the legislation, a court's case law can have effects on the different interests and rights that are at stake. In a case where interests of equal value are in conflict, the court tries to bring a balance between them by introducing some kind of compromise. The court's responsibility is to protect fundamental rights to a high level; however, in order to do so, it cannot regard them as absolute. That is because the only way to adequately protect different rights that have the same weight is to ensure that one does not undermine the

other, but rather that they coexist in a balanced way. Judicialization therefore can lead to a more balanced situation between competing interests because the courts strive for solutions that will satisfy all interests as much as possible, especially if they concern fundamental rights.

However, this approach of the courts is not always appreciated. Interest groups have strong opinions and demands about the issues that concern them and those that pursue litigation to solve their conflicts, expect that the courts will rule in their favour. But they cannot always expect to get what they want from the court. For example, all the copyright cases analysed in the paper were started by copyright holders, in order to protect their rights online from infringement. Although in some of the cases the national courts initially sided with the copyright holders, when the case was taken to the Court of Justice of the EU, the outcome was very different, and ended up not satisfying the demands of the copyright holders. The insistence of the Court of Justice to protect all rights equally is threatening the current dominant position of the copyright holders and thus the judicialization of copyright law does not seem to be a positive thing for this group. On the other hand, the actors that did not initiate the conflict and were taken to court by the copyright holders, have somewhat benefited from this process, as the Court is taking into consideration their rights and strengthening their value in its case law. Thus, judicialization is in a way a double-edged sword; it can be problematic for one specific group, while positive for another. And this is the result of the Court's ambition to be an objective actor by trying to create equilibrium between the different interests.

Through the study of a policy area that has undergone judicialization and through the analysis of the court cases, this thesis confirms the main ideas of the existing literature regarding the reasons for the judicialization of a policy area, the balancing of equal interests and the consequences for interest groups. It is the author's hope that the study makes a contribution to the literature regarding judicialization in the EU, as the existing literature on the topic mainly deals with other aspects of judicialization and does not study its implications for the different interests. Similar studies that look at other policy fields that have been judicialized might produce similar conclusions and complement these results. Judicialization is a complex phenomenon and in order to better understand it, it is necessary to study all its different aspects and its implications for different actors and political systems.



## 6 Conclusion

The objective of this thesis was to study the phenomenon of judicialization by examining its consequences on the conflict between competing interests. This was achieved by conducting a single case study on EU copyright law, and more specifically copyright protection and enforcement online. As copyright law is a policy field which has been judicialized to a certain extent over the last decade and where we can see a big clash between users and copyright holders, the goal was to see the effects that this shift of lawmaking from the legislative institutions to the judiciary has had on the different interests involved.

Although there are many legislative acts that have been adopted over the years that deal with copyright and other related rights, the legislation is still very ambiguous, ineffective and fragmented and this makes the position of the Court of Justice critical for the regulation of copyright online. Furthermore, the fast pace of technology means that the legislative framework on copyright is increasingly becoming outdated, which leads to an increase of conflicts ending up in the Court of Justice to be solved, as it appears to be the only actor capable to do so. As the legislative institutions seem to be too slow and reluctant to bring important reforms to the legislation, the Court has taken an activist stance. The result of this judicialization of copyright law is a gradual shift in the conflict between the two main groups that are concerned with online copyright.

Copyright holders were for a significant period of time able to influence and shape the legislation on copyright, and hence this group occupied a considerably powerful position in the copyright debate. However, the cases that have been analyzed in the paper mark a change in the status quo, with the balance of power between the rival groups slowly changing and moving towards a middle ground, as the fundamental rights of the users are increasingly gaining importance, while copyright is losing its status as an absolute and inviolable right.

The judicialization of copyright law through the increased involvement of the Court inevitably has consequences not only for the existing legislative framework, but also the future legislation on copyright. The Court's decisions should give a signal to legislators that there is a need for a more balanced approach in copyright law and that one right does not, and should not, curtail the other. Thus, the forthcoming reform of the 2001 Copyright Directive is expected to reflect in some way the Court's recent case law and adopt its balanced approach towards the different interests involved.

Copyright law is thus an example of how the judicialization of a policy area can have significant consequences for all interests involved and for the positions of the different groups in the legislation. When the existing legislation is not in tune with reality, and the process of reform is too slow, the Court appears as the appropriate actor to solve the problems that arise. Judicialization can thus lead to

the updating of anachronistic legislation and can fill the gaps or correct the flaws of the existing legislation. Furthermore, it can bring a balance between the different stakeholders in an issue where there seems to be an imbalance, by strengthening the weak position of the one side, while weakening the strong position of the other side. As the Court has the reputation of being neutral and objective, it tries to fulfil its role by trying to achieve equilibrium so that all rights and demands are respected and satisfied as equally as possible. Judicialization also highlights the important role of the Court in protecting fundamental rights and the need to ensure that they are respected equally and to a high standard.

The judicialization of a policy appears as an alternative to interests groups that usually try to influence policy-making through extensive lobbying of legislative institutions. However, interest groups cannot expect the Court to always be on their side; its rulings can sometimes be contrary to their own interests, and its case law can undermine their efforts to influence future legislation, since the legislators have to take into consideration the Court's judgements. The environment within which groups can act is more limited due to the fact that legislators are constrained by the Court's decisions, whose case law is becoming bigger and covers more and more issues each year. Interest groups can no longer have the same possibilities and act under the same premises as they did in the past. Judicialization can thus be part of the explanation on why some interest groups sometimes fail to influence the legislation to the degree that they want.

Another aspect of judicialization in the EU that is important to highlight is how it affects the relationship of the Court of Justice with other institutions, especially those that are in charge of the legislative process. The Court's increased role and its ability to often instruct what the legislators should or should not do can potentially lead to some tension between the different institutions, and hence create problems in the policy-making process.

Whether judicialization in the EU is a good or a bad thing is a difficult question to answer, because it is a multifaceted phenomenon that has numerous positive and negative consequences for different actors. What is unquestionable is that judicialization is here to stay and it is inevitably changing the political and institutional landscape of the EU and the way interest groups can exert influence on policy-making.

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