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Conflicts Between Intellectual and Consumer Property Rights in the Digital Market

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Abstract

This article argues that at present the EU's legal and policy approach to the balance between consumer rights in digital goods and intellectual property rights in the same material has consistently favoured intellectual property rights. As a result, there has been a progressive limitation on the capacity of consumers to engage with, and exercise property rights over, digital goods. The article traces this imbalance to a lack of clarity in the definitions of property under the Charter of Fundamental Rights as well as the Union's preference for market over socially oriented law and policy and an approach of functional equivalence with the traditional market.

Keywords: industrial property, individual property, fundamental rights, EU law

1. Introduction

Blackstone opined that nothing 'strikes the imagination and engages the affections of mankind' to the extent of the right of property. [1] Indeed, property rights have endured as a central, though controversial, tenet of the liberal political schema since the time of Plato and Aristotle. [2] Contemporaneously, while definitions of property, as right and as concept differ, a majority of fundamental rights documents place the right among the four orienting values of democratic theory, alongside liberty, equality, and security. [3]

This article examines how property rights have been transmuted to the digital context, with a particular focus on how private actors in the digital market mediate individual relationships with digital goods. In its examination the article draws a differentiation between consumer and intellectual property rights. While there has been increasing attention to the interaction between intellectual property and fundamental rights in EU law, in particular in relation to the right to freedom of expression [4] there has been little engagement with the conflict internal to Article 17 between intellectual property and property rights more generally.

Consumer property rights are understood within the article as those rights to own and deal with goods which are held by natural persons as consumers, and which are ostensibly vindicated by Article 17 of the Charter of Fundamental Rights of the European Union as section two explores. The article argues that at present the EU's legal and policy approach to the relationship between

these two groups of rights holders, and rights, has consistently favoured intellectual property rights and has progressively limited the capacity of consumers to engage with and exercise property rights in and over, digital goods. This is accomplished specifically through limitations and exclusions of individual capacities to use, transfer and possess digital goods and the failure of consumer protection standards to intervene and assure minimum consumer property rights.

The article traces the genesis of these limitations to three features of European law and policy. The first feature is the Union's ambiguous attitude towards fundamental rights more generally, and specifically the lack of clarity in articulating the scope and justifications of property under Article 17 of the Charter of Fundamental Rights. In this respect, the article draws on the inconsistent recourse both to fundamental rights as internal mechanisms for determining the contours of intellectual property, as well as the somewhat incongruous developments in the recent triptych of decisions (Funke Medien, Pelham and Spiegel Online) from the CJEU which advanced the idea of intellectual property exceptions as user rights.

The second feature is a preference for market oriented over socially oriented legislation. As part of this feature, when rights cross the Rubicon from vertically enforced constitutional (or primary law) contexts to horizontally enforced legislative (or secondary law) ones, their enforcement preferences economic interests and the market-oriented aspects of their guarantees over the socially oriented functions which they serve. Thus, in the case of property, intellectual property as an aspect of a central property right finds extensive expression in the Union's secondary law while consumer property interests have been largely neglected in secondary contexts.

The third feature which has contributed to this imbalance, is the adoption of regulatory approaches to the digital market which presume a functional equivalence between offline and digital contexts. As part of this feature, the issues and actors raised by the digital market are considered to be mere reiterations of those raised by the traditional market. This is a problem as it has resulted in a failure to acknowledge the quantitative differences between the traditional and digital markets and a deference to traditional systems of private ordering through freedom of contract which have enjoyed significant latitude in imposing contractual terms which restrict the capacity of consumers to engage with and exercise their rights in digital goods, unobstructed by requirements of secondary law.

The article begins in section two by outlining the nature of the rights-conflict under examination before turning in section two to examine the existing judicial and constitutional understanding, and protection, of individual and intellectual property rights in EU law and the philosophical justifications which underpin such rights. In this section the article examines the brittle constitutional understanding of property rights within EU law and how this brittle character underpins the imbalances identified. Section three then turns to examine how industrial and individual property rights have found expression in the Union's secondary law.

This section emphasises the failure of individual property rights to successfully cross the Rubicon from constitutional to legislative expression, and the failure of the Union's secondary law to recognise both the destructive and constructive capacities of intellectual property in its secondary law. Section four examines the third feature, namely the Union's adoption of a regulatory approach of functional equivalence when dealing with the digitaland traditional markets. The resulting impacts on individuals' capacity to engage with and exercise proprietary rights in digital goods, and the secondary impacts of such interferences are examined in sections five and six before the article turns, in part seven, to consider how the balance between industrial and individual property rights might be achieved through consumer protection.

2. The Conflict Between Intellectual and Consumer Property Rights in the Digital Market

Rose, in her efforts to predict the future of individual or consumer property at the dawn of the digital age [5] argued that contrary to public assumptions property systems are neither free nor cheap. Rather, there is a significant cost involved in defining property rights, monitoring trespass to those rights and enforcing them. As a result, society has constructed systems of registration for property items which are considered important like property and cars, with institutional regulations which decline in size and cost relative to the value of those items it seeks to protect.

Historically, Rose's argument mirrors that made by Demsetz in his examination of property rights protections by reference to the effects of an increase in value of beaver pelts in early colonial Quebec and Labrador. The increase in price in that context lead to the development of a system of proto-property rights in response to the overhunting that resulted from an increase in the value of the pelts. [6] Demsetz described these property rights as a solution to the costs of the previous communal regime - in other words the increased costs of a private property regime- which entails marking and enforcing boundaries, among other things-became worthwhile only after the value of the hunted animals went up. [7]

Both Demsetz and Rose proposed as a result of their examinations that changes in the technological or administrative costs of establishing, monitoring and exchanging property prompted parallel shifts in property regimes [8] and that the future direction of property lay where savings were to be made. In the context of the digital market these observations have proved apposite. In an environment in which digital goods were suddenly valuable, incentivising regulatory practices which could monitor the exchange of digital property and minimise both the risks and costs of such property being misappropriated became not only desirable but necessary.

In this context intellectual property protections were coupled with contractual clauses and built in restrictions on interoperability and use as part of a system of 'digital rights management' (DRM). DRM technologies seek to control the use, modification, and transfer of works protected by intellectual property rights, through systems within devices that enforce these policies. [9] Measures which seek to ensure intellectual property is protected are neither unusual nor problematic in and of themselves. However, the agglomeration of DRM and contractual restrictions which are currently employed in the digital market exceed traditional restrictions on tangible goods and content by effectively limiting to the point of non-existence the capacity of consumers to transfer, use and arguably to possess the goods and content they purchase. [10]

This is accomplished largely through the creation of limited, and unilaterally revocable licenses in digital content in particular as well as in digital goods [11] in accordance with which termination can occur where users fail to comply with the terms of the licenses which prohibit alteration, alienation or attempts to change use and carry further conditions prohibiting future use where they are violated. [12] In effect, these clauses can operate to prohibit an individual from using a purchased device and, more concerningly, any use of another Apple device at present or in the future where it runs on the same software. This effect is only heightened because these actors lock users in - associating proprietary hardware and software products with their offerings to prevent consumers from alternating between content providers to force more advantageous, or at a minimum, more competitive market conditions. [13]

This trend has not gone unremarked. Perzanowski and Schultz, [14] and Fairfield [15] writing in a US context have argued that the combination of aggressive enforcement of intellectual property, restrictive commercial practices and technological locks (DRM) have combined to weaken end user control over digital goods, and fundamentally undermine the capacity of individuals to exercise ownership over their goods, a trend Fairfield refers to as 'digital serfdom.' [16] Writing on the European context Jütte, [17] Helberger, [18] Guidaut, [19] and Schovsbo and Schwermer have noted similar patterns, with the latter in particular emphasising that legislative interventions as part of EU law which have led to a risk of 'over enforcement' of intellectual property rights at the expense of users. [20]

Against this background, Samuelson's articulation of the 'right to tinker,' [21] as well as Perzanowski and Schultz's proposal for the extension of exhaustion to digital goods [22] and Fairfield's argument for the recognition of consumer rights to hack, [23] repair, [24] and sell [25] have been proposed as potential solution in the United States. While rights of repair [26] and extensions of exhaustion [27] have also been considered in the European Union the primary focus has been on the capacity of consumer protection to re-orientate the balance between the property interests at stake in such transactions.

Consumer law has, to date, been unsuccessful in re-orientating the property interests of intellectual property rights holders and consumers. Helberger and Guibault argue this can be attributed in part to the challenges in integrating copyright and consumer law as a result of their diverging understandings of rights, property and the internal market. [28] This argument however, neglects the standing of consumer rights as part of consumer protection, within the Union's constitutional documents, and the cross-definitional nature of the rights interests involved in such conflicts [29] recognised in the idea of user rights within the CJEU's jurisprudence, albeit that such a concept is both poorly defined and contested. [30]

Moreover, the broad nature of the property protection afforded under Article 17 of the Charter, and the justification for the protection of property which both the ECtHR and the CJEU have implicitly endorsed supports the idea of intellectual property as protecting right holders in as much as such protection is necessary for furthering broader societal goals. This is examined in the following section.

3. Brittle Constitutionalism: Defining Property Rights

In the EU, property rights are reflected in the constitutional traditions of Member States [31] as the Court examined in Nold [32] and later in *Hauer* [33] as well as in legislative provisions governing property and succession law at a national level. The development of constitutional schema for the protection and enforcement of property rights is historically contextualised, in Europe, as resulting from the deliberate dismantling of feudalism, whose central feature was a hierarchy of estate and ownership and the exclusion of large classes of individuals from ownership or control of property on an individual basis. [34] In this context, property rights, and national schemes of property protection emerged to replace feudal systems of ownership and control with a system which would promote equality and freedom through conferring on individuals the capacity and power to deal with or alienate individual property. [35]

Yet, in any society with an interest in avoiding the accumulation of power enabled by small groups controlling large amounts of individual property as was the case under feudalism, it is necessary to have, not only a system of rules to enable that aim, but also a justification for doing so which will enable the scope of such rules to be determined. In particular, theories of property

are faced with a need to distinguish those arguments which support the right of property in general from arguments which support the existence of a specific system of property rights. [36]

The inclusion of property protections in fundamental rights documents have proved controversial as a result of disagreements over just this issue - whether and what specific system of property ought to be recognised, rather than whether the right of individual property itself ought to be acknowledged and protected. [37] Despite this controversy, protections of individual property are included in Article 17 of the Universal Declaration of Human Rights (UNDHR) [38], in the European Convention on Human Rights (ECHR) in Article 1 to the First Protocol and most recently, and most relevantly for this article, in Article 17 of the Charter of Fundamental Rights [39] which protects property, including intellectual property.

3.1 The Ambiguous Framing of Article 17

Article 17 provides that '[e]veryone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions.' The Article goes on to stipulate that no person may be deprived of his or her possessions, 'except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss.' The Article further stipulates that the 'use of property may be regulated by law in so far as is necessary for the general interest.'

In contrast to this relatively comprehensive articulation, Article 17(2) provides only that 'intellectual property shall be protected.' Geiger has noted that 17(2) is thus remarkable not only for uplifting an economic right to constitutional status [40] in a context in which intellectual property rights are increasingly used as investment mechanisms [41] but also for the breadth of its reach prima facie which leaves the right open to an abusive interpretation. Indeed, Geiger notes that the provision has been relied on in justifying maximalist conceptions of intellectual property rights in the Union and conceptions of a positive obligation to provide for the protection of such rights. [42]

The ambiguity which follows from the terse articulation of 17(2) is resolved somewhat through a comparative examination of the provision in other languages. While the provision in English could be read as imposing a positive obligation, the French text states 'l]a propriété intellectuelle est protégée' (intellectual property is protected). The German version similarly declares '[g]eistiges Eigentum wird geschützt' (intellectual property is protected). Both the German and French translations thus imply that intellectual property is to be understood only as one of the classes of property protected under Article 17 rather than elevating it above those other classes of property as a right requiring specific vindication.

This view is reinforced by the Explanations to the Charter which state, '[t]he guarantees laid down in paragraph 1 shall apply as appropriate to intellectual property'. How 'appropriate' is to be defined remains uncertain. Oliver and Stothers question (but do not offer an answer) whether it might ever be appropriate to grant more protection (or less protection) to intellectual property relative to other forms of property. [43] The predominant view, however, seems to be that advanced by Voorhoof [44] and Geiger [45] who have argued that in light of the explanation and the structure of Article 17 itself, Article 17(2) should be read as clarifying, for the avoidance of doubt, the inclusion of intellectual property as an aspect of Article 17.

Indeed, such a reading was affirmed in Scarlet Extended [46] and later in Netlog [47], in which the CJEU clarified that the entry into force of Article 17(2) CFREU did not introduce an absolute

protection and inviolability for copyright,a sentiment retrenched in Luksan [48], where the Austrian non-recognition of the copyright over a movie to its director was defined as a deprivation of a 'lawfully acquired intellectual property right' granted under EU law pursuant to Article 17.

In that case theCourt of Justice found '[t]he protection of the right to intellectual property is indeed enshrined in Art 17(2) of the Charter...There is, however, nothing whatsoever in the wording of that provision or in the Court's case-law to suggest that that right is inviolable and must for that reason be absolutely protected'. [49]

It would, therefore, appear that Article 17(2) merely confirms that intellectual property rights benefit from the protection and limitations applicable to property rights more generally under Article 17 of the Charter. [50] The argument, however, was only secondary and the Court did not provide any additional guidance on the scope or implications of Article 17(2). [51]

3.2 The Relationship between the Rights Protected under Article 17

Though Articles 17 and 17(2) can be read as coetaneous it remains unclear how this unified right of property which encompasses property rights in general and intellectual property rights in particular should be understood, and what its scope should be. The case-law of the CJEU and ECtHR, however, as well as the text of the Charter, offer some guidance on the scope and content of the rights protected by Article 17.

3.2.1 Property Rights as Multi-Component Rights

Though Article 17 protects the right to 'own, use, dispose of and bequeath' lawfully acquired possessions subject to the public interest the CJEU has offered further guidance in its judgments on the interests which the right vindicates. In Sky Österrich [52] the Court defined individual property as 'rights with an asset value [53] creating an established legal position under the legal system, enabling the holder to exercise those rights autonomously and for his benefit' [54] and as encompassing moveable and immoveable property [55] and as well as immaterial positions such as claims of an economic value. [56]

This view is also in accordance with the broad definition offered in the pre-Charter decision of Hauer which emphasised freedom of use, disposal and control. [57] Within the jurisprudence of the ECtHR the classes of property protected are also widely drawn and are understood as more than 'possessions' as alluded to in the text of Article 1 Protocol 1, and perhaps as being more accurately and completely articulated by the French 'biens' used in the French version of the Convention. [58]

Perhaps more significantly, the CJEU has found that measures regulating the use of property must be distinguished from a deprivation of possessions. [59] Deprivation of possessions, per the decision in Booker Aquaculture, requires not only that a person is deprived of property but also that the property is transferred to another person. [60] This seems similar to the provisions acknowledging de facto expropriations recognised under Article 1 Protocol 1 ECHR which finds incorporation through Article 52 of the Charter. [61]

Individual property rights in the European regime can thus be said to be multi-component and are infringed where the guarantee of individual property is deprived of its substance, but not when it is affected only marginally or when the modalities of its exercise are regulated. [62] In this respect a parallel can be drawn between the Charter's conceptualisation of property rights as

multi-component, centring on a functional ability to deal with possessions and Honoré's incidents of ownership. Under Honoré's schema full, individual ownership is disassembled into eleven constituent incidents. [63] Although Honoré does not consider it necessary to demonstrate all of these incidents are present, he does consider it necessary that possession and a sufficient number of further incidents can be identified in order to satisfy the existence of ownership. [64]

Echoing Honoré's analysis, both the CJEU and ECtHR emphasise the ability to control, and act autonomously in relation to property [65] in their decisions, and appear to consider possession to be a core requirement of individual property while implicitly endorsing a view of property as requiring freedom of use and transfer. [66]

Yet the multi-component nature of the rights guaranteed under Article 17 offers little guidance in locating the relative scope of the right and how competing property rights are to be balanced against each other. In seeking to answer those questions it is necessary to understand the justifications and intended functions of the rights.

3.2.2 The Scope of Article 17

Unfortunately, the justification for property rights in EU law remains ambiguous. European arguments seeking to justify individual property and its limits can be traced to Plato [67] and Aristotle [68] and have endured through the early modern period, in the works of theorists including Hobbes and Hume [69] who focused on the institutional aspects of property, arguing against Greek natural law theories and contending that property rights should be understood as the creation of the State - a deliberate socially constructed edifice [70] entered into 'by all the members of the society to bestow stability on the possession of...external goods, and leave everyone in the peaceable enjoyment of what he may acquire by his fortune and industry'. [71]

Perhaps most prominent among the natural law theorists against whom Hobbes and Hume argued was Locke whose justificatory arguments for individual property focus specifically on the labour theory in accordance with which individuals gain ownership of property by mixing their labour with it. [72] However, while Locke is most immediately associated with labour theories of property he is only one of a group of theorists whose justifications for property rights centre on ideas of self-ownership and which most accurately represent European articulations of the justification for the protection of consumer interests in property which can be broadly characterised as adhering to personality based property theories. [73]

Other than Locke, personality theorists include Kant, [74] Green, [75] Radin [76] and Hegel whose account centred on property's assurance of self-ownership and personhood 'superseding and replacing the subjective phase of personality.' [77] It is important, however, to distinguish between two distinct types of self-ownership within these theories. The first, is the Lockean idea of self-ownership as necessary to protect against invasions into the private and personal aspects of an individual's life. The second, Hegelian idea of self-ownership also views property as affording a barrier against intrusion, but additionally views self-ownership as a manifestation of individual personality and will in the world - valuable because it is necessary for the individual self-expression that is constitutive of a truly human life. Hegelian personality theorists thus maintain that control over physical and intellectual objects is essential for self-actualization as part of self-ownership.

Moreover, while judicial considerations of Article 17 have tended to group the Article with the economic rights protected in Articles 15 [78] and 16 [79] the dicta of the Court of Justice

in Stauder [80] and later in Omega Spielhallen [81] emphasising human dignity, in combination with the textual endorsements of dignity and liberty in the Charter and the Treaties can be read as supportive of a Hegelian understanding of the justifications for individual property as necessary for autonomy or self-ownership in the absence of judicial commentary to the contrary. [82]

Of course, it is necessary to explain how this core European constitutional concern of dignity [83] encapsulates a personality justification expressed as concern with self-ownership. The central commonality between dignity and self-ownership lies in the European constitutional understanding of dignity as relational [84] perhaps best articulated by the German Federal Constitutional Court who noted,

This [freedom to determine and develop himself] is based on the conception of man as a spiritual-moral being endowed with freedom to determine and develop himself. This freedom within the meaning of the Basic Law is not that of an isolated-self regarded individual but rather [that] of a person related to and bound by the community. [85]

Dignity is thus understood in a European context as ensuring the freedom to develop one's self, through relationships with others and without being obliged to conform to a pre-determined definition of self, imposed by a public power. [86] In this respect then, dignity is fundamentally linked to and affirming of personality based theories rooted in self ownership and individual development. Dignity like Hegelian theories seek to secure to the individual a core autonomy. This social function of dignity, and thus Hegelian idea of property finds reflection in the emphasis on social function as the limit of property in the European Union.

As Geiger notes, property rights are understood in the European legal schema as inherently limited by their social function. [87] In this respect, both the Charter and the second paragraph of Art 1 Protocol 1 ECHR provide for socially oriented limitations on the right to property. The Charter provides that the right may be restricted by the public and general interest while Art 1 of the Protocol provides for the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest.'

The ECtHR echoing this in Potomska v Poland noted that 'property ... has a social function which given the appropriate circumstances must be put into the equation to determine whether the fair balance has been struck between the demands of the general interest of the community and the individual's fundamental rights.' [88] The provision, in both documents for limitations in order to achieve the public or general interest suggests that the operation of property rights for the furtherance of these objectives is the status quo and intervention should occur only where the maintenance of this general or public interest require active intervention by the State.

This, Hegelian, justification of property as serving an autonomy preserving function in the general interest is the most accurate articulation of the implicit justifications of individual property within the framing values of the Charter enumerated in its preamble - namely human dignity and freedom as well as the other rights included within the Charter's text (notably Article 1) and the text of Article 2 TEU. Read in concert these provisions support a view of Article 17 as part of a legal landscape which prioritises personal autonomy and human dignity. This position is further supported by the ECtHR's statement that 'the very essence [of the ECHR] is respect for human dignity and human freedom'. [89]

The inclusion of intellectual property as an aspect of Article 17's broader protection complicates the justificatory account of property within the Charter somewhat, intellectual property having

historically different justifications than property rights more generally. The developmental origins of intellectual property protections within the European constitutional schema offer some help in this regard.

Article 27 UNDHR provides all individuals have the right to 'protection of the moral and material interests resulting from scientific, literary or artistic production of which he is the author ... everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.' Drafted less than three years after the end of the Second World War the Article was understood as offering a practical means of ensuring scientific and creative works were not used in a discriminatory manner and recognising that individuals enjoyed a right to share in the benefits of their creations. [90]

The emphasis of Article 27 on enabling societal participation, militating against discrimination and seeking to vindicate personal interests in emanations of an individual's creative capacities is echoed in the International Covenant on Economic, Social and Cultural Rights [91] (ICESCR) which guarantees, in Article 15(c), the rights to take part in cultural life, enjoy the benefits of scientific progress and its application and to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which individual is an author. [92]

The justifications for intellectual property offered by the text of both the ICESCR and the UNDHR appear to endorse a Hegelian personality justification similar to that which underpins individual property, in as much as Hegel's personality-based justification of intellectual property rights includes an incentive-based justification that protection of intellectual products promotes their proliferation for the benefit of society. [93] This reading finds further support in the jurisprudence of the CJEU as well as several pre-Charter decisions. [94]

The next question which must be answered, is why and how consumer rights in property arise in the context of Article 17 given the scope of intellectual property as defined by its justification. Guibault has argued, for example, that consumer rights as politically granted, legislative rights lack the normative weight necessary to 'outweigh' intellectual property rights claims. [95] Yet such an argument in the context of Article 17 would ignore the constitutional character of consumer protection within the Union under both the Treaties, [96] and under the Charter. [97] Even on a conservative reading of consumer protection as a mere principle rather than a right under the Charter it must still be read as a normative provision intended to guide the interpretation of other fundamental rights. [98] There is thus support for the idea of consumer rights generally in the Union's constitutional documents.

More specifically however, can it be said that there is a right to consumer property under the Charter? It is argued that it can. Intellectual property rights under the Charter and in accordance with a Hohfeldian notion of jural correlation must be held vis a vis a duty bearer. Those duty bearers are consumers. However, as the social function of property within the European constitutional schema dictates the limits of intellectual property as bound up in individual (or consumer) interests in property as part of a Hegelian notion of self-determination, we must conscience that intellectual property rights, while rights within a Hohfeldian schema are neither an absolute, nor the only, discrete category of rights recognised by the Charter.

Rather, intellectual property rights are recognised as exceptions (albeit constitutionally sanctioned ones) to a general schema in which the status quo is of individual interactions with and power over property are un-interfered with. Intellectual property rights thus permit

privately emanating restrictions on individual rights over and in relation to the property at issue but do not extinguish these broader, subsisting rights.

This category of broader subsisting rights, given intellectual property's private nature (operating as between a right-holder and a consumer or group of consumers), must thus be characterised (however improperly characterised it is elsewhere) as a consumer right to exercise certain interests in property. In this schema both consumers and intellectual property rights holders are duty bearers and rights holders in respect of distinct rights which must be appropriately limited by reference to each other.

The broader category of property rights of which intellectual property forms part, is of course subject to freedom of contract. In this respect the ECtHR has held that the Convention will not intervene to vindicate property rights infringements which result from a contract between two private parties the conflict in such cases being a matter for national resolution. [99] However, this line of jurisprudence must, necessarily be read in light of the absence, under the Convention of a right of consumer protection and the interpretation of other constitutional articles in accordance with that provision. It must also be read in the context of its institutional setting.

The ECtHR is not, unlike the CJEU, the judicial organ of an institution with a policy competence parallel to Article 114, 115 and 169 TFEU nor is it situated in an institutional structure which places, as the EU does, such an emphasis on consumer rights. The assertion that freedom of contract operates as a total bar to recognition of a broader consumer interest in property is thus questionable. Indeed, van Rijn has noted that the horizontal scope of the ECHR remains uncertain. [100]

Reading the core constitutional documents of the Union, along with those fundamental rights documents which contributed to their framing, a Hegelian personality-based theory of rights emerges in which property as part of a constitutional schema concerned with dignity and self-ownership. The idea that such a constitutional culture would stop short of Article 17 would be to impose an artificial restraint on the Charter's character to retrospectively justify decisions and policies of the Union which have failed to reflect it. That there has been a failure to give voice to a coherent, Hegelian understanding of the scope of Article 17 within the Union's jurisprudence or secondary law is not indicative of its absence, but rather of a fragmentary and often contradictory understanding of the constitutional character and scope of intellectual property within the Union.

3.2.3 The Normative Case for Consumer Property Rights

Before this article moves to consider the fragmentary nature of the Union's constitutional understanding of property it is necessary to draw on what has been outlined to chart the normative case for the inclusion of consumer property rights within the distinct property guarantee of Article 17. The normative justification is twofold. The first is the need to locate the appropriate compromise between the constructive and destructive understandings of property which are entailed in any system of property rights and which is required in order to ensure the Hegelian understanding of property as serving a broader social function is achieved. The second is the need to ensure the Hegelian understanding of property as serving a broader social function, which appears to be implicitly endorsed by the CJEU, is achieved.

The European justification of property, rooted in Hegelian theories of dignity and self-determination can be considered broadly constructive in the relation it draws between property, personhood and controls on institutional power. Despite this, personality theories may seem, on

their face, to conflict with the distributive values enumerated in the preamble of the Charter, namely equality and solidarity as a result of the inevitable tensions between how individuals wish to act or use their goods and the collective good in how such goods should be used. [101] However, it is more accurate to say that Hegelian personality theories while constructive, also import destructive potentials for the same attributes of self-ownership and personal development they seek to advance - and which must be balanced against each other.

These twinned constructive and destructive potentials are illustrated by Marx's analysis of the means by which constructive impacts of property possession for the individual have corollary, destructive effects on the personhood of others, in the context eighteenth century enclosures of common land. [102] Marx suggested that as a result of enclosure, while small classes of individuals gained exclusive rights in land, broader classes of individuals were deprived of their previously communal means of production and subsistence. The result of that deprivation was a loss by individuals of control of their own labour with the result that they were unable to fully realize themselves as persons through their work, being obliged to work for others under conditions over which they had no control. [103]

In Foucault's account, without access to common land or control of private land, individuals were obliged to migrate and participate in workplaces characterised by embedded surveillance, punishment and discipline mechanisms designed to induce conformity and maximise productivity. [104] A similar enclosure and redefinition of rights has taken place in the digital market as intellectual property rights are used to concentrate ownership, and power, among a small proportion of private actors. There are, of course, dissimilarities between the physical enclosures Marx and Foucault consider and the intellectual enclosure occasioned by digitisation. The primary divergence results, perhaps obviously, from the differences as between tangible and intangible property concerned in each example.

Drawing on this difference Van Dijk has argued that enclosure in the digital environment does not suffer from the 'tragedy of the commons.' [105] This is correct is as much asintellectual property, which is intangible, is a supposedly non-rivalrous resource with the result that use by multiple parties does not diminish its utility. The argument, however, does not identify the tension between achieving an intellectual commons in which all members can participate and protecting the economic and moral interests of those who create the content on which the commons is based. It fails, in other words, to identify the tension between constructive and destructive understandings of property.

While intellectual capacity, on which intellectual property is based is, writ large, non-exhaustible, the individual contributions to that common pool of intellectual works rely on a legal construct of finite-ness to incentivise their creation, and therefore ensure the existence of a common intellectual pool. In this context there is, in fact, an intellectual corollary to the traditional tragedy of the commons - by allowing the abuse and uncontrolled use of intellectual property such content and creation will simply cease to be a viable means of earning a living, and will not be produced.

The need to incentivise creation through protection, however, is equally threated by the intellectual enclosure currently taking place in the name of intellectual property rights protection. The failure to balance incentives for users who may view the costs of content over which the can exercise little control as too high, results in an increase, rather than a decline, in breaches of intellectual property rights. Indeed, by many accounts digitisation has in fact

harmed the revenue streams, and impeded content creators' incentives to engage in content creation. [106]

This is acknowledged, albeit indirectly, in Musik Vertreib [107] and later in Centrafarm in which case the Court endorsed a view of intellectual property as justified by reference to the need to ensure that the rights holder's creative output is protected. [108] Indeed, this justificatory understandings of intellectual property is clearly present in the Copyright Directive. [109] Recital 11 of the Directive provides that the Directive aims to provide a rigorous, effective system for copyright protections in light of the role of such protection in 'ensuring that European cultural creativity and production receive the necessary resources and of safeguarding the independence and dignity of artistic creators and performers.' [110]

The example of enclosures are relevant for the historical parallel they offer to current restrictions of access to and interaction with digital goods. The challenge facing any system seeking to guarantee property is to reconcile the tension the enclosures expose between the individually constructive capacity of property rights for discrete portions of a community with the destructive capacity of those same rights for others. The historical parallel has a further relevance, however, in as much as it highlights the role of the state in making value laden policy decisions which define property in ways which are claimed to be both neutral and natural, when neither is necessarily the case. [111]

Indeed, central to the loss of personhood occasioned by the re-organisation of property in Marx's account, was the reclassification of traditional, common land rights and uses, as civil and criminal interferences with the property rights of others. This shift was subsequently articulated by Foucault as occasioning a transition from 'illegality of rights' to 'illegality of property' [112] in an 'effort to adjust the mechanisms of power that frame the everyday lives of individuals.' [113] It was not that common land nor the existence of rights in it had been normatively transformed in the eighteenth century, but rather than political and social expediency demanded a more economically viable system of ordering.

In a modern context, the Union's secondary law and indeed the CJEU's constitutional articulation of property has delineated neatly between intellectual property rights (which are held by small groups as against a more general 'consumer' class as well as the State) and a broader class of diverse and varied property rights (which are held as against the State by the world at large and which are inclusive of property rights). This distinction artificially bifurcates a broad class of property rights into two discrete parcels of rights holders and duty bearers, ignoring the intersection of those classes of actors.

In a diverse range of interpretations, including from legal systems far less oriented toward a Hegelian notion of property, intellectual property is nevertheless understood as intended to enable 'creative self-expression,' [114] to facilitate 'play,' [115] and to 'participate in the production of culture.' [116] These theories, in concert with the constitutional documents of the Union produce an idea of property rights and individual interactions with and interests in property as part of a process of individual self-determination and societal progress.

Under this view property rights in general, and intellectual property rights in particular, serve an economic function but more fundamentally, a social one and property rights are justified not only by reference to their economic value but by the social goods which those economic incentives permit. [117]

3.3 The Union's Fragmentary Constitutionalisation of Property

This fragmentary understanding can be attributed, in part, to the ambiguity surrounding the structure and relation between the two provisions of Article 17 itself. This ambiguity is only deepened by the apparently contradictory statement in the explanations to the Charter that intellectual property rights are included within the Charter because of their growing importance within the Community's secondary legislation.' [118] In stating this the explanations are countering the normative justifications for property found elsewhere in the Union's constitutional schema and are also, more problematically, permitting constitutional norms to be dictated by statutory provisions.

Indeed, the minimal language of Article 17(2), which provides simply that intellectual property shall be protected, and the inclusion of intellectual property within the Charter at all, is surprising given lack of consensus on whether intellectual property deserves protection as a fundamental right - or should be treated, instead, as a private interest in conflict with other private interests through the law of contract, and to be balanced with fundamental rights. [119] Proponents of the latter approach view intellectual property rights as fundamentally in conflict with human rights and argue that such incompatibility can be resolved only through recognition of the alternative, primary right where the conflict arises. [120]

In contrast, proponents of the first view argue that intellectual property and fundamental rights possess equivalent normative value and seek to navigate the balance between the rights in a manner which renders them compatible, if not in consensus. This approach appears to represent the view which the CJEU has sought to advance in Laserdisken [121] and in Metronome, [122] and which has been articulated elsewhere leading from the Court's decisions in Medien, [123] Pelham [124] and Spiegel Online [125] as a constitutionalisation of intellectual property. [126]

There are, however, two issues with this approach as propounded by the Court. The first, is that the Court has largely demurred from recognition of an external influence of other fundamental rights on the scope of intellectual property - allowing a jurisprudence to develop in which intellectual property is presumptively elevated above other fundamental rights as an area which has omnipotently internalised the countervailing forces of other fundamental rights. The second issue is that it is not clear that even if such an external balancing mechanisms was recognised, that a balancing approach would, in practice, be appropriate in cases involving intellectual property.

3.3.1 Fundamental Rights and the Fair Balance Test

The CJEU has been consistently presented with cases requiring a balance or compromise to be located as between intellectual property and other rights. Thus, in Metronome Music [127] the Court of Justice was asked to decide the appropriate balance to be struck as between the intellectual property rights protected by Article 1 of the Rental Directive [128] and the applicant's freedom to pursue a trade. Eight years later, in *Laserdisken* [129] a Danish company, which had long relied on exhaustion exceptions to copyright protections in order to trade in copies of cinematographic works, challenged the validity of Article 4(2) InfoSoc Directive [130] and its system of regional exhaustion as a disproportionate violation of its freedom of expression rights.

The CJEU rejected both claims, using a two-step 'loose proportionality assessment' as part of which the Court first identified the rights and freedoms to be weighed against each other [131] and then turned to evaluate the validity of the measure restricting the rights identified asking whether it was in accordance with the law, justified in light of the general interest and necessary and proportionate to the legitimate aim pursued or whether it constituted a non-justifiable interference impairing the very substance of the rights guaranteed. [132]

This analytical approach was altered from 2008 with the decision in *Promusicae*. [133] In this case, the Court was asked whether EU law obliged Member States to lay down an obligation for ISPs to communicate personal data of their customers in the context of civil proceedings. The CJEU declined to acknowledge the existence of such an obligation, rejecting the applicant's attempt to derive it from the protection of intellectual property under Article 17 of the Charter.

To support its conclusions, the Court introduced into EU intellectual property law two key interpretative prescriptions. The first was the requirement that EU directives be read as permitting a 'fair balance' to be struck between the fundamental rights protected by the European legal order. [134] The second interpretative rule was the use of fundamental rights as interpretative tools to ensure that national measures transposing EU directives were read in accord with fundamental rights and the general principles. [135] Both prescriptions required the formulation of clear balancing criteria, which might be applied consistently in subsequent decisions. These have not been forthcoming. Instead, subsequent decisions have added only ancillary or indirect clarifications, reinforcing an ad hoc, case by case approach to decisions. [136]

Thus, in *Painer* [137], the Court refused to use freedom of expression to broaden the scope of the exception of Article 5(e) InfoSoc [138] in favour of the defendant-newspapers, arguing that the provision's goal was not to strike a balance between Article 10 of the Charter and intellectual property concerns. The effect of the decision, in practice, was to narrow the criteria established in Promusicae by limiting those fundamental rights which could be used as interpretative tools to those which the legislature had explicitly sought to protect through the provision at stake - refusing to conscience a broader role intellectual property in influencing fundamental rights more generally.

The second interpretative prescription was thus narrowed significantly. Fair balance was similarly interpreted restrictively by subsequent decisions following Promusicae. Confronted with a fact pattern similar to that of Promusicae, the Court in *Bonnier Audio* [139] upheld a Swedish provision introducing the possibility to issue injunctions obliging ISPs to disclose users' data in civil proceedings concerning copyright infringement. In Bonnier , the assessment of the fair balance remained cursory as part of the proportionality analysis and suggested a synonymity between the notion of 'fair' and the notion of 'proportionate' further confusing the nature of the analysis which was to be undertaken, fragmenting an apparently unified approach into several ambiguously differentiated tests. [140]

Some attempt to redress this fragmentation emerged in *Sky Österreicht*. [141] In that case the Court was asked to consider the validity of conditions of the unauthorized and uncompensated use by broadcasters of short excerpts of events of public interest under Article 15(6) of Directive 2010/13/EU. [142] In its decision the Court reaffirmed the use of fundamental rights and introduced a two-step analysis for the assessment of a fair balance. The first steps required the Court to verify whether the contested provision affected the core content or essence of the freedom at stake (in this case the freedom to conduct a business). Once it established that that

freedom could still be exercised,the Court then moved to the second step - an evaluation of the proportionality of the interference as provided for under Article 52 of the Charter.

The final step of this analysis is thus a strict proportionality analysis, in accordance with Article 52 asks whether the limitation is necessary and genuinely meets the objectives of general interest recognised by the Union or is necessary to protect the rights and freedoms of others. Sganga refers to this final requirement as the 'real' fair balance test, which seeks to locate an answer as to whether the impugned measure strikes the appropriate balance between the requirements of protection resulting from the two fundamental rights at stake. [143]

In applying the test in Sky Österreicht , the Court noted that based on the facts of the case the exception was to be understood as proportionate and legitimate, as it was in the public interest and sought to protect the right to receive and impart information, while leaving to intellectual property rights holders the possibility to charge for the use of their programs through other channels.

In the later decision of UPC Telekabel, [144] which again concerned blocking measures by an ISP to end copyright infringements, the Court appeared to implement parts of the test but provided substantially less detail on its application. Subsequently, in Coty Germany v Stadtsparkass [145] the CJEU specified that a measure which results in a serious infringement of a Charter right is to be regarded as contrary to the fair balance requirement, though it declined to specify whether this was a result of a failure to satisfy the proportionality requirements of the fair balance test of a result of a differing analytical approach. Coty concerned the validity of a provision in German law which permitted banking institutions to refuse to disclose the name and address of an account holder. The law was relied on by the respondent Stadtsparkasse in refusing to identify an account holder linked to the online seller of perfumes in violation of an exclusive licensing agreement. The CJEU concluded that by excluding any possibility for rights holders to acquire information on the infringers' data, the impugned provision infringed the essence of the applicant's right to an effective remedy under Article 47 and their right to the protection of intellectual property under Article 17 of the Charter.

The Court thus found a fair balance had not be achieved and determined there was no need to proceed further with the proportionality assessment. While this was in line with the decision in Sky Österreicht , the decision in Coty crystallised the assumption that an infringement of the essence of a fundamental rights presumptively excludes the possibility of proportionality which appeared implicit in Telekabel . This approach was subsequently followed in McFadden [146] and was confirmed in Bastei Lubbe. [147] Significantly, in the context of this article the decision in *Nintendo v PC Box* [148] extended this line of jurisprudence to DRM locked content.

In Nintendo the CJEU found that DRM measures embedded into videogame consoles must be proportionate, in that they should not prevent activities or devices that have a commercially significant purpose or use other than the infringement of copyright. However, the decision continued to emphasise commercial aspects rather than consumer interests and thus is limited in its contribution to a re-orientation of property interests under Article 17.

The fair balance test thus appeared to settle somewhat in Coty, however, in*GS Media*, [149] the CJEU appeared to depart from the fair balance test. In that case, the Court was asked to determine whether the posting of a link to copyrighted content, without the consent of the rights holder, constituted a breach of Article 3 InfoSoc. Emphasising the need for a fair balance between intellectual property and other fundamental rights, the CJEU noted that finding such a

breach to subsist would result in chilling effects on the expressive capacities internet users unable to ascertain with certainty whether the linked content had been legitimately posted.

Rather than following the opinion of Advocate General Wathelet and find that hyperlinks be excluded from the scope of Article 3 InfoSoc, the Court introduced an additional criterion to identify illegitimate conduct under the Directive, requiring knowledge or a reasonable expectation of the illegitimate nature of the posted material for liability to attach.The solution sought to balance freedom of expression and intellectual property, but seemed to take place outside the fair balance doctrine.

This ad hoc pattern continued as the subsequent decision in *Renckhoff*, [150] demonstrated. In that case, the CJEU found the unauthorized reposting on a school website of a protected picture should not be subject to GS Media criteria. The Court differentiated between the two cases on two grounds. The first was that while hyperlinks are necessary to preserve freedom of expression on the Internet, the same cannot be said for the reuse of an image. The second was that hyperlinks do not challenge the author's preventive right to control and eventually block the use of her work, in the same manner as a direct reposting. In this sense, the CJEU implicitly applied the first step of the fair balance test, identifying the fundamental right at stake. However, rather than proceeding to an assessment of whether the essence of the right or freedom involved was violated, the Court focused instead on the preservation of the effectiveness of Article 3 InfoSoc, limiting the evaluation of the necessity of the restriction to a cursory statement, and omitting the strict proportionality check.

Similarly, the decision in Deckmyn stands out for, yet again, employing a relatively different approach. In that case, the respondent had used a copyrighted image to illustrate a political critique and claimed the use was protected under the parody exception in Article 5(k) InfoSoc. The CJEU, applied the test developed in Sky Österreicht and explicitly linked parody to freedom of expression. While this reversion to the Sky Österreicht test was welcome, Sganga and others have argued that the Court through its decision implicitly transformed the legislative parody exception into a rights based limit. [151] The decision in Deckmyn was thus read as suggestive of a more prominent role for fundamental rights in the development of intellectual property with EU law - and a potential 'constitutionalisation' of intellectual property law. [152]

3.3.2 Selective and Incomplete Constitutionalisation

The decisions of Funke Medien, [153] Pelham [154] and Spiegel Online [155] offered further fuel for arguments that the CJEU was using fundamental rights to shaping the contours of intellectual property law in the Union in the context of conflicts between intellectual property and freedom of expression. The first of the cases, Medien concerned an unauthorised publication of German military reports by a newspaper in that jurisdiction. The reports were held by the German government and included information on the deployment of that country's federal armed forces abroad. Seeking to prevent their publication, the German government sought an injunction against the paper claiming the government held the copyright in the reports and their release thus infringed its intellectual property rights. The copyright complaint was upheld at a national level and was subsequently referred to the CJEU. [156]

The second case, Pelham concerned the permissibility of unlicensed sampling of music, in particular a series of rhythms from a song written and recorded by the applicant which had been used in a newer song subsequently recorded by the respondent. The applicant complained the use of the rhythms constituted an infringement of their intellectual property rights. While the

German court did find there was an infringement they nevertheless ruled that the sampling was permissible in the cause of protecting artistic creativity. [157]

Finally, Spiegel Online concerned the re-publication by that newspaper of a book contribution made by a German politician in connection with an article published by the paper countering claims made by the politician that his contribution had been altered by the publisher and arguing that he deliberately mislead the public in claiming such alteration had occurred. The politician sued der Spiegel claiming that in reproducing the content they had infringed his copyright and the matter was subsequently referred to the CJEU. [158]

Geiger has argued that two features in particular of the resulting decisions of the CJEU lend support to the idea that the Court is 'constitutionalising' intellectual property. The first is the recognition by the court of intellectual property carve outs as 'user rights' and the second, is the capacity of intellectual property law to internalise fundamental rights in a manner which permits such rights to shape the internal contours of the area. [159] Both these features of the judgments however, lead (at best) to a selective and incomplete constitutionalisation of intellectual property.

In its judgments the CJEU noted that copyright exceptions should be not understood as simple derogations from the exclusive rights of copyright holders, but rather as self-sufficient rights of users of copyright-protected subject-matter. Though the Court had previously hinted at this understanding in Telekabel and Ulmer [160] in both Funke Medien and Spiegel Online it emerged explicitly. [161] This concept of user rights is not novel, and has been articulated in a Canadian context by David Vaver [162] whose analysis of the rights-based nature of copyright exceptions has influenced Canadian Supreme Court. [163] Yet it is not clear that the Court's description of these exceptions as rights is correct.

Based on Hohfeld's idea of jural correlatives [164] lawful consumers have a legal claim against intellectual property rights holders to exercise rights in those areas which are excepted from the intellectual property schema if they are rights but not if they are privileges or mere defences to copyright infringements. Within a European context, as the decisions discussed indicate, it appears in as much as 'user rights' are recognised within the Union's legal schema as defences to copyright infringements in as much as their existence does not impose a correlative duty on the holder of the copyright or other intellectual property right to facilitate the performance of the permitted activities. They thus operate not as rights but as privileges under a Hohfeldian schema. [165] In this respect then it is difficult to support a claim that this recognition amounts to a constitutionalisation of intellectual property.

The assertion that these decisions amounted a constitutionalisation is also reliant on the opinion of the Advocate General and the affirmation of that opinion by the CJEU that fundamental rights could be used as an internal mechanism to define the contours of intellectual property. Advocate General Spunzar who delivered the opinion in all three cases considered that freedom of expression had a considerable role to play in defining the limits of intellectual property (and particularly copyright) protections but did not opine on the capacity of rights to serve as limits or exceptions to the scope of copyright protections. [166]

In its decisions, the CJEU followed the Advocate General in rejecting an idea of complementing the list of Article 5 with any external fundamental rights exception on the basis that copyright's own internal mechanisms presented sufficient safety valves for balancing intellectual property with freedom of expression rights. [167] In particular, the Court emphasised that the exceptions

and limitations provided in existing legislation are 'specifically intended ... to ensure a fair balance' between the interests of rightsholders and users of works or subject matter. [168]

This is problematic in several respects. In the first place, the Court in the decisions in Funke Medien, Pelham and Spiegel Online appears to indicate that an externally-introduced flexibility beyond the use of a fair balance test could be harmful to legal certainty and intellectual property harmonisation more generally. While balancing exercises have been subject to criticism on the basis of their susceptibility to uncertain, and subjective deployment, [169] balancing as between fundamental rights is, nevertheless, the approach which the Court has adopted in other areas. The suggestion that in this area, and not in others, such uncertainty is not desirable is at best inconsistent.

In addition to this, the concept of fair balance itself is uncertain in both its content and application through the Court's own decisions. In such circumstances it is hard to ascertain how secondary law has internalised such a test and, more to the point, if it has why the Court has vacillated inconsistently between alternative approaches in its decisions. Fundamentally, this assertion by the Court that intellectual property legislation has internalised a fair balance with all fundamental rights also assumes a commonality in the normative content of those fundamental rights in accordance with which they all weight equally as against each other, and as against intellectual property rights. Yet it is not clear that such normative equality is present within the rights schema.

3.3.3 Balancing Fundamental Rights and Intellectual Property - Appropriate or Necessary?

This lack of certainty in the Court's own jurisprudence has distracted from the broader concern implicated by cases involving conflicts between intellectual property and other fundamental rights, namely how far-reaching fundamental rights of an economic nature such as intellectual property are or should be, and whether they are amenable to balancing against other fundamental rights to begin with. In the context of balancing in the ECtHR Helfer notes that, aside from the involvement balancing affords the Court in policy setting, the danger (which has been realised in the case of the CJEU as the examination above details) is that the standards applied become ad hoc absent an internalised balancing mechanism.

In the context of intellectual property this potential is augmented by the numerous competing social and economic claims implicated in such disputes. [170] Indeed, Griffith argues that this ad hoc danger has been actualised in the CJEU noting that, despite its pedigree, the concept of the 'fair balance' developed by the Court (albeit on foot of existing ECtHR jurisprudence) is, 'vacuous and unhelpful' becoming useful only when understood as a metaphor for a detailed exercise of substantive comparison between the requirements of competing rights, which has been largely absent. [171]

The ECtHR has asserted that economic rights (of both legal and natural persons) are less deserving of protection than political and civil rights with legal persons in particular, frequently enjoying more limited economic rights under the ECHR than natural persons. [172] It is not clear, however, whether a similar attitude has been adopted (as Article 52(3) would dictate) by the CJEU. Advocate General Wahl in OHIM offered some guidance in relation to intellectual property in particular, echoing the judgment in Scarlett somewhat, and noting

intellectual property rules are meant to confer certain exclusive rights regarding the exploitation of creations of the intellect in order to foster creativity and innovation. Those exclusive rights are

nothing but sui generis forms of monopolies which may limit the free circulation of goods or services. Thus, by their very nature, intellectual property rules are mostly trade-related. [173]

Following the Advocate General's reasoning intellectual property rights can be characterised as economic rights, albeit that in certain continental jurisdictions they are inherently relating to conceptions of personhood through authorship. [174] Given the ECtHR's approach to balancing economic rights the various tests employed by the CJEU which assume equality of normative claims as between intellectual property as economic rights and other fundamental rights is flawed. [175] More pragmatically, however, balancing as it is currently employed by the CJEU fails to explain which normative criteria are used to resolve conflicts between fundamental rights leading to ad hoc interventions with weak if any foundations in positive law.

Peukert has noted just this problem in the context of freedom of expression, the right which intellectual property has most frequently been argued to conflict with before the CJEU. Peukert has argued that rights balancing is particularly inappropriate in such cases as it assumes that both fundamental rights are of equal normative value and that there is no hierarchy as between them. [176] In a context in which the issue appears not to be the social function of intellectual property but its capacity to generate a monetary lock-in the presumption of normative equivalence on which the balancing exercise relies becomes still more problematic. [177] In particular it presumes that a private interest (e.g. maximisation of monetary return) is an interest of equal and potentially greater weight in a rights balancing schema to freedom of expression, privacy or the ability of users to exercise property interests in goods and content. Drassinower (albeit writing in a North American context) has similarly argued that the interests vindicated through intellectual property rights highlight the 'radical insufficiency' of the concept of balancing in cases of conflict between intellectual property and other fundamental rights. [178]

Building on his critique, Peukert argues that deploying intellectual property rights in contexts where they conflict with other fundamental rights requires justification of the rights rather than balancing. [179] In a justification based analysis, intellectual property rights are acknowledged as aspects of a constitutionally guaranteed property right but which are given force by the legislature as private rights of dominion which reduce the public domain and whose prevalence and enforcement is subject to tests premised on the social function and public justification of those rights.

In this context, it is notable that the jurisprudence of the CJEU to date has divorced rights of intellectual property from their Hegelian root, obscuring their social function and their relative placement within a broader class of property rights. [180] The issue of course, is not only the ambiguity which balancing engenders. Rather, it is the lack of conceptual clarity which results from the Union's failure to accurately define the scope and constituent elements of the right protected by Article 17 in combination with the uncertain jurisprudence of the CJEU which results both from its unprincipled deployment of balancing tests as well as its failure to correctly understand the nature of the relationship between intellectual property rights, and consumer rights.

4. Market-Oriented Legislative Preferences

Given the supremacy of the Charter, the secondary law of the Union should mirror the scope of Article 17 and reflect a parallel balancing as between the social and economic aspects of intellectual property, and consumer interests in dealing freely withgoods. However, given the

constitutional ambiguities and lack of clarity in defining the right is perhaps unsurprising that this has not been the case. Rather, and in accordance with broader ordoliberal patterns within the Union's secondary law there has been an elevation of the economic interests and a failure to consider substantive consumer interests.

The intellectual property rights recognised in the European legal order are premised on the understanding that those who create content are inherently invested in the work they produce [181] but that such content generation requires incentivisation. On this basis intellectual property rights are intended to guarantee and support the existence of an intellectual commons from which other individuals might draw inspiration. The result, as the Union's secondary law illustrates, is an understanding of intellectual property as uniquely necessary for competitive markets to function [182] as part of the Union's broader ordoliberal preference for market oriented policy standards. [183]

Problematically, this understanding of the immediate justification and aim of intellectual property as solely as a means of offering creative incentives for market participation offers a distorted view of the social function of intellectual property rights. The more accurate, and complete view of intellectual property's function, as Litman notes (albeit writing from a US perspective), is more than merely encouraging market participation. Rather, and ultimately, intellectual property seeks to ensure 'people will read the books, listen to the music, look at the art, and watch the movies' as part of a pattern of cultural and societal progress and ensuring an appropriate mediation of the competing constructive and destructive capacities of property rights for personhood. [184]

During previous centuries this tension was successfully mediated through the imposition of copyright periods, [185] the concept of exhaustion [186] and, in some jurisdictions more than others, fair use. [187] Currently, in the European context limitations have primarily been imposed through the defences and exceptions outlined in Article 5 InfoSec. Article 5 provides technical exemptions, [188] payments of compensation for reproduction, [189] reproductions which are made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage, [190] informative purposes, [191] use for the purpose of caricature, parody or pastiche [192] and demonstration and repair of equipment. [193]

However, limitations on the operations of the provisions of Article 5 through contractual terms, as well as the absence of a coherent understanding of how fair balance texts are deployed in relation to its provisions has hampered its capacity to effective mediate the tension between consumer and intellectual property rights. Moreover, for mechanisms like Article 5 to operate effectively consumers must also be willing, and able, to pay supra-competitive prices for protected works available at near-zero marginal cost elsewhere. An effective system of intellectual property protections must thus convince consumers that a lawful copy is more desirable and provide deterrents to the use of unlawful copies [194] to correctly pitch incentives for both creation and consumption. Article 5, as well as the Union's legislative protections applicable to intellectual property and consumer rights has neglected to assure this as a practical necessity in framing its provisions. While Recital 3 of the InfoSoc Directive, claims it will ensure '...compliance with the fundamental principles of law and especially of property, including intellectual property, and freedom of expression and the public interest' as the previous section examined, the balance struck between the rights under the Directive and fundamental rights more generally is ambiguous at best. [195]

Moreover, the reference to compliance with rights of 'property, including intellectual property' is not reflected in the text or application of the Directive which has emphasised intellectual property rather than any understanding of property as inclusive of consumer rights. The Enforcement Directive similarly presents its aims as ensuring respect for fundamental observing, 'the principles recognised in particular by the Charter of Fundamental Rights of the European Union'. [196] Yet, as with the InfoSoc Directive, there is an absence within its text of an acknowledgement of the competing property interests implicated by Article 17.

In Hauer the Advocate General specified that it was not the intention of the European Treaties to 'impose upon Member States or to introduce into the Community legal order any new conception of property or system of rules appertaining thereto'. [197] Indeed, this was a reflection of the acknowledged position within the Community from 1958 following the entry into force of the Treaty of Rome as part of which it was generally accepted that there existed no competence to legislate in the field of intellectual property. [198]

The result was that any harmonisation of intellectual property must necessarily be achieved at an international, rather than an European, level. [199] This view that the EEC lacked a competence to legislate in respect of intellectual property was challenged by lawyers and academics who maintained that in certain circumstances deployment of industrial property and associated rights would result in anti-competitive practices and that the competition provisions of the Treaty of Rome applied as much to such practices as others in as much as they potentially affected the achievement of the Community's internal market. [200]

Subsequent to these challenges, during the 1960s, the CJEU began to consider the relationship between intellectual property rights and the Treaty of Rome, as rights-holders sought to exercise their rights against parallel imports between Member States. [201] While initially such cases were considered under the competition provisions of the Treaty, the CJEU rapidly made it clear that when considering the exercise of intellectual property rights to prevent trade between Member States the most relevant provisions were the free movement of goods provisions (now Articles 34 -36 TFEU and previously Arts 30 -36 Treaty of Rome). This in turn lead to the development by the CJEU, beginning in Consten and Grundig, of the exhaustion of rights principle [202] according to which the rights holder should have only one opportunity to obtain remuneration for their rights but could not prevent parallel imports. [203]

In parallel to these judicial developments offering a tentative foothold to intellectual property within the Community, the European Commission formed the view that harmonisation of intellectual property law was indeed possible and desirable in order to achieve the single market. [204] The Commission based this view on now Article 114 TFEU (previously Art 100 EEC Treaty and 95 EC Treaty), in accordance with which the legal basis on which an EU legislative act is adopted must be determined according to its main object. [205] The Commission reasoned that until intellectual property laws were harmonised, trade in goods protected by such rights within the common market would be substantially hindered. [206]

The Union's initial harmonisation measures under then Articles 100 and 95 were subsequently challenged, unsuccessfully, in several cases including Netherlands v European Parliament and Council. [207] In that case the appellant argued that as Member States patent laws were derived from the European Patent Convention (EPC), it was more appropriate that the Convention should be amended rather than Article 114 being used to harmonise national law through the introduction of a new Biotechnology Directive. This argument was rejected by the CJEU who stated there was nothing to prevent the EU legislature from having recourse to harmonisation by

means of a Directive in preference to the more indirect and unpredictable approach of seeking to amend the working of the EPC. [208]

The Italian government, intervening on behalf of the appellants, submitted that as the chief aim of the Biotechnology Directive was connected with scientific research in the genetic engineering sector then it should have been adopted under the predecessors to Articles 173 and 179 TFEU. This was again rejected by the CJEU who stated that the legal basis on which an act is adopted must be determined according to its main object and that it was common ground that while the aim of the Directive was to promote research and development in that field, the purpose was to remove obstacles to research and development in the area as a result of differing national approaches. [209]

The result is that, the Advocate General's statement in Hauer has proved less than accurate as a matter of Union law. In practice the even before the introduction of Article 345, which gave the Union an explicit competence in intellectual property, the European Community had promulgated a comprehensive and far reaching legislative schema for the protection of property on the basis of the need to harmonise intellectual property laws to ensure market competitiveness. Contemporaneously, while the Union enjoys a competence in intellectual property under Article 345 TFEU,the Union is limited in its capacity to draw a fundamental rights architecture related to property more broadly in accordance with Article 51(2). [210]

The Advocate's remarks in Hauer have, however, proved an accurate characterisation of the Union's approach to the protection of consumer rights in property, which have received no similar legislative protection. Indeed, it is notably that while the lack of harmonisation as between Member States' intellectual property regimes was seen as a barrier to the development of the single market, no consideration appears to have been given to the differing capacities of consumers to engage with goods as affording similar challenges to market unification.

Certain consumer protection legislation, such as the Distance Selling Directive, [211] and later the Consumer Rights Directive [212] as well as theeCommerce Directive [213] offer protection for consumer rights. [214] However, these laws do not offer a counter-balance to intellectual property rights, rather they seek to re-assert a balance as between consumers and sellers is through notice and consent mechanisms in the contractual process rather than in relation to the contract's substance.The Directive on Unfair Terms in Consumer Contracts [215] meanwhile, can extend to finding a contractual term unfair where it misrepresented the nature of the property interest acquired by a consumer as being contrary to the requirement of good faith imposed by the Directive. [216] However, where there is an accurate description of the legal interest within the contract this will, evidently, not apply.

Several of the examples listed in the Annex to the Directive have the capacity to be used in re-asserting rights as between consumers and intellectual property holders. However, many of the examples, including terms regarding unilateral alteration of terms, unilateral change of the characteristics of the product and inappropriate limitations on the rights of the parties are only unfair where they are not provided for explicitly, and justified by the contract.

The example listed in the Annex, which has the greatest potential in seeking to re-assert consumer rights in digital goods is the example of the use of terms which irrevocably bind the consumer to terms with which he had no real opportunity of becoming acquainted before the contract is concluded. However, if a seller had complied with the notice and consent architectures employed by the Union in the other legislation mentioned above it is unlikely that a claim under this example would be successful. This is all the more so as, the presence on the

list of a term is not an automatic recognition of the term's unfairness. The analysis of whether a term is unfair will instead depend on the nature of the goods and services for which the contract was concluded and the circumstances of the conclusion of the contract and its subject matter.

Several more recent Directives, part of the Union's suite of laws intended to aid the achievement of the digital single market, offered potential to move beyond such notice and consent mechanisms and countenance the effect of disparate and absent protection of consumer rights in digital goods to the single market. The first Directive, Directive 2019/770 [217] on contracts for the supply of digital content and digital services, seeks to facilitate cross-border e-commerce in the Union more broadly by ensuring better access for consumers to digital content and digital services. Yet the Directive focuses largely on ensuring conformity of digital content or a digital services with the terms of contracts rather than providing rights in digital goods.

In its focus on conformity and modification the Directive mirrors the provisions of the Sale of Goods and Associated Guarantees Directive [218] as well as the Directive on services in the internal market [219] which operate alongside national law to require that services conform to their represented nature. [220] Moreover, as is the case with the Unfair Terms Directive, the provisions of 2019/770 also defer to contractual ordering, providing that where the conduct is in accordance with the provisions of contract sufficient consumer protection has been achieved. [221]

Directive 2019/790 on copyright and related rights in the Digital Single Market [222] which is part of the same suite of secondary laws similarly neglects to engage with consumer rights in digital goods. What is notable about the Directive, and what could cautiously be considered an encouraging sign is the prominence afforded to the social and cultural role of copyright exceptions. In particular, the Directive provides for use exceptions for teaching, [223] research [224] and use by cultural heritage institutions, [225] among others. Yet the Directive falls short of extending this understanding of the social function of exceptions to copyright, to one which countenances opposing rights for individual consumers which extends beyond the flawed 'fair balance' system which already operates.

5. The Union's Approach of Functional Equivalence in Regulating the Digital Market

The final feature of EU law which has enabled the legislative elevation of intellectual property rights and the Union's failure to conceptualise the scope of and relationship between the differing aspects of the right to property in the Union's constitutional documents, is an approach of functionable equivalence in regulating the digital market which defers to freedom of contract as the primary and sufficient mechanism necessary for ordering relationships in the digital market. [226] As section four illustrates, in the absence of regulation as to the substantive content of contracts, private actors through contractual terms become standard setters for the range and extent of the rights consumers can expect to enjoy in and over digital goods.

The legislative preferences embodied in the Union's existing consumer protection regulations illustrate this pattern in as much as they outline the absence of interventions to ensure consumer protection standards which extend beyond notice and choice mechanisms, with the introduction of some technology specific measures more recently in the form of the Directive for conformity in digital content. This continuing deference largely rests on the misconception that within the digital market as within traditional markets freedom of contract enables individual autonomy

through preserving individuals' freedom of choice. Yet in the digital market it is not clear that the subsisting market features on which such assessments are premised are present.

5.1 The False Narrative of Freedom of Choice in the Digital Market

Early European measures [227] sought to remove uncertainty about the legal status of online transactions by providing laws which imposed on the digital market, regulatory standards equivalent to those which characterised traditional ones. [228] Indeed, the underlying motivation of the Digital Single Market Strategy is a continuing concern to provide such certainty through the specific promotion of equivalence with a view to thus furthering economic growth. [229] Most recently, the Directive for the supply of digital content and digital services [230] adopts an approach for the regulation of contracts in the digital market which offers an illustration of the continuing endorsement of approaches of functional equivalence within the Union. [231]

This approach is hardly surprising. It aligns with the EU's ordoliberal attitude to market regulation more generally which is characterised by a significant deference to an ideal of private ordering through freely given consent. [232] In its thickest or most substantive form consent shapes and allows the individual consenting to shape their interaction with those forces and actors around them and thus constitutes an expression of individual autonomy. [233] This is the basis on which systems of private ordering premised on freedom of contract, base their claim to be, fundamentally, systems which seek to maximise the autonomy of individual actors. Against this narrative, paternalistic interventions in the market by State actors must be effected in such a way as to justify limitations on the autonomy which the market ensures. [234]

However, this understanding of freedom of contract as an autonomy enhancing mechanism, and the suitability of an approach of functional equivalence, presumes the presence of several conditions. In particular it requires the presence of voluntariness, capacity and meaningful choice. A market characterised by absolute voluntariness, free from a-symmetries of bargaining power and replete with numerous competing participants remains an ideal. Yet, while shortcomings in the conditions for substantive consent are present in all markets, their prevalence in the digital market is particularly challenging to the functionally equivalent, consent-based approach adopted by the Union.

The primary, and most readily appreciable, difference between digital and offline markets is quantitative, in two ways. The first, is that the digital market is characterised by a small number of private actors who due to their dominance effectively operate as standard setters for the contractual terms used by new entrants as well as among themselves. This feature of the digital market fundamentally differentiates it from traditional market settings. Crucially, in a market with a small number of actors who employ similar terms, individuals enjoy little or no functional choice as to the terms on which they consent to contracts, undermining the normative quality of that consent and posing challenges to the autonomy based theory of freedom of contract which relies on it.

In such a setting, the argument that a user may seek equivalent content or goods elsewhere is impractical, while the argument that user can simply 'opt out' and choose none of the offerings is, at best, disingenuous, failing to acknowledge the social and cultural damage occasioned by failing or being unable to engage with the digital environment and digital goods. [235] Compounding this is the presence within the digital market of 'lock-ins' which restrict consumer choice by obstructing interoperability between certain content and/or goods

restricting consumers from using content provided by one seller on devices provided by another and obstructing the operation of effective competition in which consumers can participate. [236]

The second quantitative difference between digital and offline markets relates the volume and density of the terms to which individuals are asked to consent, and the linking of those terms to normative standard setting. [237] In a market with few supply side participants or normative constraints private actors can orient their terms to the detriment of consumers to an extent not mirrored in the traditional market. The evidence is that as a result of the volume of terms to which consumers are asked to agree during digital transactions, as well as the low levels of choice as between sellers, two results are occasioned. The first is that consumers are either unaware of the content and implications of the terms to which they are consenting. [238] The second is that, aware of the social necessity of participation in the digital market, and in the absence of market alternatives, consumers consent knowing the only alternative is to abstain from participation in the digital market.

In either circumstance the nature of the context and the functional choice present fundamentally undermines the quality and validity of the consent which consumers can give. While notice and choice architectures seek to remediate the first of these quantitative differences, absent parallel and substantive consumer protection measures regulating the content of contracts they fail to sufficiently impact contractual practices, and are unable to remediate the lack of alternatives within the market.

By failing to aver to these differences EU law is unable to appreciate the normative consequences which flow from them. Instead, European attitudes to the digital market have been characterised by an apparent acceptance that offering superficial prompts to action which consumers do not understand or are not empowered to avail of in a market which lacks alternatives is sufficient. [239]

5.2 The Resulting Imbalances between Intellectual and User Rights

The combination of these features, but in particular the deference to freedom of contract has been the generation of a digital market in which the interests which consumers can exercise fail to meet the central incidents of ownership which both the ECtHR and the CJEU have identified as part of their articulation of the property rights vindicated under the European constitutional schema. Moreover, while limits on the use and management of property by consumers are accepted as legitimate, to an extent proportionate to the protection of intellectual property rights, at present there are substantive restrictions on the central incidents of property which exceed those necessary to secure these ends. The result, is a disproportionate restriction on the rights of consumers to own and to use and transfer property under Article 17.

5.2.1 Ownership (Possession)

Using Honoré's definitional schema, ownership implies the existence of possession which may be considered a, if not the, central incident of property rights under both the Charter and the Convention. Under the contractual terms permitted by the current legal landscape in the EU, and used by private actors in the digital market consumers 'purchase' digital goods. However, the ownership interest which consumers receive in doing so is merely a license. While licensing is not problematic in and of itself what is problematic are the license terms which restrict the conditions of consumers to claim that they in fact enjoy possession in the goods concerned.

Digital goods remain accessed in this licensing model through a unique identifier and the license is unilaterally revocable at the discretion of the licensor. In fact, even if the item is downloaded to a user device and not accessed 'online' it can only be used when the embedded identifier in the content file is approved by the provider's software as corresponding to the device or user attempting to access it. While this is consistent with licensing it is not clear that possession (as opposed to access) has ever, in fact, been granted to the consumer given the unilateral nature of the license, and the absence of notice or other countervailing consumer rights.

This ephemerality of consumers' ability to possess goods in the digital environment was pointedly illustrated by Microsoft's announcement in 2019 that its e-book store would cease trading after failing to compete with other retailers in the digital market. Microsoft announced that items purchased through the platform would be removed from user devices and would be unavailable through the platform. While customers will receive refunds, if theiroriginal payment method was no longer valid they would receive a credit to their Microsoft account for use online in the Microsoft Store. [240]

Precisely how store credit which could no longer be used to purchase books, was intended to replace a carefully selected library, and why users would wish to 'purchase' more content which may then disappear is unclear. Nor could such remuneration compensate the loss of the texts themselves and the annotations and similar marks of interaction which they bore. What the example illustrates is that the rights of access and interaction with digital goods which currently subsist are neither normatively nor practically comparable to those which subsist in traditional market contexts.

5.2.2 Use and Transfer

Property rights in the constitutional documents of the EU, as well as in the constitutional traditions of the Union's Member States, place a premium on alienability and individual capacities to interact with and exercise control over property. In accordance with Honoré's analysis and the jurisprudence of both the CJEU and ECtHR control is a central, though implicit, characteristic of property rights. The implication is that individuals who lack this capacity cannot be said to enjoy an individual property right in the contested goods or material. [241] Conditions of current licenses for digital goods substantially restrict both the capacities for consumers of digital goods.

To begin with, the contractual terms governing digital goods purchased from Amazon and Apple's platforms do not permit, or permit only restricted or temporary, one-off transfers of digital goods. Their donation or more permanent transfer is not permitted. This inability to transfer licensed content either for non-commercial purposes to other parties, or indeed as between the devices of a user restricts consumer rights in property beyond what is necessary to secure intellectual property rights, and does so to the extent that it functionally negates the existence of a capacity to transfer. While Article 5 InfoSec does ostensibly permit transfers and use by consumers, patterns of deference to freedom of contract, an absence of consumer property protections in the Union's secondary law, and a failure to interpret existing secondary law as requiring compliance with a broader socially oriented conception of property has lead to a practical situation in which contractual provisions are used to exclude the exercise of such rights.

These capacities in relation to digital goods are currently forfeited as a result of the instability and impermanence of the property interests which are permitted to subsist in the digital market.

The result is a digital market composed of goods which consumers can access and interact with only under such extensive restraints as to make the existence of the incidents of property rights which such interaction should be constitutive of questionable.

Licensing has traditionally meant that the owner of an exclusive right holds this exclusivity in abeyance, [242] however, in a digital context the use of licensing might more accurately be described as being a selective permission to access coupled with substantive restrictions on the individual use. This is particularly troubling in circumstances where there is no objective justification for the limited licensing regime in use rather than a digital transposition of the analogue system of sale and intellectual property rights enforcement.

6 Secondary Impacts of Property Infringements

Under a classical, liberal view, the primary function of property rights is twofold, to restrain the government from intrusion upon individual citizens and thus maintain a zone of autonomy and to guide incentives in interpersonal interactions to achieve a greater internalisation of potential externalities. [243] New property rights thus emerge in response to the desire to adjust to new benefit-cost possibilities, and indeed this is the basis on which DRM has justified it's operation since the emergence of the Internet. [244]

In the current schema, however, no new rights oriented toward securing greater consumer interests in digital goods have emerged to deal with the challenges associated with digitisation. Instead there has been a redistribution of the risks associated with intellectual property protections which has placed a disproportionate burden on users, negatively impacting their capacity to enjoy rights over individual property and generating externalities in the form of negative impacts on individual privacy - and, in certain circumstances, on the Rule of Law.

6.1 Privacy Rights Impacts

Much of the debate surrounding, and attention to the impacts of intellectual property rights on other fundamental rights in the digital environment is occupied with considerations of the interactions between intellectual property rights and freedom of expression. [245] While the implications of intellectual property protections for academic and scholarly rights and abilities have received some attention [246] relatively little focus has been afforded to the more immediate impacts of current enforcement practice on rights to privacy. [247] Yet, the technologies that have eroded individual property have also negatively impacted individual privacy by enabling platforms which provide copyrighted content to generate precise and detailed records of user behaviour and preferences which can be used to surveil user behaviour for targeted advertising. [248]

When a user purchases a film on iTunes, Apple charges the consumer and associates the 'purchases' with that user's device and Apple identifier which links to a record of previous purchases across Apple's platforms. More significantly, iTunes inserts pieces of microcode into the purchased file that notifies Apple when it is opened, by whom, when and where it is viewed and which portions are viewed, or skipped most frequently. [249] While this code is embedded under the auspices of intellectual property protection, to prevent users copying, sharing or otherwise using the file except in accordance with their license it also functions as an effective means of consumer surveillance.

This interconnection between property and privacy bolsters the concern over property specifically. Modern legal conceptions of privacy rooted in the 'right to be left alone' developed by Warren and Brandeis (from French origins) is notable for its relation of privacy to rights of individual and intellectual property which both contain a right to determine the moment and extent to which ideas, and sentiments are communicated. [250]

Indeed, Zittrain has argued, in a medical context, that there is no conceptual difference between the privacy problem and the copyright problem. [251] Both can be reduced to examples of instances in which actors seek to militate against content escaping from the control of those legally entitled to restrict or permit their dissemination. [252] In a European context e-Privacy and data protection laws are thus motivated by the reality that personal data only too easily falls out of the control of the relevant data controller while in the case of intellectual property protections, including copyright protections, are motivated by a similar recognition that copyrighted content only too easily escapes legal channels of sharing thus diminishing its value.

Consumer privacy largely concerns the relation between individuals and private actors, rather than between individual and the State. In such circumstances, how is the Rule of Law implicated? Companies such as Apple and Amazon now control large collections of personal information which governments can in turn access, and in doing so can, as Hoofnagle foresaw, accumulate information about individuals which enhances their authority by making it easier to target citizens for discriminatory treatment. [253] The answer more specifically lies in how large scale gathering of data about individual users permits State authorities to outsource intelligence gathering to private entities [254] and, in doing so, to bypass constitutional controls. [255]

6.2 The Rule of Law

The most glaring example of such constitutional by-passing is the US third party doctrine developed by the Supreme Court in *Smith v Maryland* [256] though there is a possibility that a similar, highly conditioned, expectation of privacy may evolve in a European context, subsequent to the ECHR's decision in Benedik v Slovenia. [257] Prior to the decision in Benedik the language used by the ECtHR had largely mirrored that of the US Supreme Court, with a repeated reference to an objective test based on 'reasonable expectations of privacy.' [258] Benedik, however, confirmed that a strict construction of reasonable expectations of privacy is not to be adopted, raising the implication that the CJEU will adopt a similar stance and follow the US in moving toward a subjective test which would permit the emergence of a European equivalent of the third party doctrine. [259]

Such a development, enabled by the data collected through the consumer surveillance employed by companies like Apple and Amazon through the limitations placed on individual property, would not only constitute a further erosion of privacy rights but would threaten the constitutional balance on which democratic governance is premised and hamper the cumulative exercise of privacy rights which act as a broader societal control on State action. The consequence of which could be the effective deprivation not only of individuals' right to privacy but also of the rights which privacy enables.

This compounds the unacceptable nature of current contractual practices. Traditionally twinned with contract, property has been seen by some, perhaps most notably Epstein, [260] as an essential element of individual liberty and as demarcating a constraint on governmental authority. Epstein argues only the rights of ownership and the law of contract can secure

individuals against the arbitrary exercises of authority which are the central concerns of the rule of law.

Cass has gone further noting that '[a] critical aspect of the commitment to the rule of law is the definition and protection of property rights' as the degree to which a society is bound by law is reflected in society's commitment to the predictable application of property rules the commitment to which is the essence of the rule of law. [261] These understandings are in contrast with both thin, procedural accounts of the Rule of Law that laws be general, public, certain, [262] and align with substantive or thick conceptions of the Rule of Law apparently adopted by the European Union [263] and which emphasises human rights rather than economically orientated supplementary characteristics of the Rule. [264]

Rights to property and privacy are interdependent and, in liberal democratic theory, act as basic guarantees of self-determination, ensuring at an independence of action and expression and thus contributing to the development of individual identity, and, at a broader, societal level, of ensuring individual liberty.

Moreover, this vein of classical liberalism privileges individual autonomy, on the basis of achieving self-realisation or as a means of establishing the rights necessary for the emergence of a vibrant market economy [265] and in this respect mirrors the justifications offered by the theories of individual and intellectual property reflected at the outset of this paper and arguably endorsed by the European Union. [266] Thus, individuals have an interest in securing to others the free use and enjoyment and disposal of property because such freedom contributes to that equal development of the faculties of all which maximises liberty for society as a whole, in particular serving the stated end of the Union to achieve greater integration by means of the single market.

In this schema, the social function of property is twofold; enabling individuals to control those things which contribute to their freedom and security and, empowering individuals to control the capacity of others to threaten or limit such values. [267] These functions appear, in some ways, radically opposed, however, in practice this means rather that individuals enjoy the ability to exclude others from their property or in the context of intellectual property, to impose limits on how individuals may deal with the content or goods they purchase. The problem arises when, as in this case, actors use this latter function of property to actively erode the rights or other individuals rather than merely asserting their own rights.

7 Towards a Rights Based Understanding of Consumer Protection

The current imbalance between consumer and individual property rights has clearly facilitated a context in which contractual practices can, and have, reduced the situations in which individuals can exercise property rights in respect of digital goods, with corollary harms to privacy rights and cumulative impacts for the rule of law. In these circumstances how can the balance between the two aspects of the right protection by Article 17 be re-asserted in European law?

Signs of a consumer protection driven re-orientation of the imbalance between individual and intellectual property are already evident in the United States where the Federal Trade Commission has challenged the use of the term free in mobile app stores resulting in Apple replacing the 'Buy' button with one labelled 'Get' in its stores globally in attempt to, at a minimum, re-orientate consumer expectations concerning digital goods. [268] However, the

content offered for 'purchase' elsewhere in iTunes have not been similarly re-labelled, while Amazon's labelling remains unchanged. Moreover, in reality, these are superficial concessions to temporary swells in consumer attention which fail to address the underlying erosion of fundamental rights which such contracts enable, and lack the character of a rights driven understanding of consumer protection which this article proposes.

The first, and perhaps most obvious, requirement is that a concrete understanding of individual property in EU law be articulated with a particular view to tying such an understanding to the normative function of individual property implicit in the Union's constitutional documents and the jurisprudence of the CJEU and ECtHR as allied to Hegelian theories of self-ownership and autonomy.

Such a reorientation is not easy, requiring not only the application of the Courts and Commission to the identification and articulation of a coherent, and unified understanding of the relationship between two aspects of the fundamental right to property but also that they re-orientate their analysis from a preference for and focus on economic aspects of the right and intellectual property and towards a more holistic understanding of property rights as encompassing such market-orientated understandings as an aspect rather than the preferable expression of the normative aims of Article 17.

Ultimately a solution which achieves this in a systematic manner will take the form of a legislative effort as it is not clear that the CJEU either can develop the area in a sustainable and comprehensive manner, nor that it should. [269] However, a legislative re-orientation must be pursued through one of the Union's established competencies, of which the securing of individual property is not one. While a similar approach to that taken in respect of intellectual property could be taken using Article 114 to pursue harmonisation on the basis that the current schema impacts the common market, the re-orientation of emphasis from market-oriented towards equal recognition of individually-oriented rights likely calls for a more citizen and less market-centred mechanism.

In this respect, the Union's established competence to legislate in the area of consumer protection offers a utile means of achieving the reorientation. In particular, introducing a rights-orientated consumer protection law would facilitate the recognition of individual property protections as a broader social good rather than merely an individual right, and permit them to be appropriately assessed in concert with intellectual property rights.

What is meant by a 'rights-oriented' consumer protection law is consumer protection standards which have as their object the facilitation of a market which is not predicated on the reduction of individual rights and which tempers the market-oriented aspects of Article 17 with those social aspects of the Article. More particularly, consumer protection law has the capacity to specifically orientate its provisions towards ends beneficial to the consumer, in circumstances such as those in this article, where industry and market practice has reduced the capacity or obscured the possibility of consumers to avoid undesirable reductions in their rights.

Consumer protection standards also, crucially, offer the capacity to focus regulatory concern on actors rather than technology. The reductions in individual property rights facilitated by the current operation of the digital market are not, after all, the result of the technologies which makes such goods and exchanges possible, but rather the management of such goods by the actors providing them. A rights-oriented version of consumer protection offers the ability to vindicate privacy interests in a way that recognises that digital technologies while occasionally harmful in and of themselves, are more frequently deployed by actors in ways which make them

harmful. The reduction of such harms must thus look beyond the technology at issue, and the individuals to be protected from the negative impacts of such technologies, and examine the actors controlling and deploying such technologies and their motivations.

The capacity of competition law to be used to change the operation of the digital market to improve consumer choice are real and, increasingly, acknowledged. However, they are also beyond the scope of this article which limits its remarks to noting that the use of competition law to ameliorate the issues identified would continue in the established vein of treating the issues identified here as defined by and therefore resolvable through market-oriented mechanisms.

8 Conclusion

By privileging intellectual property rights through secondary legislation without a corollary insurance for consumer property interests, the European Union has implicitly endorsed a hierarchy of property rights which values the commercial viability of intellectual property (as enforced by private actors) above securing the broader interests which subsist as part of the property rights protected by Article 17. In some respects, this is hardly surprising: the Union has, after all, has a demonstrable record in advancing an ordoliberal approach to policy evaluation and legislative enforcement. [270]

However, in light of the broader implications for the values of liberty and dignity the Union espouses, and indeed the right to privacy, allowing the current imbalance to persist is increasingly untenable. It also arguable that, in the longer term, the persistence of such imbalances will distort competition within the market by offering established actors who do not provide interoperable content or devices, and effectively locking out market entrants. A rights-oriented understanding of consumer protection law would mediate the constructive and destructive potentials of the systems of property which currently subsist in EU law by re-orientating the balance between the competing understandings and protections of consumer and intellectual property and the social and economic aspects of Article 17.

References

Doctorow C, Cory Doctorow: Terra Nullius (2019)

Nazer D, Aspen to Students: Your Property Book is Not Your Property (2014)

Austin LHaGW, Human Rights and Intellectual Property (Cambridge University Press 2011)

Benohr I, EU Consumer Law and Human Rights (Oxford University Press 2013)

Bingham T, The Rule of Law (Penguin 2011)

Blackstone W, Commentaries on the Laws of England , Vol 2 (1765)

Blum J, The End of the Old Order in Rural Europe (Princeton University Press 2017)

Burca PCaGD, EU Law: Text, Cases, and Materials (6th edn, Oxford University Press 2015)

Christman J, The Myth of Property: Toward an Egalitarian Theory of Ownership (Oxford University Press 1994)

Coban AR, Protection of Property Rights within the European Convention on Human Rights (Ashgate 2004)

Cohen G, Self-ownership, Freedom and Equality (Cambridge University Press 1995)

Daly A, Private Power, Online Information Flows and EU Law, Mind the Gap , vol 15 (Hart Studies in Competition Law, Hart 2016)

David Harris MOB, Ed Bates and Carla Buckley, Law of the European Convention on Human Rights (4th edn, Oxford University Press 2018)

Epstein RA, Liberty, Property and the Law (Garland 2000)

Epstein RA, Design for Liberty: Private Property, Public Administration, and the Rule of Law (Harvard University Press 2011)

Fairfield JT, Owned: Property, Privacy and the New Digital Serfdom (Cambridge University Press 2017)

Finnis J, Natural Law and Natural Rights (Clarendon Law Series, Oxford University Press 2011)

Foucault M, Discipline and Punish (Penguin 1991)

Green T, Lectures on the Principles of Political Obligation (1895) (Longmans Green & Co 1941)

Grégoire Webber PY, Richard Ekins, Maris Köpcke, Bradley W Miller and Francisco J Urbina, Legislated Rights: Securing Human Rights Through Legislation (Cambridge University Press 2018)

Hegel GWF, Philosophy of Right (Prometheus Books 1996)

Hobbes T, Leviathan (Penguin Classics 2016)

Hohfeld WN, Fundamental Legal Conceptions: as applied in Judicial Reasoning (Yale University Press 1923)

Kant I, The Metaphysics of Morals (Cambridge University Press 1991)

Krotoszynski R, Privacy Revisited (Cambridge University Press 2016)

Marx K, Capital: A Critique of Political Economy (1887) (International Publishers 1967)

Mezei P, Copyright Exhaustion: Law and Policy in the United States and the European Union (Cambridge University Press 2018)

Mill JS, Principles of Political Economy (1984) (Oxford University Press 1994)

Mireille van Eechoud PBH, Stef van Gompel, Lucie Guibault, Natali Helberger, Harmonising European Copyright Law: The Challenges of Better Lawmaking , vol 19 (Information Law Series, Wolters Kluwer 2009)

Nozick R, Anarchy, State and Utopia (Blackwell 1974)

Penner J, The Idea of Property in Law (Oxford University Press 1997)

Post D, In Search of Jefferson's Moose (Oxford University Press 2009)

Proudhon P-J, What is Property (Cambridge University Press 1994)

Radin M, Boilerplate: the fine print, vanishing rights and the rule of law (Princeton University Press 2012)

Rawls J, A Theory of Justice (Oxford University Press 1972)

Richard Davis BL, Ashley Roughton, Tom St Quintin and Guy Tritton, Tritton on Intellectual Property in Europe (4th edn, Sweet and Maxwell 2014)

Schultz APaJ, The End of Ownership: Personal Property in the Digital Economy (MIT Press 2016)

Tamanaha BZ, On the Rule of Law: History Politics and Theory (Cambridge University Press 2004)

Temin P, The Fall of the Bell System (Cambridge University Press 1989)

Trebilcock M, The Limits of Freedom of Contract (Harvard University Press 1994)

Vaver D, Copyright Law (Irwin 2000)

Waldron J, The Right to Private Property (Clarendon Press 1988)

Weiser JENaPJ, Digital Crossroads: Telecommunications Law and Policy in the Internet Age (2nd edn, The MIT Press 2013)

Wu T, The Master Switch: The Rise and Fall of Information Empires (Knopf 2010)

Beauchamp TL, 'Autonomy and Consent' in Wertheimer FMaA (ed), The Ethics of Consent: Theory and Practice (Oxford University Press 2009)

Bombois POaT, 'La liberté d'expression commerciale en droit de l' Union européenne', Annuaire de Droit de l' Union européenne (Editions Panthéon-Assasse 2015)

Cass R, 'Property Rights Systems and the Rule of Law' in Colombatto E (ed), The Elgar Companion to the Economics of Property Rights (Edward Elgar 2004)

Demsetz H, 'Toward a Theory of Property Rights' in Epstein RA (ed), Modern Understandings of Liberty and Property (Garland Publishing 2000)

Geiger C, 'The Constitutional Dimension of Intellectual Property' in Torremans P (ed), Intellectual Property and Human Rights (Kluwer Law International 2008)

Geiger C, 'Fundamental Rights as Common Principles of European (and International) Intellectual Property Law' in Ohly A (ed), Common Principles of European Intellectual Property Law (Mohr Siebeck 2012)

Geiger C, 'The Social Function of Intellectual Property Rights, or How Ethics can Influence the Shape and Use of IP Law' in Dinwoodie GB (ed), Intellectual Property Law: Methods and Perspectives (Edward Elgar 2013)

Geiger C, 'Implementing Intellectual Property Provisions in Human Rights Instruments: Towards a New Social Contract for the Protection of Intangibles' in Geiger C (ed), Research Handbook on Human Rights and Intellectual Property (Edward Elgar 2015)

Geiger C, 'The Role of the Court of Justice of the European Union: Harmonizing, Creating and sometimes Disrupting Copyright Law in the European Union' in Stamatoudi IA (ed), New Developments in EU and International Copyright Law (Kluwer Law International 2016)

Grey TC, 'The Disintegration of Property' in Epstein RA (ed), Modern Understandings of Liberty and Property (Garland Publishing 2000)

Griffiths J, 'Taking power tools to the acquis - The Court of Justice, the Charter of Fundamental Rights and European Union Copyright Law' in Geiger C (ed), Intellectual Property and The Judiciary (Edward Elgar 2018)

Helfer LR, 'Mapping The Interface Between Human Rights And Intellectual Property' in Geiger C (ed), Research Handbook on Human Rights and Intellectual Property (Edward Elgar 2015)

Hobhouse LT, 'The Historical Evolution of Property, In Fact and in Idea' in Epstein RA (ed), Liberty, Property and the Law (Garland 2000)

Honore AM, 'Ownership' in Guest AA (ed), Oxford Essays in Jurisprudence (Clarendon 1961)

Kim ASaH-E, 'The Balancing Impact of General EU Law on European Intellectual Property Jurisprudence' in Pila AOaJ (ed), The Europeanisation of Intellectual Property Law: Towards a European Legal Methodology (Oxford University Press 2013)

Kleinlein T, 'Judicial lawmaking by judicial restraint? The potential of balancing in international economic law' in Venzke AvBaI (ed), International Judicial Lawmaking (Springer 2012)

Mak V, 'Two levels one standard? The multi-level regulation of consumer protection in Europe' in Kenny JDaM (ed), European Consumer Protection: Theory and Practice (Cambridge University Press 2012)

Mylly T, 'The Constitutionalisation of the European Legal Order: impact of human rights on intellectual property in the EU' in Geiger C (ed), Research Handbook on Human Rights and Intellectual Property (Edward Elgar 2015)

Peukert A, 'The Fundamental Right to (Intellectual) Property and the Discretion of the Legislature ' in Geiger C (ed), Research handbook on human rights and intellectual property (Edward Elgar 2015)

Raz J, 'The Rule of Law and its Virtue', The Authority of Law (Oxford University Press 1979)

Rijn Av, 'Right to the Peaceful Enjoyment of One's Possessions' in Pieter van Dijk FvH, Arjen van Rijn and Leo Zwaak (ed), Theory and Practice of the European Convention on Human Rights (4th edn, Intersentia 2006)

Rosas A, 'Property Rights' in Rosas A (ed), The Strength of Diversity: Human Rights and Pluralist Democracy (Springer 1992)

Schovsbo SSaJ, 'What is Left of User Rights? Algorithmic Copyright Enforcement and Free Speech in the Light of the Article 17 Regime' in Torremans P (ed), Intellectual Property Law and Human Rights (4th edn, Wolters Kluwer 2020)

Urbina FJ, 'How Legislation Aids Human Rights Adjudication' in Grégoire Webber PY, Richard Ekins, Maris Köpcke, Bradley W Miller and Francisco J Urbina (ed), Legislated Rights: Securing Human Rights Through Legislation (Cambridge Univeristy Press 2018)

Voorhoof D, 'Freedom of Expression and the Right to Information: Implications for Copyright' in Geiger C (ed), Research Handbook on Human Rights and Intellectual Property (Edward Elgar 2015)

Kopsell RBaS, 'Trained to Accept? A Field Experiment on Consent Dialogs' (Proceedings of the SIGCHI Conference on Human Factors in Computing Systems)

Laslett P (ed), John Locke, Two Treatises of Government (Cambridge University Press 1988)

Nidditch LS-BaP (ed), David Hume, A Treatise of Human Nature (1739) (Clarendon Press 1978)

Steve Peers TH, Jeff Kenner and Angela Ward (ed), The EU Charter of Fundamental Rights: A Commentary (Hart 2014)

Alvarez JE, 'The Human Right of Property' (2018) Working Paper 18-21 Public Law and Legal Theory Research Paper Series

Bart Custers SvdH, Bart Schermer, Sandra Appleby-Arnold and Noeline Brockdorff, 'Informed Consent in Social Media Use - The Gap between User Expectations and EU Personal Data Protection Law' (2013) 10 SCRIPTed 435

Bernhard S, 'From Conflict to Consensus: European neoliberalism and the debate on the future of EU social policy' (2010) 4 Work Organisation, Labour and Globalisatio 175

Bietti E, 'Consent as a Free Pass: Platform Power and the Limits of the Informational Turn' (2020) Pace Law Review Vol 40 Issue 1.

Boyle J, 'Fencing off Ideas: enclosure and the disappearance of the public domain' (2002) 2 Daedelus 13

Brandeis SDWaLD, 'The Right to Privacy' (1890) 4 Harvard Law Review

Chapdelaine P, 'The Ambiguous Nature of Copyright Users' Rights' (2013) 26 Intellectual Property Journal 1

Cohen J, 'The place of the user in copyright law' (2005) 74 Fordham Law Review 347

Cohen JE, 'DRM and Privacy' (2003) 18 Berkeley Technology Law Journal 575

Demsetz H, 'Toward a Theory of Property Rights' (1967) 57 American Economics Review 347

Dijk Nv, 'Property, privacy and personhood in a world of ambient intelligence' (2010) 12 Ethics of Information Technology 57

Dupré C, 'Human Dignity in Europe: A Foundational Constitutional Principle' (2013) 19 European Public Law 319

Elkin-Koren N, 'Making room for consumers under teh DMCA' (2007) 22 Berkeley Journal of Law and Technology 1119

Froschmaier NKaF, 'The Doctrine of Territoriality in Patent Law and the European Common Market' (1966) 9 Patent, Trademark and Copyright Journal of Research and Education 343

Geiger C, 'De la nature juridique des limites au droit d'auteur' (2004) 1 Propriétés intellectuelles 882

Geiger C, 'Fundamental Rights as a Safeguard for the Coherence of Intellectual Property Law' (2004) 35 International Review of Intellectual Property and Copyright Law 268

Geiger C, '"Constitutionalising" Intellectual Property Law? The Influence of Fundamental Rights on Intellectual Property in the European Union' (2006) 37 International review of Industrial Property and Copyright Law 371

Geiger C, 'Intellectual Property Shall be Protected!? - Article 17(2) of the Charter of Fundamental Rights of the European Union: a Mysterious Provision with an Unclear Scope' (2009) European Intellectual Property Review 115

Gervais D, 'Making Copyright Whole: a principled approach to copyright exceptions and limitations ' (2008) 5 University of Ottowa Law and Technology Journal 1

Ginsburg JC, 'A Tale of Two Copyrights: Literary Property in Revolutionary France and America' (1990) 64 Tulane Law Review 991

Griffiths J, 'Constitutionalising or harmonising? the Court of Justice, the right to property and European copyright law' (2013) 38 European Law Review 65

Guibault NHaL, 'Clash of Cultures - Integrating copyright and consumer law' 14 Info 23

Hartzog NRaW, 'The Pathologies of Digital Consent' (2019) Forthcoming Washington University Law Review

Helberger JvHaN, 'Looking Ahead—Future Issues when Reflecting on the Place of the iConsumer in Consumer Law and Copyright Law' (2008) 31 Journal of Consumer Policy 489

Helfer LR, 'Human Rights and Intellectual Property: Conflict or Coexistence' (2003) 5 Minnesota Intellectual Property Review 47

Helfer LR, 'The New Innovation Frontier - Intellectual Property and the European Court of Human Rights' (2008) 49 Harvard International Law Journal 49

Hermann C, 'Neoliberalism in the European Union' (2007) 70 Studies in Political Economy 61

Hestres LE, 'App Neutrality: Apple's App Store and Freedom of Expression Online ' (2013) 7 International Journal of Communication 1265

Hoofnagle APaCJ, 'What we buy when we 'buy now'' (2017) 165 University of Pennsylvania Law Review 315

Hoofnagle CJ, 'Big Brother's Little Helper: How Choicepoint and other Commercial Data Brokers Collect, Process and Package your Data for Law Enforcement' (2004) 29 North Carolina Journal of International Law and Commercial Regulation 595

Hoofnagle CJ, 'Digital Rights Management: Many Technical Controls on Digital Content Distribution can Create a Surveillance Society' (2004) 5 The Columbia Science and Technology Law Review 1

Howells RBaG, 'When Surfers Start to Shop: Internet Commerce and Contract Law' (1999) 19 Legal Studies 287

Husovec M, 'The Essence of Intellectual Property Rights under Article 17(2) of the Charter'' (2019) 20 German Law Journal 840

Jones EEaML, 'Analysing the Legal Roots and Moral Core of Digital Consent' (2019) 21 New Media & Society 1804

Jütte BJ, 'Coexisting digital exploitation for creative content and the private use exception' (2016) 24 International Journal of Law and Information Technology 1

Kimel D, 'Neutrality, Autonomy and Freedom of Contract' (2001) 21 Oxford Journal of Legal Studies 473

King RC, 'The Moral Rights of Creators of Intellectual Property' (1991) 9 Cardozo Arts and Entertainment Law Journal 267

Kommers DP, 'Can German Constitutionalism Serve as a Model for the US?' (1998) 58 Zeitschrift für ausländisches öffentlichesund Völkerrecht 787

Litman JD, 'Real Copyright Reform' (2010) 96 Iowa Law Review 1

Liu J, 'Copyright law's theory of the consumer' (2003) 44 Boston College Law Review 397

Liu J, 'Owning digital copies: copyright law and the incidents of copy ownership' (2008) 42 William and Mary Law Review 1245

Mazis MHaM, 'Deception by Implication: A Typology of Truthful but Misleading Advertising and Labeling Claims' (2011) 30 Journal of Public Policy and Marketing 157

Meyer T, 'Graduated Response in France: The Clash of Copyright and the Internet' (2012) 2 Journal of Information Policy 107

Oeldorf-Hirsch JAOaA, 'The biggest lie on the Internet: ignoring the privacy policies and terms of service policies of social networking services' (2018) 1 Information, Communication & Society 1

Oliver P, 'The Protection of Privacy in the Economic Sphere within the European Union' (2009) 46 Common Market Law Review 1443

Oliver P, 'Companies and their Fundamental Rights: a Comparative Perspective' (2015) 64 International and Comparative Law Quarterly 661

Perzanowski JSaA, 'DigitalExhaustion' (2011) 58 UCLA Law Review 889

Petersen N, 'How to Compare the Length of Lines to the Weight of Stones: Balancing and the Resolution of Value Conflicts in Constitutional Law' (2013) 14 German Law Journal 1387

Radin MJ, 'Property and Personhood' (1982) 34 Stanford Law Review 957

Rao N, 'Three Concepts of Dignity in Constitutional Law' (2011) 86 Notre Dame Law Review 183

Rose CM, 'The Several Futures of Property: Of Cyberspace and Folk Tales, Emission Trade adn ecosystems' (1998) 83 Minnesota Law Review 129

Rothschild KW, 'Neoliberalism, EU and the Evaluation of Policies' (2009) 21 Review of Political Economy 213

Samuelson P, 'Freedom to Tinker' (2016) 17 Theoretical Inquiries in Law 563

Schovsbo J, 'Integrating Consumer Rights into Copyright Law: From a European Perspective' (2008) 31 Journal of Consumer Policy 393

Sganga C, 'A Decade of Fair Balance Doctrine, and How to Fix It: Copyright versus Fundamental Rights before the CJEU from Promusicae to Funke Medien, Pelham and Spiegel Online' (2019) 11 European Intellectual Property Review

Stothers POaC, ' Intellectual Property under the Charter: Are the Court's Scales Property Calibrated?' (2017) 1 Common Market Law Review 54

Wagner RP, 'Information wants to be Free: Intellectual Property and the Mythologies of Control' (2003) 103 Columbia Law Review 995

Zittrain J, 'What the Publisher can Teach the Patient: Intellectual Property and Privacy in an Era of Trusted Privication' (2000) 52 Stanford Law Review 1201

Gartenberg C, 'Amazon strikes deal with Apple to sell new iPhones and iPads' The Verge (< https://www.theverge.com/2018/11/9/18079340/amazon-apple-iphone-ipad-watch-beats-deal-selling-products-online >

Hawkins AJ, 'Tesla won't let you use your self-driving Model X to drive for Uber' The Verge (< https://www.theverge.com/2016/10/20/13346396/tesla-self-driving-ride-sharing-uber-lyft > accessed 20 March 2019

Kobie N, 'The complicated truth about China's social credit system' Wired (< https://www.wired.co.uk/article/china-social-credit-system-explained >

Solon O, 'A right to repair: why Nebraska farmers are taking on John Deere and Apple' The Guardian (< https://www.theguardian.com/environment/2017/mar/06/nebraska-farmers-right-to-repair-john-deere-apple > accessed 20 March 2019

Wiens K, 'Apple Shouldn't Get to Brick Your iPhone Because you Fixed it Yourself' Wired (< https://www.wired.com/2016/02/apple-shouldnt-get-to-brick-your-iphone-because-you-fixed-it-yourself/ >

Microsoft, Books in Microsoft Store: FAQ (2019)

Warren SE, Levelling the Playing Field for America's Family Farmers (2019)

Forum WE, Digital Media and Society Implications in a Hyperconnected Era , 2016)

Güneş Acar1 BVA, Frank Piessens3, Claudia Diaz1, Bart Preneel1, Facebook Tracking Through Social Plug-ins , 2015)

International P, Secret Global Surveillance Networks: Intelligence Sharing Between Governments and the Need for Safeguards , 2018)

Jacques MHaSISaS,

Digitalisation and intermediaries in the music industry (CREATe Working Paper 2017/07, 2017)

Mchangama J, The Right to Property in Global Human Rights Law , 2011)

Sahra Svensson JLR, Eléonore Maitre-Ekern, Taina Pihlajarinne, Aline Maigret, Carl Dalhammar, The Emerging Right to Repair legislation in the EU and the US , 2018)

Izyumenko CGaE, The Constitutionalization of Intellectual Property Law in the EU and the Funke Medien, Pelham and Spiegel Online Decisions of the CJEU: Progress, But Still Some Way to Go! (Centre for International Intellectual Property Studies 2019)

Oeldorf-Hirsch JAOaA, Clickwrap Impact: Quick-Join Options and Ignoring Privacy and Terms of Service Polcies of Social Networking Services (York Univeristy; Quello Centre, Michigan State University and University of Connecticut 2017)

Werkers E, Intermediaries in the Eye of the Copyright Storm - A Comparative Analysis of the Three Strike Approach within the European Union (KU Leuven 2011)

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[1] William Blackstone, Commentaries on the Laws of England , vol 2 (1765)Article I, Of Property in General.

[2] Thomas C Grey, 'The Disintegration of Property' in Richard A Epstein (ed), Modern Understandings of Liberty and Property (Garland Publishing 2000), 295

[3] Pierre-Joseph Proudhon, What is Property (Cambridge University Press 1994), 37.

[4] See,Laurence R Helfer, 'Mapping The Interface Between Human Rights And Intellectual Property' in Christopher Geiger (ed), Research Handbook on Human Rights and Intellectual Property (Edward Elgar 2015), 5;Dirk Voorhoof, 'Freedom of Expression and the Right to Information: Implications for Copyright' in Christopher Geiger (ed), Research Handbook on Human Rights and Intellectual Property (Edward Elgar 2015), 331;Laurence R Helfer, 'Human Rights and Intellectual Property: Conflict or Coexistence' (2003) 5 Minnesota Intellectual Property Review 47.

[5] Carol M Rose, 'The Several Futures of Property: Of Cyberspace and Folk Tales, Emission Trade adn ecosystems' (1998) 83 Minnesota Law Review 129.

[6] Harold Demsetz, 'Toward a Theory of Property Rights' (1967) 57 American Economics Review 347.

[7] Ibid, 351-3.

[8] Rose, 'The Several Futures of Property: Of Cyberspace and Folk Tales, Emission Trade adn ecosystems', 133.

[9] See iOS 12 terms (< https://www.apple.com/legal/sla/docs/iOS12.pdf >) accessed 27 March 2019.

[10] Apple is currently the world's largest music retailer, and a market leader in the provision of other digital content. The iTunes store describes the content it makes available through transactions with users as 'purchases' and invites users to 'buy' or 'rent'. Despite this, Apple's terms of service specify that consumers enjoy only a license in their 'purchases' or the content they 'buy' and prohibits users from renting, leasing, loaning, selling or otherwise distributing to others the content they purchase. The TOS further provide that although customers may re-download previously acquired content to devices associated with the same Apple ID, content may not necessarily be available for re-download in other jurisdictions

[11] Amazon provides this content on terms having the same result as those used by Apple, and grants consumers a "non-exclusive, non-transferable right to use ...for your personal, non-commercial purposes" as well as prohibiting resale, rental, lease or other transfer of purchased items - "Amazon or its content providers grant you a limited, non-exclusive, non-transferable, non-sublicensable license to access and make personal and non-commercial use of the Amazon Services ... No Amazon Service, nor any part of any Amazon Service, may be reproduced, duplicated, copied, sold, resold, visited, or otherwise exploited". Similar to the TOS used by Apple, Amazon reserves the right to refuse service, terminate accounts, remove or edit content, or cancel orders at their sole discretion.

[12] Ibid.

[13] Nor are such contractually enabled limitations exclusive to these two companies, rather they have become a norm not only in digital but also in physical goods. In the United States, Aspen, the legal publisher, tied its physical books to an online subscription and demanded the return of the physical textbooks. See, Daniel Nazer, Aspen to Students: Your Property Book is Not Your Property (2014); Elsewhere, John Deere and Tesla both impose restrictive conditions on how consumers may use or interact with their vehicle - see Olivia Solon, 'A right to repair: why Nebraska farmers are taking on John Deere and Apple' The Guardian (<https://www.theguardian.com/environment/2017/mar/06/nebraska-farmers-right-to-repair-john-deere-apple> accessed 20 March 2019); and Andrew J Hawkins, 'Tesla won't let you use your self-driving Model X to drive for Uber' The Verge (<https://www.theverge.com/2016/10/20/13346396/tesla-self-driving-ride-sharing-uber-lyft> accessed 20 March 2019). Senator Elizabeth Warren in her policy platform as part of her Presidential bid announced the right to repair as a specific area of concern with relation to its impacts on farmers - see,Senator Elizabeth Warren, Levelling the Playing Field for America's Family Farmers (2019). In respect of this lock-in through hardware and software restrictions and the control of markets it enables, the conduct of Amazon and Apple bears a striking resemblance to the strategy employed by AT&T during the nineteenth and twentieth centuries in the United States when that company maintained strict control over its communications infrastructure and prohibited interconnections as part of the 'Bell System'. See, Tim Wu, The Master Switch: The Rise and Fall of Information Empires (Knopf 2010); Jonathan E Neuchterlein and Philip J Weiser, Digital Crossroads: Telecommunications Law and Policy in the Internet Age (2nd edn, The MIT Press 2013); Peter Temin, The Fall of the Bell System (Cambridge University Press 1989). See also, Bernd Justin Jütte, 'Coexisting digital exploitation for creative content and the private use exception' (2016) 24 International Journal of Law and Information Technology 1.

[14] Aaron Perzanowski and Jason Schultz, The End of Ownership: Personal Property in the Digital Economy (MIT Press 2016).

[15] Joshua T Fairfield, Owned: Property, Privacy and the New Digital Serfdom (Cambridge University Press 2017).

[16] Ibid.

[17] Jütte, 'Coexisting digital exploitation for creative content and the private use exception'.

[18] Joris van Hoboken and Natali Helberger, 'Looking Ahead—Future Issues when Reflecting on the Place of the iConsumer in Consumer Law and Copyright Law' (2008) 31 Journal of Consumer Policy 489.

[19] Natali Helberger and L Guibault, 'Clash of Cultures - Integrating copyright and consumer law' 14 Info 23.

[20] Sebastian Schwermer and Jens Schovsbo, 'What is Left of User Rights? Algorithmic Copyright Enforcement and Free Speech in the Light of the Article 17 Regime' in Paul Torremans (ed), Intellectual Property Law and Human Rights (4th edn, Wolters Kluwer 2020).

[21] Pamela Samuelson, 'Freedom to Tinker' (2016) 17 Theoretical Inquiries in Law 563.

[22] Schultz, The End of Ownership: Personal Property in the Digital Economy ;Jason Schultz and Aaron Perzanowski, 'DigitalExhaustion' (2011) 58 UCLA Law Review 889.

[23] Fairfield, Owned: Property, Privacy and the New Digital Serfdom , 189.

[24] Ibid, 191.

[25] Ibid, 199.

[26] Jessika Luth Richter Sahra Svensson, Eléonore Maitre-Ekern, Taina Pihlajarinne, Aline Maigret, Carl Dalhammar, The Emerging Right to Repair legislation in the EU and the US , 2018).

[27] Exhaustion as a means of remediating this imbalance in relation to digital goods has been rendered unlikely following the recent decision in Case C-263/18 Tom Kabinet EU:C:2019:1111. On exhaustion more generally see, Péter Mezei, Copyright Exhaustion: Law and Policy in the United States and the European Union (Cambridge University Press 2018).

[28] Guibault, 'Clash of Cultures - Integrating copyright and consumer law'. See also,Helberger, 'Looking Ahead—Future Issues when Reflecting on the Place of the iConsumer in Consumer Law and Copyright Law'.

[29] See, section 4.

[30] Pascale Chapdelaine, 'The Ambiguous Nature of Copyright Users' Rights' (2013) 26 Intellectual Property Journal 1.

[31] Allan Rosas, 'Property Rights' in Allan Rosas (ed), The Strength of Diversity: Human Rights and Pluralist Democracy (Springer 1992), 132-157; As examples of the national guarantees of individual property see Article 14 of the German Constitution, Articles 2 and 17 of the French Constitution, Article 33 of the Spanish Constitution, Article 42 of the Italian Constitution, Article 17 of the Greek Constitution, Article 14 of the Dutch Constitution all of which guarantee rights to private property.

[32] Case C-4/73 Nold v High Authority EU:C:1974:51.

[33] Case C-44/79 Hauer v Land Rheinland-Pflaz EU:C:1979:290.

[34] See generally,Jerome Blum, The End of the Old Order in Rural Europe (Princeton University Press 2017).

[35] Grey, 'The Disintegration of Property', 296.

[36] Jeremy Waldron, The Right to Private Property (Clarendon Press 1988).

[37] Jacob Mchangama, The Right to Property in Global Human Rights Law , 2011);Jose E Alvarez, 'The Human Right of Property' (2018) Working Paper 18-21 Public Law and Legal Theory Research Paper Series.

[38] Paul Craig and Grainne De Burca, EU Law: Text, Cases, and Materials (6th edn edn, Oxford University Press 2015), 849 et seq;Ali Riza Coban, Protection of Property Rights within the European Convention on Human Rights (Ashgate 2004).

[39] Significantly, the guarantees of Article 17 apply to claims made by legal as well as natural persons. See, See Case C-154/78, 205/78 Ferriera Valsabbia EU:C:1980:81, [88] et seq; Case C-59/83 Biovilac v EEC EU:C:1984:380, [21]; Case C-265/87 Hermann Schrader HS Kraftfutter GmbH EU:C:1989:303, [13] et seq.

[40] On this, see Helfer, 'Human Rights and Intellectual Property: Conflict or Coexistence'.

[41] Christophe Geiger, 'Implementing Intellectual Property Provisions in Human Rights Instruments: Towards a New Social Contract for the Protection of Intangibles' in Christopher Geiger (ed), Research Handbook on Human Rights and Intellectual Property (Edward Elgar 2015) 661, 662.

[42] Ibid, 671. Geiger notes, in particular, Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, Recital 11; Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, Recital 16; European Commission, 'Green Paper: copyright in the knowledge economy' COM(2008)466 final, 4.

[43] Peter Oliver and Christopher Stothers, ' Intellectual Property under the Charter: Are the Court's Scales Property Calibrated?' (2017) 1 Common Market Law Review 54, 517.

[44] Voorhoof, 'Freedom of Expression and the Right to Information: Implications for Copyright', 343.

[45] Cristophe Geiger, 'Intellectual Property Shall be Protected!? - Article 17(2) of the Charter of Fundamental Rights of the European Union: a Mysterious Provision with an Unclear Scope' (2009) European Intellectual Property Review 115.

[46] Case C-70/10 Scarlett Extended SA v SABAM EU:C:2011:771.

[47] Case C-360/10 SABAM v Netlog EU:C:2012:85.

[48] Case C-277/10 Luksan EU:C:2012:65.

[49] Scarlett Extended , [43].

[50] This also reflects the ECtHR's earlier conclusions that intellectual property rights, including patents, copyright and trademarks, are "possessions" for the purpose of the right to peaceful enjoyment of possessions. The text of Art 17 (Brendan Van Alsenoy2 Güneş Acar1, Frank Piessens3, Claudia Diaz1, Bart Preneel1, Facebook Tracking Through Social Plug-ins)is based closely on the equivalent right under Art 1, of the First Protocol 1 to the ECHR. See also,Jonathan Griffiths, 'Constitutionalising or harmonising? the Court of Justice, the right to property and European copyright law' (2013) 38 European Law Review 65.

[51] Caterina Sganga, 'A Decade of Fair Balance Doctrine, and How to Fix It: Copyright versus Fundamental Rights before the CJEU from Promusicae to Funke Medien, Pelham and Spiegel Online' (2019) 11 European Intellectual Property Review.

[52] Case C-283/11 Sky Osterrich GmbH v Osterreichischer Rundfunk EU:C:2013:28.

[53] Ibid, [35], the Court holding a right has an asset value if granted in return for consideration.

[54] Ibid, [34].

[55] Tamara Harvey Steve Peers, Jeff Kenner and Angela Ward (ed), The EU Charter of Fundamental Rights: A Commentary (Hart 2014), 17.1(16).

[56] Ibid17.1(16).

[57] Case C-44/79 Hauer, [19]-[20].

[58] See, Gasus Dosier-und Fördertechnik GmbH , App no 15375/89 (ECHR, 23 February 1995), [52];Michael O'Boyle David Harris, Ed Bates and Carla Buckley, Law of the European Convention on Human Rights (4th edn, Oxford University Press 2018), 850.

[59] Case C-44/79 Hauer [19].

[60] Joined Cases C-20/00 ad C-64/00 Booker Aquaculture [58] et seq. This similarly, finds expression in the ECtHR's jurisprudence on the limitations to property rights under Article 1 Protocol 1 ECHR.

[61] Sporrong and Lonnroth App no 7152/75 (ECHR, 23 September 1982) [63]; Brumarescu v Romania App no 28342/95 (ECHR, 28 October 1999), [76].

[62] Case C-59/83 Biovilac EU:C:1984:380, [22]; Case C-177/90 Kuhn EU:C:1992:2, [17].

[63] A.M. Honore, 'Ownership' in A.A. Guest (ed), Oxford Essays in Jurisprudence (Clarendon 1961).

[64] Ibid.

[65] See, Loizidou App no 15318/89 (ECHR, 18 December 1996); Sporrong and Lönnroth ; Erkner and Hofauer App no 9616/81 (ECHR, 23 April 1987).

[66] See,Honore, 'Ownership'.

[67] Plato, Republic , 462.

[68] Aristotle, Politics , 126.

[69] Hume considered there to be nothing natural about private property, writing that until possession is stabilised by social rules, there is no secure relation between person and thing,LA Selby-Bigge and PH Nidditch (ed), David Hume, A Treatise of Human Nature (1739) (Clarendon Press 1978), 488, 490.

[70] Thomas Hobbes, Leviathan (Penguin Classics 2016).

[71] Nidditch (ed), David Hume, A Treatise of Human Nature (1739) , 489.

[72] Peter Laslett (ed), John Locke, Two Treatises of Government (Cambridge University Press 1988)[27];Hobbes, Leviathan , 84. Mill proposes a labour-based argument similar to Locke though he does not acknowledge the self-ownership argument of Locke. According to Mill the fundamental justification for the institution of privacy property is the right of producers to what they themselves have produced, a theory not limited to land but which extended to all property.

John Stuart Mill, Principles of Political Economy (1984) (Oxford University Press 1994), 217. More recently, Doctorow notes the spectre of Locke which has been used to justify colonisation in the real world, locking indigenous and first nations' peoples out of land held in common because Europeans mixed their labour with it, as well as the racially tinged deployment of intellectual property in a manner which protects western cultural values at the expense of those aspects of cultural works valued by other cultures and communities, see Cory Doctorow, Cory Doctorow: Terra Nullius (2019).

[73] This Lockean justification for the protection of property rights is not without difficulties. See, Waldron, The Right to Private Property ;Proudhon, What is Property ;Robert Nozick, Anarchy, State and Utopia (Blackwell 1974).

[74] Kant derived connections between individual property and human agency who derived connections between individual property and human agency and suggests that it would be an affront to agency and thus to human personality if a system were not established to permit the use of useful objects or materials,Immanuel Kant, The Metaphysics of Morals (Cambridge University Press 1991), 74.

[75] Green emphasized the contribution of ownership to the growth of individual,TH Green, Lectures on the Principles of Political Obligation (1895) (Longmans Green & Co 1941), though neither Green nor Hegel view individual development as the sole justification or end of property but rather as a stage in a broader pattern of the growth of social responsibility and positive freedom more generally.

[76] Margaret Jane Radin, 'Property and Personhood' (1982) 34 Stanford Law Review 957.

[77] Georg Wilhelm Friedrich Hegel, Philosophy of Right (Prometheus Books 1996).

[78] The right to choose an occupation and to engage in work.

[79] The right to conduct a business; Case C-44/79 Hauer [32]; Case C-63/93 Duff et al v Minister for Agriculture and Food EU:C:1996:51, [28] et seq ; Case C-84/95 Bosphorus v Minister for Transport EU:C:1996:312, [21]; Joined Cases C-248/95 and C-249/95 SAM Schuffahrt and Stapf v Bundesrepublik EU:C:1997:377, [71]; Case C-200/96 Metronome Musik EU:C:1998:172, [21].

[80] Case C-29/69 Stauder v City of Ulm EU:C:1969:57.

[81] Case C-36/02 Omega Spielhallen EU:C:2004:614.

[82] Article 15 International Covenant on Economic, Social and Cultural Rights; Case C-4/73 Nold [14] referring to the social utility of property.

[83] On the place of dignity within Europe's constitutional schema see, Catherine Dupré, 'Human Dignity in Europe: A Foundational Constitutional Principle' (2013) 19 European Public Law 319, 325-326.

[84] Donald P Kommers, 'Can German Constitutionalism Serve as a Model for the US?' (1998) 58 Zeitschrift für ausländisches öffentlichesund Völkerrecht 787.

[85] 45 BVerfGE 187, 227.

[86] Neomi Rao, 'Three Concepts of Dignity in Constitutional Law' (2011) 86 Notre Dame Law Review 183, 222-223.

[87] Christophe Geiger, 'The Social Function of Intellectual Property Rights, or How Ethics can Influence the Shape and Use of IP Law' in Graeme B. Dinwoodie (ed), Intellectual Property Law: Methods and Perspectives (Edward Elgar 2013), 153.

[88] Potomska v Poland App no 33949/05 (ECHR, 4 November 2014), [67].

[89] SW v UK , App no. 47/1994/494/576 (ECHR, 22 November 1995).

[90] Steve Peers (ed), The EU Charter of Fundamental Rights: A Commentary , 490 et seq.

[91] Which all EU Member States have ratified.

[92] Though it is notable that no parallel obligation is imposed in respect of individual property, the reasons for such parallel treatment are beyond the scope of this article.

[93] Hegel, Philosophy of Right

[94] Martin Husovec, 'The Essence of Intellectual Property Rights under Article 17(2) of the Charter'' (2019) 20 German Law Journal 840.

[95] Guibault, 'Clash of Cultures - Integrating copyright and consumer law', 28.

[96] Article 169 Treaty of the Functioning of the European Union.

[97] Article 38 Charter of Fundamental Rights of the European Union.

[98] Iris Benohr, EU Consumer Law and Human Rights (Oxford University Press 2013), 64-65; Vanessa Mak, 'Two levels one standard? The multi-level regulation of consumer protection in Europe' in J Devenney and M Kenny (ed), European Consumer Protection: Theory and Practice (Cambridge University Press 2012).

[99] Gustafsson App no 1107/04 (ECHR, 25 April 1996), [60]; James and Others , App no 8793/79 (ECHR, 21 February 1986), [35].

[100] Arjen van Rijn, 'Right to the Peaceful Enjoyment of One's Possessions' in Fried van Hoof Pieter van Dijk, Arjen van Rijn and Leo Zwaak (ed), Theory and Practice of the European Convention on Human Rights (4th edn, Intersentia 2006), 864.

[101] GA Cohen, Self-ownership, Freedom and Equality (Cambridge University Press 1995).

[102] Karl Marx, Capital: A Critique of Political Economy (1887) (International Publishers 1967).

[103] Ibid.

[104] Michel Foucault, Discipline and Punish (Penguin 1991), Part II, Article 1.

[105] Niels van Dijk, 'Property, privacy and personhood in a world of ambient intelligence' (2010) 12 Ethics of Information Technology 57.

[106] World Economic Forum, Digital Media and Society Implications in a Hyperconnected Era , 2016); Morten Hviid and Sofia Izquierdo Sanchez and Sabine Jacques, Digitalisation and intermediaries in the music industry (CREATe Working Paper 2017/07, 2017).

[107] Case C-55/80 Musik Vertreib EU:C:1981:10 [12].

[108] Case C-15/74 Centrafarm v Sterling EU:C:1974:114.

[109] Directive 2001/29/EC OJ L 291, 24-47, Recital 6. which implements the provisions of the WIPO Copyright Treaty 1996 and the WIPO Performances and Phonograms Treaty 1996 into European law as well as harmonising the copyright laws of the various Member States.

[110] In particular, Article 6bis. It should of course be noted that moral rights are not harmonised at an EU level, see,Jane C Ginsburg, 'A Tale of Two Copyrights: Literary Property in Revolutionary France and America' (1990) 64 Tulane Law Review 991.

[111] On the hypocrisy of 'respect for property' arguments which underwrote the enclosure movement see,James Boyle, 'Fencing off Ideas: enclosure and the disappearance of the public domain' (2002) 2 Daedelus 13, 14.

[112] Foucault articulated as a transition from 'illegality of rights' to 'illegality of property,'Foucault, Discipline and Punish 86-7.

[113] Ibid,77.

[114] J Liu, 'Owning digital copies: copyright law and the incidents of copy ownership' (2008) 42 William and Mary Law Review 1245. See also,J Liu, 'Copyright law's theory of the consumer' (2003) 44 Boston College Law Review 397.

[115] Julie Cohen, 'The place of the user in copyright law' (2005) 74 Fordham Law Review 347.

[116] Niva Elkin-Koren, 'Making room for consumers under teh DMCA' (2007) 22 Berkeley Journal of Law and Technology 1119.

[117] See, in a similar argument about the interactions of copyright and consumer protection, Jens Schovsbo, 'Integrating Consumer Rights into Copyright Law: From a European Perspective' (2008) 31 Journal of Consumer Policy 393, 403.

[118] Explanations Relating to the Charter of Fundamental Rights (2007/C 303/02).

[119] Steve Peers (ed), The EU Charter of Fundamental Rights: A Commentary ibid17(2).04.

[120] Helfer, 'Human Rights and Intellectual Property: Conflict or Coexistence'.

[121] Case C-479/04 Laserdisken ApS v Kulturministeriet EU:C:2006:549, [60]-[66]; EU:C:2006:292, [68].

[122] Case C-200/96 Metronome Musik [21].

[123] Case C-469/17 Funke Medien EU:C:2019:623.

[124] Case C-476/17 Pelham and Others EU:C:2019:624.

[125] Case C-516/17 Spiegel Online EU:C:2019:625.

[126] Christophe Geiger, '"Constitutionalising" Intellectual Property Law? The Influence of Fundamental Rights on Intellectual Property in the European Union' (2006) 37 International review of industrial property and copyright law 371; Christophe Geiger and Elena Izyumenko, The Constitutionalization of Intellectual Property Law in the EU and the Funke Medien, Pelham and Spiegel Online Decisions of the CJEU: Progress, But Still Some Way to Go! (Centre for International Intellectual Property Studies 2019).

[127] Case C-200/96 Metronome Musik EU:C:1998:172.

[128] Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (codified version) OJ L 376 .

[129] Case C-479/04 Laserdisken EU:C:2006:549.

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

[131] The protection of intellectual property rights was qualified as a general principle of EU law in Metronome and part of the right to property in Laserdisken , [51]-[53].

[132] Ibid, [60]-[66].

[133] Case C-275/06 Promusicae EU:C:2008:54.

[134] As reflected in Directive 2001/29, Recital 31.

[135] Promusicae, [68].

[136] Sganga, 'A Decade of Fair Balance Doctrine, and How to Fix It: Copyright versus Fundamental Rights before the CJEU from Promusicae to Funke Medien, Pelham and Spiegel Online'.

[137] Case C-145/10 Painer EU:C:2013:138.

[138] Exceptions for use for the purposes of public security or to ensure the proper performance or reporting of administrative, parliamentary or judicial proceedings.

[139] Case C-461/10 Bonnier Audio and Others EU:C:2012:219.

[140] Ibid;Sganga, 'A Decade of Fair Balance Doctrine, and How to Fix It: Copyright versus Fundamental Rights before the CJEU from Promusicae to Funke Medien, Pelham and Spiegel Online'.

[141] Case C-283/11 Sky Österreicht EU:C:2013:28.

[142] Ibid.

[143] Sganga, 'A Decade of Fair Balance Doctrine, and How to Fix It: Copyright versus Fundamental Rights before the CJEU from Promusicae to Funke Medien, Pelham and Spiegel Online'

[144] Case C-314/12 UPC Telekabel Wien EU:C:2014:192.

[145] Case C-580/13 Coty Germany v Stadtsparkass EU:C:2015:485.

[146] Case C-484/14 McFadden EU:C:2016:689.

[147] Case C-149/17 Bastei Lubbe EU:C:2018:841.

[148] Case C-355/12 Nintendo v PC Box EU:C:2014:25.

[149] Case C-160/15 GS Media EU:C:2016:644.

[150] Case C-161/17 Renckhoff EU:C:2018:634.

[151] Sganga, 'A Decade of Fair Balance Doctrine, and How to Fix It: Copyright versus Fundamental Rights before the CJEU from Promusicae to Funke Medien, Pelham and Spiegel Online'. See also, Jonathan Griffiths, 'Taking power tools to the acquis - The Court of Justice, the Charter of Fundamental Rights and European Union Copyright Law' in Christophe Geiger (ed), Intellectual Property and The Judiciary (Edward Elgar 2018).

[152] Geiger, '"Constitutionalising" Intellectual Property Law? The Influence of Fundamental Rights on Intellectual Property in the European Union'; Izyumenko, The Constitutionalization of Intellectual Property Law in the EU and the Funke Medien, Pelham and Spiegel Online Decisions of the CJEU: Progress, But Still Some Way to Go!; Christophe Geiger, 'The Constitutional Dimension of Intellectual Property' in Paul Torremans (ed), Intellectual Property and Human Rights (Kluwer Law International 2008), 101; Christophe Geiger, 'Fundamental Rights as Common Principles of European (and International) Intellectual Property Law' in Ansgar Ohly (ed), Common Principles of European Intellectual Property Law (Mohr Siebeck 2012), 223; Sganga, 'A Decade of Fair Balance Doctrine, and How to Fix It: Copyright versus Fundamental Rights before the CJEU from Promusicae to Funke Medien, Pelham and Spiegel Online'; Tuomas Mylly, 'The Constitutionalisation of the European Legal Order: impact of human rights on intellectual property in the EU' in Christopher Geiger (ed), Research Handbook on Human Rights and Intellectual Property (Edward Elgar 2015).

[153] Case C-469/17 Funke Medien EU:C:2019:623.

[154] Case C-476/17 Pelham and Others EU:C:2019:624.

[155] Case C-516/17 Spiegel Online EU:C:2019:625. Christophe Geiger and Elena Izyumenko, 'The constitutionalisation of intellectual property law in the EU and the Funke Medien, Pelham and Spiegel Online decisions of the CJEU: Progress, but still some way to go!' (2019) Centre for International Intellectual Property Studies Research Paper No. 9.

[156] Ibid, [24] in its judgment the CJEU noted that military status reports, such as those at issue, were purely informative documents, so that the information and the expression which they contained became indissociable and the reports were, as a result, entirely characterised by their technical function such that it was impossible for the author to express his or her creativity in an original manner and to achieve a result which is the author's own intellectual creation.

[157] German Federal Constitutional Court, "Metall auf Metall", 1 BvR 1585/13, 31 May 2016, DE:BVerfG:2016:rs20160531.1bvr158513.

[158] Spiegel Online, [4], [45], [80], [82]. Ultimately, the Court considered that freedom of expression required an interpretation of the quotation exception relied on which viewed hyperlinking as a form of quotation.

[159] Funke Medien, [24], [71], [73]-[76]. This is not the first time that the CJEU emphasizes the need to interpret EU copyright law in the light of fundamental rights, including freedom of expression and information: See e.g. CJEU, Judgments in Case C-145/10 Painer, EU:C:2013:138, [135]; Case C-201/13 Deckmyn EU:C:2014:2132, [27]; Scarlet Extended, [54]; Netlog, [52]; Telekabel, [47]; GS Media, [45]; Mc Fadden, [90]; and Case C-161/17 Land Nordrhein-Westfalen v Dirk Renckhoff EU:C:2018:634, [41]. See also, Christophe Geiger, 'The Role of the Court of Justice of the European Union: Harmonizing, Creating and sometimes Disrupting Copyright Law in the European Union' in Irini A Stamatoudi (ed), New Developments in EU and International Copyright Law (Kluwer Law International 2016), 435.

[160] Telekabel, [57]; Case C-117/13 Ulmer EU:C:2014:2196, [43].

[161] Funke Medien , [70]; Spiegel Online , [54].

[162] David Vaver, Copyright Law (Irwin 2000), 169-227. On a critique of the definitional nature of user rights see, Chapdelaine, 'The Ambiguous Nature of Copyright Users' Rights'. For a similar reflection in the context of copyright in the EU, see Christophe Geiger, 'De la nature juridique des limites au droit d'auteur' (2004) 1 Propriétés intellectuelles 882.

[163] Canadian Supreme Court, CCH Canadian Ltd. v. Law Society of Upper Canada , [2004] 1 SCR 339, [12]; Théberge v. Galerie d'Art du Petit Champlain Inc , [2002] 2 SCR 336; SOCAN v. Bell Canada , [2012] 2 SCR 326; and Alberta (Minister of Education) v. Canadian Copyright Licensing Agency (Access Copyright) , [2012] 2 SCR 345.

[164] Wesley N Hohfeld, Fundamental Legal Conceptions: as applied in Judicial Reasoning (Yale University Press 1923).

[165] Ibid.

[166] Opinion C-516/17 Spiegel Online, EU:C:2019:16, [63]; Opinion C-476/17 Pelham EU:C:2018:1002, [54], [77], [98].

[167] Funke Medien, [58]; Pelham, [60]; Spiegel Online, [43].

[168] Funke Medien, [70]; Spiegel Online, [54].

[169] Stothers, ' Intellectual Property under the Charter: Are the Court's Scales Property Calibrated?', 546; Thomas Kleinlein, 'Judicial lawmaking by judicial restraint? The potential of balancing in international economic law' in Armin von Bogdandy and Ingo Venzke (ed), International Judicial Lawmaking (Springer 2012); Niels Petersen, 'How to Compare the Length of Lines to the Weight of Stones: Balancing and the Resolution of Value Conflicts in Constitutional Law' (2013) 14 German Law Journal 1387.

[170] Laurence R Helfer, 'The New Innovation Frontier - Intellectual Property and the European Court of Human Rights' (2008) 49 Harvard International Law Journal 49, 49-50.

[171] Griffiths, 'Constitutionalising or harmonising? the Court of Justice, the right to property and European copyright law', 17.

[172] Peter Oliver, 'The Protection of Privacy in the Economic Sphere within the European Union' (2009) 46 Common Market Law Review 1443; Peter Oliver and Thomas Bombois, 'La liberté d'expression commerciale en droit de l' Union européenne', Annuaire de Droit de l' Union européenne (Editions Panthéon-Assasse 2015), 3; Peter Oliver, 'Companies and their Fundamental Rights: a Comparative Perspective' (2015) 64 International and Comparative Law Quarterly 661.

[173] Case C-3/15 OHIM EU:C:2016:657, [56].

[174] See, Ginsburg, 'A Tale of Two Copyrights: Literary Property in Revolutionary France and America'.

[175] Geiger, '"Constitutionalising" Intellectual Property Law? The Influence of Fundamental Rights on Intellectual Property in the European Union'; Geiger, 'The Constitutional Dimension of Intellectual Property'; Mylly, 'The Constitutionalisation of the European Legal Order: impact of human rights on intellectual property in the EU'.

[176] Alexander Peukert, 'The Fundamental Right to (Intellectual) Property and the Discretion of the Legislature ' in Christopher Geiger (ed), Research handbook on human rights and intellectual property (Edward Elgar 2015)131. See also, Daniel Gervais, 'Making Copyright Whole: a principled approach to copyright exceptions and limitations ' (2008) 5 University of Ottowa Law and Technology Journal 1; Laurence Helfer and Graeme W Austin, Human Rights and Intellectual Property (Cambridge University Press 2011), 507.

[177] Gervais, 'Making Copyright Whole: a principled approach to copyright exceptions and limitations' 89,92; Christophe Geiger, 'Fundamental Rights as a Safeguard for the Coherence of Intellectual Property Law' (2004) 35 International Review of Intellectual Property and Copyright Law 268, 273.

[178] Abraham Drassinower, 'From Distribution to Dialogue: Remarks on the Concept of Balance in Copyright Law' (2009) 34 J Corp L 991, 998.

[179] Peukert, 'The Fundamental Right to (Intellectual) Property and the Discretion of the Legislature' 131, 140.

[180] Gervais, 'Making Copyright Whole: a principled approach to copyright exceptions and limitations '.

[181] See, Aristotle, Politics, 1268a; Rufus C King, 'The Moral Rights of Creators of Intellectual Property' (1991) 9 Cardozo Arts and Entertainment Law Journal 267, 270. On a similar vein of moral and economic interests see Lord Mansfield's pronouncements on copyright as a blend of economic and personal (arguably moral) rights in Millar v Tavlor (1769) 98 Eng Rep 201, 252; Ben Longstaff, Richard Davis, Ashley Roughton, Tom St Quintin and Guy Tritton, Tritton on

Intellectual Property in Europe (4th edn, Sweet and Maxwell 2014), 4-017;King, 'The Moral Rights of Creators of Intellectual Property'.

[182] Harold Demsetz, 'Toward a Theory of Property Rights' in Richard A Epstein (ed), Modern Understandings of Liberty and Property (Garland Publishing 2000).

[183] Christopher Hermann, 'Neoliberalism in the European Union' (2007) 70 Studies in Political Economy 61; Stefan Bernhard, 'From Conflict to Consensus: European neoliberalism and the debate on the future of EU social policy' (2010) 4 Work Organisation, Labour and Globalisatio 175; Kurt W Rothschild, 'Neoliberalism, EU and the Evaluation of Policies' (2009) 21 Review of Political Economy 213;Angela Daly, Private Power, Online Information Flows and EU Law, Mind the Gap , vol 15 (Hart Studies in Competition Law, Hart 2016), 36.

[184] Jessica D Litman, 'Real Copyright Reform' (2010) 96 Iowa Law Review 1, 13.

[185] Directive 2001/92/EC Article 3(2).

[186] Ibid, Article 4. The doctrine of exhaustion establishes that once a rightsholder transfers a copy of a work to a new owner, its rights against that owner are diminished

[187] Though the EU does not operate an open-ended fair use basis as in the United States Directive 2001/92/EC Article 5 provides an exhaustive list of limitations of copyright.

[188] Directive 2001/29, Article 5

[189] Ibid, Article 5(2).

[190] Ibid, Article 5(2)(c), (d),(a).

[191] Ibid, Article 5(2)(c),(d),(e),(f),(g),(h),(j),(n).

[192] Ibid, Article 5(k).

[193] Ibid, Article 5(l).

[194] Evi Werkers, Intermediaries in the Eye of the Copyright Storm - A Comparative Analysis of the Three Strike Approach within the European Union (KU Leuven 2011); Trisha Meyer, 'Graduated Response in France: The Clash of Copyright and the Internet' (2012) 2 Journal of Information Policy 107. It is also arguable that, in a marketplace where individuals can not enjoy a predictable ability to retain and deal with 'purchases' have poor incentives to engage with legitimate intellectual property mechanisms and avenues.

[195] Directive 2001/29, Recital 3.

[196] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2011]OJ L 167,Recital 32.

[197] Case C-44/79 Hauer EU:C:1979:254, 3759 (Advocate General Capotorti).

[198] Richard Davis, Tritton on Intellectual Property in Europe , [1-038].

[199] This view borne out in the signing of the European Patent Convention in 1973 as a regional European Treaty rather than an EEC legislative measure.

[200] Norbert Koch and Franz Froschmaier, 'The Doctrine of Territoriality in Patent Law and the European Common Market' (1966) 9 Patent, Trademark and Copyright Journal of Research and Education 343; P Bernt Hugenholtz Mireille van Eechoud, Stef van Gompel, Lucie Guibault, Natali Helberger, Harmonising European Copyright Law: The Challenges of Better Lawmaking , vol 19 (Information Law Series, Wolters Kluwer 2009), 11 et seq.

[201] Case C-56/64 Consten and Grundig v Commission EU:C:1966:41. On the phases of the CJEU's development of its intellectual property jurisprudence see,Alain Strowel and Hee-Eun Kim, 'The Balancing Impact of General EU Law on European Intellectual Property Jurisprudence' in Ansgar Ohly and Justine Pila (ed), The Europeanisation of Intellectual Property Law: Towards a European Legal Methodology (Oxford University Press 2013)121, 125-128.

[202] See generally, Richard Davis, Tritton on Intellectual Property in Europe , [7-009] et seq .

[203] Case C-56/64 Consten and Grundig v Commission.

[204] Richard Davis, Tritton on Intellectual Property in Europe , [1-040].

[205] Case C-155/91 Commission v Council EU:C:1933:98. The scope of Article 114 is not unlimited. It cannot be relied on where the sole issue is a disparity between the laws of Member States for example, rather it must be established that the difference sought to be remedied will, when eliminated, actually contribute to the elimination of barriers to the free movement of goods.

[206] It is not clear whether or not this was a view informed or influenced by the jurisprudence emerging from the CJEU during this period though Tritton has posited that this was indeed the case, Richard Davis, Tritton on Intellectual Property in Europe.

[207] Case C-377/98 Netherlands v Parliament and Council EU:C:2001:523.

[208] Ibid, [25].

[209] Ibid, [27].

[210] Article 51(2) provides that the Charter does not establish any new power or task for the Community or the Union or modify any powers and tasks defined by the Treaties, a limitation mirrored in Article 6Güneş Acar1, Facebook Tracking Through Social Plug-ins TEU and affirmed by Opinion 2/13 EU:C:2014:2454.

[211] Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts [1997] OJ L 144 .

[212] Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and

Directive 97/7/EC of the European Parliament and of the Council Text with EEA relevance [2011] OJ L 304.

[213] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') [2000] OJ L 178 .

[214] On the interaction of consumer protection and human rights see,Benohr, EU Consumer Law and Human Rights .

[215] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L 95 .

[216] Ibid, Article 3.

[217] Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services (Text with EEA relevance) [2019]OJ L 136.

[218] Directive 99/44/ECon certain aspects of the sale of consumer goods and associated guarantees (1999) OJ L171/12. See in particular Recitals 6-12 and Articles 1-5.

[219] Directive 2006/123/EC on services in the internal market (2006) OJ L 376/36.

[220] Ibid, Recital 50, 51 and Articles 22 and 27(2).

[221] Ibid,Articles 7 and 8.

[222] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (Text with EEA relevance.) [2019] OJ L 130 .

[223] Ibid, Article 5.

[224] Ibid, Article 3.

[225] Ibid, Article 8.

[226] Schultz, The End of Ownership: Personal Property in the Digital Economy , 11.

[227] See, Roger Brownsword and Geraint Howells, 'When Surfers Start to Shop: Internet Commerce and Contract Law' (1999) 19 Legal Studies 287.

[228] Directive 2000/31/EC, Article 9.

[229] European Commission, Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee and the Committee of the Regions, A Digital Single Market Strategy for Europe COM(2015) 192 final.

[230] Directive (EU) 2019/770on certain aspects concerning contracts for the supply of digital content and digital services (2019)OJ L 136/1.

[231] David Post, In Search of Jefferson's Moose (Oxford University Press 2009), 186.

[232] Margaret Radin, Boilerplate: the fine print, vanishing rights and the rule of law (Princeton University Press 2012), 19.

[233] Tom L Beauchamp, 'Autonomy and Consent' in Franklin Miller and Alan Wertheimer (ed), The Ethics of Consent: Theory and Practice (Oxford University Press 2009).

[234] M Trebilcock, The Limits of Freedom of Contract (Harvard University Press 1994). On the rejection of this assertion see,Dori Kimel, 'Neutrality, Autonomy and Freedom of Contract' (2001) 21 Oxford Journal of Legal Studies 473.

[235] Smith v Maryland 422 US 735 (1979), Marshall and Brennan JJ dissenting, 1 articulated this necessity particularly well.

[236] Kyle Wiens, 'Apple Shouldn't Get to Brick Your iPhone Because you Fixed it Yourself' Wired (<https://www.wired.com/2016/02/apple-shouldnt-get-to-brick-your-iphone-because-you-fixed-it-yourself/>; Luis E Hestres, 'App Neutrality: Apple's App Store and Freedom of Expression Online' (2013) 7 International Journal of Communication 1265; Chaim Gartenberg, 'Amazon strikes deal with Apple to sell new iPhones and iPads' The Verge (<https://www.theverge.com/2018/11/9/18079340/amazon-apple-iphone-ipad-watch-beats-deal-selling-products-online>.

[237] Jonathan A Obar and Anne Oeldorf-Hirsch, Clickwrap Impact: Quick-Join Options and Ignoring Privacy and Terms of Service Polcies of Social Networking Services (York Univeristy; Quello Centre, Michigan State University and University of Connecticut 2017);Jonathan A Obar and Anne Oeldorf-Hirsch, 'The biggest lie on the Internet: ignoring the privacy policies and terms of service policies of social networking services' (2018) 1 Information, Communication & Society 1.

[238] This has been repeatedly demonstrated in the context of privacy choices,Rainer Bohme and Stefan Kopsell, 'Trained to Accept? A Field Experiment on Consent Dialogs' (Proceedings of the SIGCHI Conference on Human Factors in Computing Systems); Simone van der Hof Bart Custers, Bart Schermer, Sandra Appleby-Arnold and Noeline Brockdorff, 'Informed Consent in Social Media Use - The Gap between User Expectations and EU Personal Data Protection Law' (2013) 10 SCRIPTed 435; Neil Richards and Woodrow Hartzog, 'The Pathologies of Digital Consent' (2019) Forthcoming Washington University Law Review;Elettra Bietti, 'Consent as a Free Pass: Platform Power and the Limits of the Informational Turn' (2019) Forthcoming Pace Law Review; Elizabeth Edenberg and Meg Leta Jones, 'Analysing the Legal Roots and Moral Core of Digital Consent' (2019) 21 New Media & Society 1804.

[239] Schultz, The End of Ownership: Personal Property in the Digital Economy , 59-60;Oeldorf-Hirsch, 'The biggest lie on the Internet: ignoring the privacy policies and terms of service policies of social networking services';Aaron Perzanowski and Chris Jay Hoofnagle, 'What we buy when we 'buy now'' (2017) 165 University of Pennsylvania Law Review 315;Manoj Hastak and Michael Mazis, 'Deception by Implication: A Typology of Truthful but Misleading Advertising and Labeling Claims' (2011) 30 Journal of Public Policy and Marketing 157 Hoofnagle, 'What we buy when we 'buy now'', 7.

[240] Microsoft, Books in Microsoft Store: FAQ (2019)

[241] Honore, 'Ownership'.

[242] JE Penner, The Idea of Property in Law (Oxford University Press 1997), 77.

[243] Demsetz, 'Toward a Theory of Property Rights', 125-126.

[244] Ibid.

[245] See,Voorhoof, 'Freedom of Expression and the Right to Information: Implications for Copyright'.

[246] Article 13 of the Charter is perhaps the most evident context in which a conflict might occur, see also Case C-479/09 Laserdisken EU:C:2010:571, [60]-[66]. In a US context this has been touched on briefly inSchultz, The End of Ownership: Personal Property in the Digital Economy , 6.

[247] Case C-461/10 Bonnier Audio AB v Perfect Communication Sweden AB EU:C:2012:219.

[248] Chris J Hoofnagle, 'Digital Rights Management: Many Technical Controls on Digital Content Distribution can Create a Surveillance Society' (2004) 5 The Columbia Science and Technology Law Review 1;Julie E Cohen, 'DRM and Privacy' (2003) 18 Berkeley Technology Law Journal 575.

[249] Cohen, 'DRM and Privacy'; Hoofnagle, 'Digital Rights Management: Many Technical Controls on Digital Content Distribution can Create a Surveillance Society'.

[250] Samuel D Warren and Louis D Brandeis, 'The Right to Privacy' (1890) 4 Harvard Law Review

[251] Jonathan Zittrain, 'What the Publisher can Teach the Patient: Intellectual Property and Privacy in an Era of Trusted Privication' (2000) 52 Stanford Law Review 1201.

[252] On the semantics of control in intellectual property discussions see,R Polk Wagner, 'Information wants to be Free: Intellectual Property and the Mythologies of COntrol' (2003) 103 Columbia Law Review 995

[253] Chris Jay Hoofnagle, 'Big Brother's Little Helper: How Choicepoint and other Commercial Data Brokers Collect, Process and Package your Data for Law Enforcement' (2004) 29 North Carolina Journal of International Law and Commercial Regulation 595.

[254] Privacy International, Secret Global Surveillance Networks: Intelligence Sharing Between Governments and the Need for Safeguards , 2018).

[255] Examples of State and privacy sector co-operation in ways which seem, to Western conceptions, constitutionally problematic are increasingly frequent. China's State Council aims to have achieved a comprehensive system of "social credit" (shehui xinyong) by 2020 which will require compliance with legally prescribed social and economic obligations and contractual commitments with a range of service exclusions and taxation, transportation and judicial penalties to incentivize legal and regulatory compliance for individuals and businesses. Nicole

Kobie, 'The complicated truth about China's social credit system' Wired (<https://www.wired.co.uk/article/china-social-credit-system-explained>) accessed 7 March 2019.

[256] Smith v Maryland 442 US 735 (1979).

[257] Benedik v Slovenia , no. 62357/14 ECHR 2018.

[258] Ibid, [46]-[47]; Halford v The United Kingdom (1997) 24 EHRR 523; Barbulescu v Romania , no. 61496/08 ECHR 2017.

[259] Ibid, at [115]-[118].

[260] Richard A Epstein, Design for Liberty: Private Property, Public Administration, and the Rule of Law (Harvard University Press 2011).

[261] Ronald Cass, 'Property Rights Systems and the Rule of Law' in Enrico Colombatto (ed), The Elgar Companion to the Economics of Property Rights (Edward Elgar 2004), 131.

[262] See,Tom Bingham, The Rule of Law (Penguin 2011), 67; John Rawls, A Theory of Justice (Oxford University Press 1972), 208-10; John Finnis, Natural Law and Natural Rights (Clarendon Law Series, Oxford University Press 2011), 270-1; Joseph Raz, 'The Rule of Law and its Virtue', The Authority of Law (Oxford University Press 1979), 214-18.

[263] See, Article 7.

[264] See,Brian Z Tamanaha, On the Rule of Law: History Politics and Theory (Cambridge University Press 2004), 91 et seq .

[265] Richard A Epstein, Liberty, Property and the Law (Garland 2000), viii-ix.

[266] Fairfield has also questioned whether, if we view freedom as a function of material wealth, the absence of an ability to accrue such wealth through individual property effectively constrains individual freedom, see Fairfield, Owned: Property, Privacy and the New Digital Serfdom; John Christman, The Myth of Property: Toward an Egalitarian Theory of Ownership (Oxford University Press 1994), 70.

[267] L.T. Hobhouse, 'The Historical Evolution of Property, In Fact and in Idea' in Richard A Epstein (ed), Liberty, Property and the Law (Garland 2000), 376.

[268] Schultz, The End of Ownership: Personal Property in the Digital Economy .

[269] On the capacities and conflicts between the legislative and judicial branches in securing human rights see,Francisco J Urbina, 'How Legislation Aids Human Rights Adjudication' in Paul Yowell Grégoire Webber, Richard Ekins, Maris Köpcke, Bradley W Miller and Francisco J Urbina (ed), Legislated Rights: Securing Human Rights Through Legislation (Cambridge Univeristy Press 2018); Paul Yowell Grégoire Webber, Richard Ekins, Maris Köpcke, Bradley W Miller and Francisco J Urbina, Legislated Rights: Securing Human Rights Through Legislation (Cambridge University Press 2018).

[270] Bernhard, 'From Conflict to Consensus: European neoliberalism and the debate on the future of EU social policy';Rothschild, 'Neoliberalism, EU and the Evaluation of Policies'.