

Preface

This book represents the product of intensive research by experts of intellectual property law, who employ rigorous interpretative methodologies while keeping an eye on comparative law and on the effects of new technologies on law.

The idea for this book sprang from often heated debates among intellectual property scholars on the possibilities and the limits of copyright. The book draws on the research path started in a seminar held at the Faculty of Law of the University of Trento on December 6, 2013, titled “Copyright, technological evolution, and balance of rights”, a path that continued during the following months. The goal of the research, concretely reached through this book, was to discuss the balancing of rights in controversies where one of the conflicting rights is copyright, in light of the revolutionary mutation that digital technologies brought with them.

Examples of these troublesome conflicts are the clash of fundamental rights, intensified by the so-called propertization of copyright; the contrast between users’ access to works of authorship and the principle of exhaustion of the distribution right; the situation of conflict that exists when the protection of privacy and personal data need to be partially or totally constricted to obtain an effective enforcement of copyright; and the need for a balance between users’ access to scientific literature and exclusive control of publishers.

Copyright law has been broadening its scope for decades. International treaties are often at the origin of this enlargement, which is therefore a pervasive phenomenon. This increasing wideness implies that copyright often faces other rights (frequently, fundamental rights), creating the issue of deciding what right prevails.

Decision makers need to take into account these recurring conflicts and to try to solve them. This need shows both at the lawmaking level and at the concrete case level. Sometimes the latter situation is a consequence of the former: when law-makers do not consider the problem of balancing copyright with other rights, judges need to find a correct solution for the specific case.

Starting from the difficulties inherently connected with the task of balancing rights that respond to opposing interests, each essay analyzes techniques and arguments applied by institutional decision makers in trying to solve this dilemma.

Meanwhile, the authors also highlight the weaknesses and shadows of the analyzed approaches.

Each author applies a specific method always involving legal comparison while taking into account the European framework for copyright and related rights.

Caterina Sganga's paper, based on a deep analysis of the relations between copyright and property, springs from the interpretative *impasse* that often characterizes the conflict between copyright and other rights in European Union law. In the author's idea, this *impasse* derives from the vagueness of balancing criteria such as "proportionality" or "reasonableness". Caterina Sganga believes that the only way to overcome this problem is by assigning a specific constitutional rank to copyright. This task has become more and more complicated due to the "propertization" of copyright, critically analyzed in the work of Caterina Sganga. The paper tries to fill the emptiness of the mentioned balancing criteria, taking into account the synergies between European law and the member states' constitutional commonalities on copyright and property.

Also, *Giorgio Spedicato's* piece concentrates on the problem of the principle of online exhaustion. The paper has its bases on the existing interpretation given by the scholars and judges and proceeds from the evidence that copyright suffers from a lack of legitimization, originating from the excessive protection provided to this right in the last years. Copyright law is often accused to be the result of lobbyism, which strengthens copyright in spite of conflicting rights of users and subsequent creators. In addition to this, in the author's view, also courts indulge the enlargement of copyright's domain. Therefore, Giorgio Spedicato stresses the role of the scholarly interpretation, in restoring the balancing that was the ontological core of copyright at its origins.

Federica Giovanella's paper, applying a law and culture methodology, concentrates on a specific subject, that is, the enforcement of copyright against Internet users suspected of illegal file sharing. In this kind of controversies, copyright inevitably collides with users' privacy and data protection. In fact, users' data need to be revealed if copyright holders want to enforce their rights directly against the users. The solutions given to this collision vary in the considered countries, namely Italy, USA, and Canada. The author hypothesizes the existence of a cultural influence on judges, who balance conflicting rights also according to the conception and the perception of copyright and data protection.

The piece by *Valentina Moscon* focuses on a highly topical issue: the phenomenon of Open Access to scientific literature. Under a "law and technology" as well as a comparative perspective, the paper highlights how the advent of digital technologies fosters collaborative logic that, with old tools such as contracts, creates new forms of sharing within—and not in contrast with—copyright laws. Valentina Moscon analyzes the current obstacles to a broader diffusion of Open Access, which she identifies with the lack of coherent regulation. Therefore, the author hopes for a deeper and better intervention by lawmakers, able to balance copyright with the demand for open access to knowledge.

Our gratitude goes to the Faculty of Law of the University of Trento and to its staff, which promoted and sponsored the conference from which this book sprouted. We greatly thank the authors for the enthusiasm and commitment shown in the research and the realization of their essays.

Trento, Italy

Roberto Caso
Federica Giovanella



<http://www.springer.com/978-3-662-44647-8>

Balancing Copyright Law in the Digital Age
Comparative Perspectives

Caso, R.; Giovanella, F. (Eds.)

2015, XI, 135 p., Hardcover

ISBN: 978-3-662-44647-8