The purpose of copyright—moving beyond the theory

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Introduction

Since the early 1990s, copyright policy has increasingly shifted to European Union (EU) level as digital technology revolutionized how copyright protected works[1] are produced, distributed and consumed. While copyright law remains territorial with some member states variation, three decades of harmonization have led to a distinct EU copyright policy with key legal concepts that have to be interpreted independently of national law.[2] For example, recent discussions about the Digital Single Market Directive are distinct in their scope and emphasis from concerns raised at member state level[3] and involved a different set of stakeholders, not least because many stakeholders have formed EU-level organizations to represent their interests. EU policy today sets the benchmark for its member states, defining both the rights available to right holders[4] and the scope of exceptions.[5] While the creative industries succeed as an economic force,[6] the policy's track record is highly controversial:

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1 The word copyright also covers neighbouring rights unless states differently.

2 One example is the meaning of 'public' in the right of communication to the public. EU copyright law is distinct enough that it can be taught as a separate subject at post-graduate level, see for example University of Amsterdam.

3 Compare, for example, the EU level consensus on upload filters which are strongly dissented in the member states, even leading to Poland asking for an assessment by the CJEU (the case is on-going Poland v Parliament and Council Case C-401/19), or the strong resistance in Germany. M Winde, 'Urheberrechtsreform- der Kampf gegen Artikel 13' (Heise Online, 1 March 2019). Available at https://www.heise.de/newsticker/meldung/Urheberrechtsreform-Der-Kampf-gegen-Artikel-13-4323738.html (accessed 5 August 2021).

4 EU copyright law is not fully harmonized, there are gaps for example in the field of neighbouring rights, definition of authorship, co-authorship and some term of protection calculations among others. Directive 2001/29/EC on the harmonization of certain aspects of copyright and related rights in the information society (InfoSoc) [2001] OJ L167, art 2–4.

5 InfoSoc, art 5 and recital 32. On its nature as a closed list, see—determined as a closed, see T Snijder and S van Deursen, 'The Road Not Taken – The CJEU Sheds Light on the Role of Fundamental Rights in the European Copyright Framework – A Case Note on the Pelham, Spiegel Online and Funke Medien Decisions' (2019) 50 IIC 1176–90.

6 The creative sectors contributed 7.8% to the EU economy in 2017 already. R Boix-Domènech and P Rausell-Köster, 'The Economic Impact of the Creative Industry in the European Union' in V Santamarina-Campos and M Segarra-Oña (eds) *Drones and the Creative Industry* (Springer 2018) 30.

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This article

- The rationales for copyright protection have come under intense and sustained scrutiny over the last two decades. The debates are wide ranging and even challenge that copyright is a suitable tool to support the creative industries in their economic and cultural function. The result is politicization, stagnating reforms, stakeholder dissatisfaction and the notion that copyright policy is failing.
- This article argues that the copyright aims need to be reassessed from an internal perspective rather than by relying on external normative benchmarks. It applies conventional content analysis to European Union (EU) copyright policy to identify the cross-institutional minimum consensus on what copyright aims to achieve, based on empirical evidence rather than theory.
- The results show how EU copyright policy deviates from the theoretical and member state level debates. In particular, all aspects of copyright at EU level are shaped by the Single European Market, affecting the nature of copyright, its approach to challenges and the resolution of conflicts. The findings partially explain the evolution of copyright in the past, not least when reforms were met with stakeholder disapproval, and indicate which characteristics enhance a reform proposals chance of adoption in the future.

doi:https://doi.org/10.1093/jiplp/jpab130
Advance Access Publication 27 November 2021

stakeholders are united in their dissatisfaction.[7] Disillusionment on all sides is fuelled by reforms being delayed and continuously falling short of expectations.[8] In other words, the EU copyright policy process is restricted if not failing.[9]

This article argues that one key reason why reforms achieve little is the lack of clarity about what EU copyright policy seeks to achieve in the first place. In particular, the debates rooted in copyright protection at member state level underestimate the defining role of the Single European Market (SEM) at EU level. The result is an incongruence between EU copyright policy in practice and the wider copyright-centric literature and member-state-level discourse. This at least partially explains why reform proposals with clear support in the copyright communities fail at EU level but discredited proposals are still adopted.[10] The first part of this article will outline how copyright policy and its aims are conceptualized in the copyright literature and the policy community, focusing on the fraying consensus. It then discusses an alternative approach based on insights from other protracted policy areas in how policy aims can be conceptualized. This is then applied to EU copyright policy to identify the core characteristics of the underlying copyright narrative and their practical effect. These findings represent the minimum consensus at EU level on copyright policy, overlapping with but distinct from national and theoretical debates. The article concludes with insights into how reform proposals need to be framed to be successfully adopted at EU level.

The collapsing external normative framework for copyright policy

While a full review of the literature is beyond the scope of this article,[11] it should be noted that the basic nature of copyright has always been disputed. While some see copyright as a natural right protecting the author, others consider it a property right or statutory privilege to facilitate market exchanges involving copyright works.[12] However, there was always an agreement in principle that creative works are important for society to flourish through innovation and should therefore be made available to the public at large.[13] Copyright in this context was an appropriate tool that guides how the interests of the three main stakeholder groups (the creative individual [author], the commercial intermediary [representing the market] and the end user [consumer]) should be aligned.

This basic consensus has first frayed and is now challenged in its entirety. In the last 30 years, digital technology has changed the basic balance of interests underlying copyright policy as standard end user behaviour entered the remit of the law, usually as unauthorized behaviour and often (perceived) piracy. The legislative response has been to expand copyright protection, but this destroyed the underlying consensus.[14] The basic presumptions of stakeholder interests have been challenged, and copyright increasingly seen as a problem. In this context, scholars have tried to readjust copyright policy,[15] reasoning

7 These issues include the following: online piracy is rife, traditional commercial intermediaries are squeezed, new entries do not play by established rules and the rights of the consumer have been hallowed out, while the financial position of the individual author has further deteriorated (value gap).

8 For the most recent example, see the Directive (EU) 2019/790 on copyright and related rights in the DSM and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L130/92. For overview of the debates and reception of the recent DSM directive, see CREATe, 'EU Copyright Reform-Evidence from the Digital Single Market Directive (*CREATe*)'. Available at https://www.create.ac.uk/policy-responses/eu-copyright-reform/#timeline (accessed 21 May 2021).

9 This does not mean that there are no reforms but reforms are often smaller in scope than anticipated and often remain disputed. The DSM Directive's provisions on platforms, for example, were extensively amended and are subject to ongoing debates by both right holders (provisions do not go far enough) and users (provisions go too far and threaten the viability of the internet as a whole). For details on how the debates evolved, see: CREATe, 'EU Copyright Reform- Evidence from the Digital Single Market Directive (*CREATe*)'. Available at https://www.create.ac.uk/policy-responses/eu-copyright-reform/#timeline (accessed 21 May 2021).

10 See for example the press publishers right in DSM, art 15. For a good overview of the key debates, see: C Geiger et al., 'The Introduction of a Neighbouring Right for Press Publisher at EU Level: The Unneeded (and Unwanted) Reform' (2017) 39 EIPR 202–10; T Pihlajarinne and J Vesala, 'Proposed Right of Press Publishers: A Workable Solution?' (2018) 13 Journal of Intellectual Property Law & Practice 220–28; E Czarny-Drozdzejko, 'The Subject-Matter of Press Publishers' Related Rights Under Directive 2019/790 on Copyright and Related Rights in the Digital Single Market' (2020) 51 IIC 624–41; and the importance of linking as a concept in particular: U Furgal, 'Ancillary Right for Press Publishers: An Alternative Answer to the Linking Conundrum?' (2018) 13 Journal of Intellectual Property Law & Practice 700–10.

11 Good starting points are: J Hughes, 'The Philosophy of Intellectual Property' (1988–1989) 77 Geo. L. J. 287, 287–366; N Elkin-Koren and E Salzberger, *The Law and Economics of Intellectual Property in the Digital Age: The Limits of Analysis* (Routledge 2013). O Bracha and T Syed, 'Beyond Efficiency: Consequence-Sensitive Theories of Copyright' (2014) 29 Berkley Technology Law Journal 229–315; Y Sang, 'Revisiting Copyright Theories: Democratic Culture and the Resale of Goods' (2019) 29 Communication Theory 277–96.

12 For a summary of the three basic theories, see G Davies, Copyright and the Public Interest (Sweet and Maxwell 2002).

13 The idea is that exclusive control creates incentives to innovate which in turn helps society as a whole to flourish, both culturally and economically.

14 For early contributions, see L Lessig, *Free Culture: The Nature and Feature of Creativity* (Penguin 2004); J Boyle, *Public Domain*: *Enclosing the Commons of the Mind* (Yale University Press 2008). For more recent ones: D Gervais, *(Re) Structuring Copyright*: *A Comprehensive Path to International Copyright Reform* (Edward Elgar 2017); B Hugenholtz (ed) *Copyright Reconstructed: Rethinking Copyright's Economic Rights in a Time of Highly Dynamic Technological and Economic Change* (Kluwer 2018).

15 Most famously: Boyle, *Public Domain*. The contributions are very varied, see for example K Delaney, 'Valancing in Light of the Purposes of Copyright: Whether Video Music Lessons Constitute Copyright Infringement' (2015) 20 Communication Law and Policy 261–85; B Jütte, *Reconstructing European Copyright Law for the Digital Single Market*: *Between Old Paradigms and Digital Challenges* (Nomos 2017); R Merges,

from the rationales for copyright protection downwards to stakeholder interests and to the design of individual provisions. These efforts have effectively stalled as it has proven impossible to identify the optimum level of protection;[16] the centuries-old writing lack specificity, generating only rough guiding principles;[17] and the proposed changes are too far from the status quo, making their implementation in the politicized environment impossible.[18] Today, even commentators in the mainstream argue that copyright should be based on new principles,[19] replaced by an alternative system of government intervention[20] or abolished altogether.[21] In other words, the consensus that copyright principles are best suited to achieve the aim of continued innovation and therefore a flourishing society has broken down. In the absence of a viable normative framework, this article aims to clarify copyright's aims beyond theory, using an empirical analysis of the policy instead.

An alternative approach

Copyright policy is not unique in having its basic approach and therefore record of success or failure challenged. It is therefore worth looking at the lessons learned in other policy areas that are characterized by similarly politicized environments.[22] Three insights stand out: first, any policy analysis has to pay particular attention to framing.[23] Policies essentially provide a solution to a specific issue but the same issue can be framed in different ways which in turn affects which solution is deemed the most suitable. For example, users are generating content based on protected copyright works and share them online. Whether this behaviour is considered problematic under copyright policy depends on what part of the activity is emphasized.[24] If the activity is framed as individual fans paying homage to their favourite author without a commercial motive, targeting the fan with copyright is often deemed excessive. However, if the emphasis is on the unauthorized use of copyright works and the commercial platforms earning profits through the traffic that the user generated content facilitates, copyright enforcement seems like a more suitable response. In other words, framing is key: clarity about the problem conceptualization underlying a policy is crucial because it shapes if and what action should be taken.

The second insight is that framing does not occur in a vacuum. Problem conceptualizations and responses evolve over time as past decisions provide the context for future ones. Past decisions set a precedent in how an issue is framed,[25] increasing the cost of radical policy change—not least because policy failure is more noticeable.[26] It is politically easier and safer to stay close to what is already established. Policy options are therefore more likely to be selected if they fit not only the established basic reasoning of the problem but also past decisions. Policies are also hardly ever abandoned outright but instead superimposed on existing ones.[27] This means in practice that any analysis needs to be chronologically comprehensive to capture the full layering of policies.

The third insight is that, when the general aim is agreed but the approach disputed, policy success or failure can

Justifying Intellectual Property (Harvard University Press 2011); T Noda, 'Copyright Retold: How Interpretative Rights Foster Creativity and Justify Fan-Based Activities' (2010) 20 Seton Hall J. Sports Ent. L. 131–63.

16 Merges, *Justif ying Intellectual Property*, 3.

17 The traditional theories such as Locke, Kant, Hegel and Rawls were not written for copyright or even IP and in the case of the former three are centuries old, pre-dating modern technology and especially digital technology. In addition, key parts such as Locke's provisos were never applied to IP in the first place.

18 Hugenholtz and Kretschmer for example describe their efforts as 'utopian'. B Hugenholtz and M Kretschmer, 'Reconstructing Rights: Project Synthesis and Recommendations' in B Hugenholtz (ed) *Copyright Reconstructed: Rethinking Copyright's Economic Rights in a Time of Highly Dynamic Technological and Economic Change* (Kluwer 2018) 24.

19 Gervais, *(Re) Structuring Copyright*; Hugenholtz, *Copyright Reconstructed*.

20 These are based on the literature for the public goods problem and resolving it. See for example, S Lunney, 'Reexamining Copyright Incentives- Access Paradigm' (1996) 49 Vanderbilt Law Review 483–518; W Landes and R Posner, *The Economic Structure of Intellectual Property Law* (Harvard University Press 2003). For a systematic review, see: Elkin-Koren and Salzberger, *The Law and Economics of Intellectual Property*, 57–114.

21 The electoral success of the pirate party for example is a good indicator that this opinion reached significant portions of the public, especially among the younger generations.

22 The field of policy failure is especially relevant. See for example: A McConnell, 'What Is Policy Failure? A Primer to Help Navigate the Maze' (2015) 30 Public Policy and Administration 221; C Dunlop, 'Policy Learning and Policy Failure: Definitions, Dimensions and Intersections' (2017) 45 Policy and Politics 3; C Fitzgerald et al., 'Policy Success/Policy Failure: A Framework for Understanding Policy Choices' (2019) 67 Administration 1; P Begley et al., 'Assessing Policy Success and Failure: Targets, Aims and Processes' (2019) 40 Policy Studies 188; M Bovens and P 't Hart, 'Revisiting the Study of Policy Failures' (2016) 23 Journal of European Public Policy 653.

23 Begley et al., 'Assessing Policy Success and Failure'; A McConnell, *Understanding Policy Success: Rethinking Public Policy* (Macmillan 2010); McConnell, 'What Is Policy Failure?'.

24 See for example the extensive debates surrounding DSM Directive, art. 17. CREATe's evidence Wiki provides an excellent starting point. CREATe, 'EU Copyright Reform'. Available at https://www.create.ac.uk/policy-responses/eu-copyright-reform/#timeline (accessed 26 May 2021).

25 G Copaccia and R Keleman, 'The Study of Critical Junctures: Theory, Narrative, and Counterfactuals in Historical Institutionalism' (2007) 59 World Politics 341; M Blyth, 'The New Ideas Scholarship in the Mirror of Historical Institutionalism: A Case of Old Whines in New Bottles?' (2016) 23 Journal of European Public Policy 464; P Pierson, 'The Path to European Integration: A Historical Institutionalist Analysis' (1996) 29 Comparative Political Studies 123; J Wallner, 'Legitimacy and Public Policy: Seeing Beyond Effectiveness, Efficiency, and Performance' (2008) 36 Policy Studies Journal 421.

26 McConnell, *Understanding Policy Success*.

27 W Streeck and K Thelen, *Beyond Continuity: Institutional Change in Advanced Political Economies* (Oxford University Press 2005).

more reliably be assessed inductively against the internal policy aims and characteristics rather than external benchmarks.[28] This traditionally entails an analysis of government goals based on discussion papers, parliamentary debates and even the media for both explicit and implicit aims. However, this methodology cannot be directly applied to the idiosyncratic EU policymaking. National political systems are dominated by political parties which coordinate between the executive branch (government) and the legislative branch (parliament). This ensures that legislative proposals reflecting government policies can move (comparatively) smoothly from ideas to bills to legislation. At EU level however, this coherence is missing as there is no comparable party discipline between the executive (European Commission) and the legislative (Council of Ministers and European Parliament).[29] As a result, the policy consensus is only established once all three actors agree.

The conventional content analysis adopted here addresses these three insights. The legislative recitals will be used as the most suitable option to capture the EU-level consensus. First, the recitals elaborate the reasoning behind the legal provisions, including the problem to be resolved, the context and the presumed interests of key stakeholders. This is exactly the information to identify the framing of issues and solutions. Secondly, the recitals are also subject to the same negotiations as the law itself and often drawn on by the Court of Justice of the European Union (CJEU), giving them importance beyond their non-binding official status. They therefore reflect an agreed consensus. Finally, since each legislative instrument has its own sets of recitals and most EU copyright instruments are issue specific, it is essential to analyse all of them together to capture the layering in EU policy.

The EU currently has 16 copyright-relevant, intra-SEM legislative instruments in force, consisting of 15 directives and one regulation.[30] There are 624 recitals of varying length overall, ranging from a single sentence to several paragraphs covering numerous issues and the link between them. Given the lack of a coherent external framework, the recitals were analysed inductively using a conventional content analysis to identify the underlying narrative. It should be noted that individual recitals were coded to more than one theme if necessary. This means that the number of references attributed to a specific code is comparable and the more numerous themes can be presumed to be more influential.

The primacy of the single European market

EU-level copyright protection is fundamentally shaped by the SEM.[31] Copyright here plays an essential role: it actively builds the level playing field[32] and even enhances competitiveness more broadly.[33] References to the SEM are by themselves not surprising given that the EU is only allowed to take legislative action on the basis of certain grounds, including the free movement of goods and services.[34] However, its influence is significantly more pervasive than reflected in the copyright-centric literature where the SEM, or European integration, is rarely mentioned and especially not as a determining factor in copyright design.[35] This omission is important because the SEM with its emphasis on the free movement of goods, services and the level playing field conceptualizes copyright policy as first and foremost an economic policy. This attitude permeates all policy components and differs from the academic and public discourse alike as the following analysis will show, including the nature of copyright, the approach to technological challenges, how the interests of users are addressed and the issues raised by contractual freedom.

Copyright as a property right

In line with the economic reasoning, the role of copyright is to facilitate market exchanges. While the nature of copyright is highly debated in both the public discourse

28 Begley et al., 'Assessing Policy Success and Failure'.

29 The Council's members are drawn from the national executives and members of national parties. The European Parliament is based on European groups and while national parties join these groups, many different national parties have to coordinate, limiting the influence of national preferences.

30 There is an additional regulation for the use of Marrakesh exemption based copies by third countries but given its focus on third countries, this one has been excluded from the study. For easier understanding, the term instrument is used both for directives and regulations alike.

31 53 recitals across 15 instruments refer explicitly to the problems attributed to a lack of harmonization causes. The author uses the term SEM which includes the knowledge society and the DSM.

32 15 references across 10 instruments.

33 Directive 2004/48/EC on the enforcement of intellectual property rights (Enforcement Directive) [2004] OJ L157/45, rec 1: '[…] *The protection of intellectual property is important not only for promoting innovation and creativity, but also for developing employment and improving competitiveness*'.

34 The basic principles are enshrined in the treaties as the Proportionality principle and the Subsidiarity principle (art 5 TEU). See also: A Ramalho, *The Competence of the European Union in Copyright Lawmaking: A Normative Perspective of EU Powers for Copyright Harmonization* (Springer 2016).

35 For a recent example, see J Poort and O Rognstad, 'The Right to Reasonable Exploitation Concretized: An Incentive Based Approach' in B Hugenholtz (ed) *Copyright Reconstructed: Rethinking Copyright's Economic Rights in a Time of Highly Dynamic Technological and Economic Change* (Kluwer 2018) 181 (ebook).

and the scholarly literature,[36] the EU explicitly refers to copyright as a property right.[37] Property by its nature is designed to allow for the most efficient allocation of resources in the market. In copyright law, the property status facilitates the transfer of rights to those who can exploit a work most efficiently and therefore maximize the benefits for both the right holder and society more broadly.[38] The emphasis is therefore on the economic exploitation of works. This has several distinct effects.

First, the market focus determines that the creation of works requires primarily economic resources[39] and these are best secured through a functioning market that supports investment in services and products:

> If authors or performers are to continue their creative and artistic work, they have to receive an 'appropriate reward for the use' of their work, as must producers in order to be 'able to finance this work'. […] Adequate legal protection of intellectual property rights is necessary in order to 'guarantee the availability of such a reward and provide the opportunity for satisfactory returns on this investment'.[40]

This part of the narrative is reinforced by emphasizing the effects if copyright is not adequately enforced.[41] Secondly, it is also clear that the EU takes a rational choice approach to copyright policy. The right holder understands her interest and ranks her preferences accordingly. In doing so, she prioritizes her economic interests over any other ones, including the reputational interests considered key in the traditional copyright theories. Accordingly, stronger copyright leads to stronger incentives or as the legislators called it: a well-functioning SEM presumes a 'high level of protection'.[42]

The economic, rational choice focus also has the third side effect of de-emphasizing the individual author. In the recitals, the word 'author' refers to an individual actual creator while 'right holder' is broader, covering anyone owning the copyright which includes the author, employer, commercial entity (neighbouring rights) and assignee depending on the specific context. Overall, 'right holder' is significantly more common than author.[43] The personality of the author, central to copyright theory, does not feature prominently either. For example, there is only one recital which directly refers to the author's dignity or personality.[44] The whole discourse is dominated instead by rewards (as opposed to entitlements).[45] This gap makes it less surprising that reform proposals based on entitlements and the author's personality have been met with strong resistance at EU level. It should also be noted that this right holder rather than author focus clearly deviates from the copyright discourse presented towards the public which justifies copyright as a benefit to the individual author rather than corporations.[46]

The response to technological challenges

The economic nature of EU copyright policy inherently shapes how it responds to technological change. For copyright in general, the basic narrative is well established: new technology creates a novel use of copyright works with economic value. This value is appropriated by a third party and therefore negatively affects the right holder by unfairly depriving her of the rewards for her efforts. Copyright reform in response expands to absorb the new economically valuable exploitation methods, returning them to right holder control.[47] At the national and

36 See references in the section 'The collapsing external normative framework for copyright policy'.

37 InfoSoc, rec 9.

38 Elkin-Koren and Salzberger, *The Law and Economics of Intellectual Property*, 115–45.

39 7 legislative instruments explicitly refer to financial incentives, with 15 references overall. The concept of being remunerated for the investment already made, ensuring a return on financial investment, is equally common with 16 references in 7 legislative instruments.

40 InfoSoc, recital 10.

41 Enforcement Directive, recital 3: 'However, without effective means of enforcing intellectual property rights, innovation and creativity are discouraged and investment diminished. […]'.

42 Commonly cited in case law and in academia. 'Any harmonisation of copyright and related rights must take as a basis a high level of protection since such rights are crucial to intellectual creation. […].' InfoSoc, recital 4, 9; similarly most recently in DSM, recital 2; but also Enforcement Directive, recital 10. Overall, there are 18 recitals across 10 instruments emphasizing high levels of protection.

43 1407 mentions for 'rightholder' but only 69 'author' references.

44 InfoSoc, recital 11: 'A rigorous, effective system for the protection of copyright and related rights is one of the main ways of ensuring that European cultural creativity and production receive the necessary resources and of safeguarding the independence and dignity of artistic creators and performers.' A second one exists but actually only applies to performers. Directive 2011/77/EU amending Directive 2006/116/EC on the term of protection of copyright and certain related rights (Term Directive) [2006] OJ L265/1, recital 5.

45 Enforcement Directive, rec 2: 'The protection of intellectual property should allow the inventor or creator to derive a legitimate profit from his invention or creation. […]', The word 'compensation' (18 references) and 'remuneration' (36 references) are more commonly used than 'entitlement' (only 4 references). See for example Rental Directive, recital 5. The only exemptions are the performers who were at the time of EU level harmonization in the unique position that their work had significant economic value but was not traditionally fully recognized. The socially recognized importance of the creative contribution of performers should be reflected in a level of protection that acknowledges their creative and artistic contribution (Term Directive, recital 4).

46 See for example Lessig, *Free Culture*; Boyle, *Public Domain*. For an analysis of the early copyright history: C Seville, *The Internationalisation of Copyright Law: Books, Buccaneers and the Black Flag in the Nineteenth Century* (OUP 2006). For a very recent example, CREATe, 'EU Copyright Reform- Evidence from the Digital Single Market Directive (*CREATe*)'. Available at https://www.create.ac.uk/policy-responses/eu-copyright-reform/#timeline (accessed 21 May 2021).

47 For a succinct summary, see J Quintais and J Poort, 'A Brief History of Value Gaps: Pre-Internet Copyright Protection and Exploitation Models' in B Hugenholtz (ed) *Copyright Reconstructed: Rethinking Copyright's*

international level, the response has followed this familiar pattern, conceptualizing unauthorized uses as piracy and therefore something harmful that needs to be controlled.

However, this narrative is incomplete for copyright at EU level. Copyright law is territorial in nature and member states traditionally reform copyright to meet challenges, but digital technology makes the national borders increasingly porous.[48] Differences in protection can disadvantage some actors and therefore negatively affect the level playing field on which the SEM is build.[49] In other words, the key problem the EU seeks to address is not only unauthorized uses but also the differences between member state legislation and the negative impact this can have on the SEM as a whole. This SEM context has shifted the response at EU level.

Most importantly, although the same piracy-based reasoning dominates the EU literature,[50] the theme of piracy is empirically speaking comparatively rare at EU level and is largely limited to the Enforcement Directive.[51] Even the InfoSoc Directive, tasked with implementing the WIPO internet treaties and agreed during a time of rampant online infringement, is not predominantly concerned with it. The EU's focus today is on the potential new technologies have for the SEM:

> Rapid technological developments 'continue to transform' the way works and other subject matter are created, produced, distributed and exploited. New business models and new actors 'continue to emerge'. Relevant legislation needs to be future-proof so as 'not to restrict technological development'. […][52]

In this context, it needs to be remembered that copyright is seen as an economic policy. This frames all unauthorized uses as a question of incentives, in particular safeguarding rewards while keeping the economic potential of new technologies in mind.[53] In practice, EU policy targets the economic value created and not the lack of authorization. This approach crucially depends on who benefits from the unauthorized use.

In the first situation, copyright is expanded because the economic value can be easily appropriated by a small number of freeloaders, distorting competition on a level playing field. For example, the Database Directive introduced new work types and justified their protection (the sui generis database right in particular) on the basis of economic value, high upfront investment and low-cost copying technology.[54] The same reasoning also explains the protection of software[55] and the highly controversial new press publisher right.[56] In these situations, copyright provides the assurance to future right holders that the control they gain will allow them to effectively compete in the marketplace and therefore earn a return on their investment. This approach fits closely with the piracy-based narrative, even though the term piracy is hardly used.

However, there is another way to address challenges which is triggered when a large number of low-value unauthorized uses create systematic market harm. Here, the commercial value cannot be targeted through the individual infringements, either because the full enforcement of copyright law is deemed impossible or undesirable from a societal point of view.[57] For example, many online platforms such as YouTube are commercial in nature but do not infringe copyright themselves as long as they meet basic requirements and hold licences where appropriate.[58] The actual infringers are the users who often lack a commercial motive, their activities have cultural value and/ or the economic value of the individual infringement is very low. The economic harm to the right holder is created by aggregated infringements. As a result, a further exclusive right is unlikely to work: the activity is already illegal, enforcement impossible/undesirable but the economic harm needs to be ameliorated. At the same

Economic Rights in a Time of Highly Dynamic Technological and Economic Change (Kluwer 2018) 36–98; B Kernfeld, *Pop Song Piracy*: *Disobedient Music Distribution Since 1929* (University of Chicago Press 2011); Seville, *The Internationalisation of Copyright Law*. The latter also outlines how the use of the word piracy already imposes a moral imperative to act.

48 36 recitals across 12 instruments refer to the effect of open borders, especially in the broader InfoSoc and DSM directives. 9 recitals emphasize the problem of cross-border issues.

49 53 recitals across 15 instruments refer explicitly to the problems attributed to a lack of harmonization causes.

50 Quintais and Poort, 'A Brief History of Value Gaps'. Studies on specific sectors outline narratives as well, see for example: Kernfeld, *Pop Song Piracy* or J Thompson, *Merchants of Culture*: *The Publishing Business in the 21st Century* (2nd edn, Polity 2012).

51 Enforcement Directive recital 19 and 29. In addition, InfoSoc, recital 15 (referring to the aim of the WIPO treaties) and Directive 2006/115/EC on rental right and lending right and on certain rights related to copyright in the field of intellectual property (codified version) (Rental Directive) [2006] OJ L376/28, recital 2.

52 DSM, recital 3.

53 16 references across 5 instruments alone refer to a user right to benefit from technology for example. Two more emphasize that technology can enhance competitiveness while another 7 point to missed opportunities in the current setting.

54 8 recitals.

55 Directive 2009/24/EC on the legal protection of computer programs (Codified version) (Software Directive) [2009] OJ L111/16, recital 2.

56 DSM, 3 recitals.

57 This argument is especially prevalent in the context of online infringement and the use digital rights management technologies. For a broader, current view: Poort and Rognstad (n 35).

58 The platform is protected from secondary infringement claims as long as it meets the safe-harbour standard. E-commerce Direction, chapter II, section 4. DSM Directive, title IV, chapter 2 on the Certain uses of protected content by online services.

time, the narrative presented by the recitals emphasizes that users have the right to benefit from the opportunities new technologies offer.[59] The solution adopted weights the conflicting aims with the concept of 'appropriate reward':

> The remuneration of authors and performers should be 'appropriate and proportionate to the actual or potential economic value' of the licensed or transferred rights […].[60]

In the example, the income stream benefitting right holders is created by targeting the platform while the user remains unaffected.[61] Similar reasoning is evident for example in the Orphan Works Directive and private copying levies. These do not fit the piracy narrative but follow the EU tradition of facilitating technological use by targeting intermediaries.[62]

It should be noted although that the EU does not take this focus on economic value to its logical conclusion. Based on the narrative, the most appropriate approach would be to implement a flexible, fair use style balancing mechanism for new technology.[63] The EU however has broadly defined economic rights in combination with a narrow, closed list of exceptions. The latter in particular is inherently static and therefore not actually future-proof,[64] as innovations need to be continuously monitored and legislative adjustments implemented. The resulting delay however creates legal uncertainty and therefore potentially chills innovation as the EU narrative itself emphasizes.[65] The tension is explained by the nature of the EU and in particular the different member state copyright preferences. The aim was to create indirect harmonization in an area where member states could not agree through a non-compulsory but exhaustive closed list of exemptions. It has not worked[66] but its detrimental effect remains.

The interests of the user are best served through the market

The influence of the SEM also affects the users as stakeholders more broadly. Much of the literature argues that users have lost out and are not receiving the attention they deserve,[67] an argument that has led to a mobilization of the public against expanding copyright policy.[68] However, the interests of users as such are well established in EU copyright policy,[69] mainly as a coherent group whose interests represent social benefit and which need to be balanced with the interests of right holders.[70] For example, the balancing act copyright entails is described as:

> The exceptions and limitations provided for in this Directive seek to achieve a 'fair balance between the rights and interests of authors and other rightholders, on the one hand, and of users on the other'. They can be applied only in certain special cases that do not conflict with the normal exploitation of the works or other subject matter and do not unreasonably prejudice the legitimate interests of the rightholders.[71]

It should first be noted that in this conceptualization, user interests are monolithic and directly incorporated into the law through exemptions. The narrative explicitly

59 16 references across 5 instruments alone refer to a user right to benefit from technology.

60 DSM, recital 73 also refers to the criteria: taking into account the author's or performer's contribution to the overall work or other subject matter and all other circumstances of the case, such as market practices or the actual exploitation of the work. In InfoSoc, recital 35 which gives more detail on factors to be taken into account, including the specific context, harm, payments already made and the use of DRM. It may even lead to no payments being required.

61 DSM art 17.

62 A variation of this can be seen in the fragmented licensing solutions discussed below.

63 For an analysis of this option, please see: T Rendas, 'Destereotyping the Copyright Wars: The "Fair Use vs. Closed List" Debate in the EU' (2015) SSRN. Available at https://ssrn.com/abstract=2657482 (accessed 3 August 2021); M Kleinemenke, *Fair Use im deutschen und europäischen Urheberrecht? Eine rechtsvergleichende Untersuchung zur Flexibilisierung des urheberrechtlichen Schrankenkatalogs nach dem Vorbild der US-amerikanischen Fair Use-Doktrin* (Nomos 2013); M Senftleben, 'The Perfect Match: Civil Law Judges and Open-Ended Fair Use Provisions' (2017) 33 American University International Law Review 231–86; in the context of recent case law: T Rendas, 'Advocate General Szpunar in Spiegel Online (or why we need fair use in the EU)' (2019) 14 Journal of Intellectual Property Law & Practice 265–67.

64 Directly contradicts DSM Directive recital 3 which emphasizes the need to have a future proof approach.

65 28 references across 10 legislative instruments.

66 L Guibault, 'Why Cherry-Picking Never Leads to Harmonisation: The Case of Limitations on Copyright under Directive 2001/29/EC' 1 (2010) JIPITEC 55.

67 See The Collapsing External Normative Framework for Copyright Policy.

68 Famous examples include the protests against ACTA (see for example D Lee, 'ACTA: Europe Braced for Protects Over Anti-Piracy Treaty' (*BBC*, 8 March 2012). Available at http://www.bbc.co.uk/news/technology-16906086 (accessed 3 August 2021); the rise of pirate parties in several member states (Germany, Sweden, and most recently Czech Republic (W Nattrass, 'The Remarkable Rise of the Czech Pirate Party' (The Spectator, 23 February 2021). Available at https://www.spectator.co.uk/article/the-remarkable-rise-of-the-czech-pirate-party (accessed 3 August 2021) and European Parliament (such as the Julia Reda who became the EP rapporteur for the copyright reforms)) but also boycotts against key pieces of legislation, such as the Wikipedia and Reddit in 2019 (J Vincent, 'European Wikipedias Have Been Turned Off for the Day to Protect Dangerous Copyright Laws' (The Verge, 21 March 2019). Available at https://www.theverge.com/2019/3/21/18275462/eu-copyright-directive-protest-wikipedia-twitch-pornhub-final-vote (accessed 3 August 2021)).

69 44 recitals (13 instruments) refer to the users as a group and interests which reflect the societal good in general, for example through access to information.

70 This is an economic reasoning of interests which presumes that authors and right holders have the same preferences (get financial rewards) while users are presumed to prefer free access to works.

71 DSM, recital 6.

recognizes that excluding non-right holder interests and especially member states' different approaches to them has a negative impact on the functioning of the market more broadly.[72] In other words, protecting the market requires well-defined user exemptions that balance the interests of right holders and users, especially in the digital age.[73] The EU approach is characterized by a recognition that, in some contexts, societal benefits from free access outweigh the interests of right holders.

However, all exceptions are seen a necessary evil that needs to be limited as much as possible to ensure that the SEM is not unnecessarily interfered with. First, the recitals emphasize that exceptions have to interpreted narrowly (ie specific situations only) and that the systematic effect is judged against market impact along the lines of the Berne 3 step test.[74] This by itself follows the logic of all Berne Convention and therefore EU member states. At the same time, any market harm is addressed through 'fair remuneration', representing a financial solution to market impact:[75]

> In certain cases of exceptions or limitations, rightholders should receive fair compensation to compensate them adequately for the use made of their protected works or other subject-matter.[76]

It is interesting to see that the legislative requirements in most exemptions to name the author/source are not reflected in the narrative. Instead, the actual reasoning is predominantly economic.

The Collective Management Organizations (CMOs) directive illustrates how this balancing between user and right holders works in practice. The directive starts by outlining the market benefit of strong copyright as a tool to support viable creative industries which produce goods and services which in turn will benefit the user.[77] In other words, copyright is essential for the economic well-being of the market. The benefits to society are then expanded in recital 3 in reference to the Treaty on the Functioning of the European Union (TFEU) art. 167. In particular, copyright supports society by ensuring cultural activities are viable, diversity is protected and cultural heritage accessible. The recital order reflects the order of priorities: the market concerns stated in recital 1 outweigh the cultural concerns from recital 3.

The focus on exemptions as a balancing mechanism is oversimplified although because it neglects the effect of exclusive rights. User interests are not only shaped by exemptions, but also the control given to right holders in the first place. For example, it has been convincingly argued that the reproduction right in particular is overreaching by covering all kinds of copying activities. The applicable exemption for lawful uses is not sufficient to remedy this, especially in the context of digital technology.[78] Striking an effective balance between right holders and users therefore requires a broader approach, combining a consistent solution to the design of exclusive rights, exemptions and their interaction.

The limited role of human rights

A second effect of the economic reasoning on users is that the importance attributed to human rights in striking the balance is not fully reflected at EU level. On one hand, the references to human rights are numerous[79] whereby the most influential is clearly cultural diversity,[80] followed by freedom of expression and education/teaching/learning.[81] The latter ones in particular are traditional grounds for copyright exemptions, fed upwards from the member states.[82] This narrative appears most clearly when article TFEU art. 167 is invoked:

> Article 167 of the Treaty on the Functioning of the European Union (TFEU) requires the Union to take cultural diversity into account in its action and to 'contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore'.[83]

On the other hand, most references to human rights as such are very general in nature. For example, both the Digital Single Market (DSM) and CMO Directives have (nearly identical) references to the Charter of Fundamental Rights[84] but all EU laws should be in line with the

72 DSM, recital 5.

73 6 of the recitals allude to or explicitly refer to the bargain nature of copyright by accounting for a balance to be struck. For example: InfoSoc, recital 31 reiterated in DSM, recital 7.

74 See for example, DSM recital 6.

75 7 references explicitly link fair remuneration and users.

76 InfoSoc, recital 35.

77 Directive 2014/26/EU on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market (CMO Directive) [2014] OJ L84/72, recital 1.

78 A Ohly, 'A Fairness-Based Approach to Economic Rights' in B Hugenholtz (ed) *Copyright Reconstructed: Rethinking Copyright's Economic Rights in a Time of Highly Dynamic Technological and Economic Change* (Kluwer 2018) 144; see also recent case law: Public Relations Consultants Association *v* Newspaper Licensing Agency (C-360/13) ECLI:EU:C:2014:1195; UPC Telekabel *v* Constantin Film (C-314/12) ECLI:EU:2014:192.

79 26 reference across 9 instruments.

80 14 references across 8 instruments.

81 6 references and 18 references across 5 instruments, respectively.

82 Guibault, 'Why Cherry-Picking Never Leads to Harmonisation'.

83 CMO Directive, recital 3. Article 167 TFEU is the old article 151 which is relevant for all pre-2010 sources.

84 DSM, recital 84 compare with CMO Directive, recital 54 or Enforcement Directive, recital 32.

Charter since 2012. The reference to it can therefore be seen as a formality, adding little substance. This has also been confirmed by recent case law.[85] It is also striking that the main focus is not on the traditional exemptions like education but flourishing cultures in general. Here, copyright is a tool to achieve it rather than a hindrance imposes costs as is the traditional frame applied to exemptions. In addition, it implicitly recognizes not only the benefits of access by society but also the threat the SEM poses to smaller communities, in terms of opening the market to more dominant players from other member states. In this sense it is a safety valve as much as an independent aim.

Fine-tuning copyright: when copyright policy undermines the SEM

Up to this point, the discussion has focused on copyright policy as a whole and how its design is shaped by the SEM. However, copyright's inherent focus on creating exclusivity for right holders creates tensions within the SEM itself. In particular, the SEM is built on the basic principle of contractual freedom which states that all parties involved in a transaction should be free to decide the terms and conditions.[86] This reason is based on economic theory by presuming that contractual freedom allows right holders, commercial intermediaries and users to bargain effectively, leading to overall welfare gains as resources are allocated in the most efficient way. In the EU narrative, there are two key scenarios where contractual freedom has proven problematic and therefore warranting intervention: safeguarding actors in a weaker bargaining position and fragmented licensing.

The effect of contractual freedom on the individual author

The SEM emphasizes the importance of contractual freedom. Contractual freedom is essential to ensure the rights associated with copyright works are allocated in the most efficient manner across the marketplace and therefore maximize the benefits of the property right.[87] However, the basic conditions for this to work effectively are not met: comparable bargaining power between the parties. Without this, one party can impose its preferences on the other party, leading to a suboptimal allocation of resources. In the creative industries, a large number of individual authors are faced with a comparatively small number of commercial intermediaries who act as gatekeepers. As a result, their bargaining power vis-à-vis the intermediary tends to be weak.[88] This weaker contractual position of authors and performers features prominently in the EU narrative. For example:

> Authors and performers tend to be in the 'weaker contractual position when they grant a licence or transfer their rights' […] for the purposes of exploitation in return for remuneration […].[89]

A systematic solution to remedy this would entail measures to strengthen the author's position in contract negotiations affecting both his reputational and monetary interests, including the ability to cancel contracts, unwaivable rights and strong moral rights as some member states provide.[90]

However, while such provisions sometimes exist at member-state level, the emphasis on the SEM with its preference for contractual freedom mitigates against systematic intervention at EU level.[91] The intervention to the benefit of individual authors is limited to those instances where copyright as an economic tool is not working: situations where the original price paid for a work is not reflecting the economic value revealed later through market transactions.[92] The Resale Directive, for example, explicitly targets the imbalance between the original author and intermediaries.[93] The solution has recently been broadened in the DSM directive which includes a superstar clause.[94] On the surface, these interventions are to the benefit of all authors and protect at least their economic interests. However, this is based on an oversimplification of author interests.

Superstar-style clauses will not systematically address the highly unequal income distribution because it neglects the nature of the creative industries. First, creative industries are characterized by what is called the superstar effect (a small group of authors earn most of the

85 Snijder and van Deursen, 'The Road Not Taken'.

86 There are some limits to this (consumer protection, etc.) but this is beyond the scope of this article.

87 8 instruments with 22 references directly refer to this core principle.

88 R Caves, *Creative Industries*: *Contracts between Art and Commerce* (Harvard University Press 2000).

89 DSM, recital 72. See also recital 73. These imbalances are recognized most clearly for performers. For example, the Term directive emphasizes that existing contracts may be unfair (Term Directive, recital 16).

90 See for example the French or German copyright and related laws, including the Urheberrechtsvertragsrecht. The clash between exploitable copyright works and author safeguards is most clearly discussed in the context of the moral rights in the Berne and Universal Copyright Convention and the philosophical traditions. See for example: P Goldstein and B Hugenholtz, *International Copyright: Principles, Law, and Practice* (3rd edn, OUP 2013) and S von Lewinski, *International Copyright Law and Policy* (OUP 2008).

91 8 instruments with 22 references directly refer to this core principle.

92 For EU law and remuneration, see also G Priora, 'Catching Sight on a Glimmer of Light: The Emerging Distributive Rationale in EU Copyright Law' (2019) JIPITEC 10, 330–43.

93 Directive 2001/84/EC on the resale right for the benefit of the author of an original work of art (Resale Directive) [2001] OJ L272.

94 DSM Directive, art. 20.

income while the majority make very little), the long tail (most income is generated in a very short timeframe) and uncertainty about which works will be successful.[95] In response, a record of past success is used as the predictive proxy for future economic value.[96] This means that less successful authors have an inherent need in build their reputation. It also implies that a lack of success becomes more relevant over time: less successful authors are even less likely to become successful in the future. Superstar clauses are therefore not a suitable tool to address the skewed distribution of income between intermediaries and authors created by bargaining inequalities on a larger scale: the large majority of authors will never be successful enough to benefit from it. In addition and as argued above, the whole EU narrative is based on rational choice. This logic predicts that the commercial intermediaries take the later payments into consideration, for example displacing sales from the EU to other jurisdictions.[97] The gap between presumptions and reality means that it is not surprising if the EU approach has either little effect at best[98] or may even make things worse for the majority of authors. In other words, the EU's focus on copyright as an economic policy tool and property right in combination with the SEM's core principle of contractual freedom limits the scope of intervention seen as viable.

The effect of contractual freedom on the licensing market

The emphasis on copyright as an economic policy and the primacy of contractual freedom has a second effect. Contractual freedom in combination with the exclusivity created by copyright and its jurisdictional nature can fragment the licensing market at the European level.[99] For example, difficulties in licensing across member states may hamper certain industries from developing their full potential, including the provision of online services.[100] Legislative interventions are numerous, ranging from extended collective licensing schemes for out-of-commerce[101] and orphan works[102] to the management of music rights in the online context.[103] The dangers of market intervention are clearly reflected in the narrative although. Legal certainty is considered key to any functioning market and, as a result, existing contractual arrangements are often explicitly safeguarded.[104] Instead, intervention is limited to excluding 'accidental' infringement created by contractual issues from infringement actions.[105] This means that when contractual freedom starts to be a hindrance in its own right by affecting licensing and therefore the economic value of copyright protected works, restrictions are justified to ensure the proper functioning of the SEM but the interference is very targeted and narrow.

The preference for contractual freedom also creates systematic, large-scale conflicts between contracting parties but these are not resolved within copyright policy. Instead, well-established competition solutions are used. For example, CMOs are considered vital in EU copyright policy in terms of distributing works, making legal use of works viable on a large scale and the social contribution they make for authors.[106] However, the licensing market is subject to economies of scale, creating a tendency towards market concentration.[107] The conclusion is that right holders face a near monopolist and are therefore in weaker bargaining position.[108] Given the strong link between the SEM and competition, it is not surprising that the competition remedies (in particular transparency, rules on revenue distribution and member control) dominate the narrative.[109] This also reflects the long-standing tradition of regulating CMOs through competition law, pre-dating copyright harmonization.[110] The analysis also shows that this regulatory approach is expanding as the new DSM directive reflects exactly the same mindset towards all commercial intermediaries:

95 Caves (n 88).

96 Ibid.

97 For a comprehensive assessment of aims and outcomes of the Resale Directive, see: A O'Dawyer, 'The Artists' Resale Right Directive 2001/84: Reflecting Upon a Distasteful Encounter of Art and Commerce' (2018) 40 EIPR 21.

98 Yifat Nahmias, 'The Cost of Coercion: Is There a Place for "Hard" Interventions in Copyright Law?' (2020) 17 Nw. J. Tech. Intell. Prop. 155. Available at https://scholarlycommons.law.northwestern.edu/njtip/vol17/iss2/1 (accessed 28 May 2021).

99 18 times in 6 instruments.

100 See for example, CMO Directive, recital 40; Directive 93/83/EEC on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (Cable Directive) [93] OJ L248/15, recital 1; DSM Directive, recital 3.

101 DSM Directive, art. 8.

102 Directive 2012/28/EU on certain permitted uses of orphan works [2012] OJ L299/5.

103 CMO Directive, title III.

104 6 directives, 10 mentions.

105 4 instruments, 5 references.

106 Most explicitly, this is stated in CMO Directive, recital 2 and DSM Directive, recital 34.

107 C Graber, *Collective Rights Management, Competition Policy and Cultural Diversity: EU Law Making at a Crossroads* (I-Call Working Paper 2012) 6.

108 For example, there 28 recitals alone which cover the need for CMOs to be transparent and another 15 cover the accurate distribution of income. Interestingly, 10 of these directly link the two themes.

109 28 references to transparency, 25 on ensuring members can control the CMO and 15 on accurate distribution of funds.

110 S Schroff and J Street, 'The Politics of the Digital Single Market: Culture vs. Competition vs. Copyright' (2018) 21 Information, Communication and Society 1305.

> As authors and performers tend to be in the weaker contractual position when they grant licences or transfer their rights, they need information to assess the continued economic value of their rights, compared to the remuneration received for their licence or transfer, but they often face a lack of transparency. […][111]

The use of competition rules in copyright licensing has attracted criticism in the past.[112] For example, the CMO directive juxtaposes the interest of authors in social protection—especially relevant for the less successful authors—with the entitlement to be rewarded: the economic interests and social interests are weighted against each other and economics wins. This disadvantages the majority of less successful authors who would benefit from stronger social protections cross-subsidized by the few successful artists. This means in practice that the status of copyright as a property right and its role in facilitating the SEM through the free transmissibility of rights takes precedence over the interests of the less successful but majority of right holders. Systematic intervention on their behalf does not fit the narrative and is therefore not considered viable at EU level.

Conclusion

In summary, the underlying logic of the SEM makes copyright policy an economic policy where the creative industries flourish in a single market with harmonized national rules that safeguard economic rewards and a level playing field. All other aspects flow from this underlying reasoning, drawing on rational choice theory. In particular, copyright is seen as a property right and all interference with it has to be as deemed essential for the functioning of the SEM as a whole and be as narrow as possible. As a result, technological innovation is encouraged through market mechanisms which serve all main stakeholder groups. Any deviation for societal benefit needs to be as limited as possible and always remedy the market harm they create.

At the same time, the SEM's core principle of contractual freedom in combination with the nature of copyright and the creative industries creates fragmented licensing markets and an unequal distribution of profits as a result of bargaining power inequalities. The solutions are always geared towards the functioning of the SEM but the tools used vary. The author–intermediary link is subject to narrow intervention but the oversimplification of author interests has the potential for significant unintended consequences. Individual licensing issues are also resolved narrowly, prioritizing legal certainty over efficient solutions. Large-scale, systematic issues are treated outside of the copyright system. Competition rules are instead preferred to tampering with contractual freedom or the allocation of rights and duties.

These insights allow for conclusions on the frames reform proposals should use to enhance their chances of being adopted. First, reforms framed in line with the SEM and its requirements have a closer fit with the past and therefore are more likely to succeed. Secondly, proposal that frame technology as inherently positive and target any intervention on the economic effects (especially the level playing field) alone rather than a sense of entitlement based on creativity or an open-ended approach is more likely to succeed. Thirdly, while arguments about author interests can mobilize the public, their policy influence is likely limited since they do not fit the dominant SEM frame. This includes proposals based on human rights or where author (as opposed to right holder) benefits create wider market harm—directly or indirectly, real or perceived.

111 DSM Directive, recital 75.

112 M Hviid et al., 'Regulating Collective Management Organisations by Competition: An Incomplete Answer to the Licensing Problem' (2016) 7 JIPITEC 256, para 1.