

From Battles to Balance and Back: Document Analysis of EU Copyright in the Digital Era

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Abstract : Intellectual property (IP) regimes have traditionally been designed to integrate various conflicting elements stemming from private entitlement and the public good. In IP laws and regulations, this design takes the form of specific uses of protected subject-matter without the right-holder's consent, or exhaustion of exclusive rights upon market release, and the like. More recently, the pursuit of 'balance' has gained ground in the conceptualization of these conflicting elements both in terms of IP law and related policy. This can be seen, for example, in European Union (EU) copyright regime, where 'balance' has become a key element in argumentation, backed up by fundamental rights reasoning. This development also entails an ever-expanding dialogue between the IP regime and the constitutional safeguards for property, free speech, and privacy, among others. This study analyses the concept of 'balance' in EU copyright law: the research task is to examine the contents of the concept of 'balance' and the way it is operationalized and pursued, thereby producing new knowledge on the role and manifestations of 'balance' in recent copyright case law and regulatory instruments in the EU. The study discusses two particular pieces of legislation, the EU Digital Single Market (DSM) Copyright Directive (EU) 2019/790 and the finalized EU Artificial Intelligence (AI) Act, including some of the key preparatory materials, as well as EU Court of Justice (CJEU) case law pertaining to copyright in the digital era. The material is examined by means of document analysis, mapping the ways 'balance' is approached and conceptualized in the documents. Similarly, the interaction of fundamental rights as part of the balancing act is also analyzed. Doctrinal study of law is also employed in the analysis of legal sources. This study suggests that the pursuit of balance is, for its part, conducive to new battles, largely due to the advancement of digitalization and more recent developments in artificial intelligence. Indeed, the 'balancing act' rather presents itself as a way to bypass or even solidify some of the conflicting interests in a complex global digital economy. Indeed, such a conceptualization, especially when accompanied by non-critical or strategically driven fundamental rights argumentation, runs counter to the genuine acknowledgment of new types of conflicting interests in the copyright regime. Therefore, a more radical approach, including critical analysis of the normative basis and fundamental rights implications of the concept of 'balance', is required to readjust copyright law and regulations for the digital era. Notwithstanding the focus on executing the study in the context of the EU copyright regime, the results bear wider significance for the digital economy, especially due to the platform liability regime in the DSM Directive and with the AI Act including objectives of a 'level playing field' whereby compliance with EU copyright rules seems to be expected among system providers.

Keywords : balance, copyright, fundamental rights, platform liability, artificial intelligence

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