MORE THAN A FIGURE OF SPEECH?

SYSTEMATIC CONTENT ANALYSIS OF FAIR BALANCE IN THE CONTEXT OF EU COPYRIGHT LAW

Thesis submitted in partial fulfilment of the requirements for the degree of LLM Research Master in Law.

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August 2020

Abstract

The doctrine of fair balance is a powerful judicial tool used by the Court of Justice of the European Union (CJEU) to harmonise the enforcement of EU copyright legislation across the Union. Although prior literature depicts the doctrine as mere rhetoric and unpredictable from one case-law to another, I insist that only by the resorting to the correct empirical endeavour, could we discover a degree of predictability overlooked by the existing doctrinal studies. I challenged this argument in the context of copyright-related preliminary reference coming from the CJEU, the Court responsible for answering preliminary questions raised by the Member States of the European Union (EU). Using systematic content analysis to record the trends of fair balance analysis, I looked upon 30 written texts of preliminary rulings to identify, in particular, the presence of specific components or variables tied to the doctrine. In the light of the evidence presented in my empirical results, I conclude that fair balance indeed possessed structural integrity which was tied specific components. The assigned components reveal the grounds to legitimise the doctrine, the role of conflict and stakeholders in shaping its analysis, even the extent to which proportionality principle manifest in the analysis. These components ultimately contribute to different styles or iterations to fair balance, to which the literature initially misconstrued as 'unpredictability' on the doctrine's part.

Acknowledgments

I am very grateful to Jonathan Verschuuren and Anne Lafarre for having the utmost patience to supervise this thesis and providing me with constructive feedback. I am also thankful to Marianne Scholing, for her resilience in coordinating my study progress from the time I was enrolled up until the time this thesis submitted.

My deepest gratitude goes to my friends in ReMa program. Thank you, Greta, Jacintha, and Shrishti, who constantly encourage me that I could finish this thesis in times of great doubt. Also to Yeimi who was kindful enough to become my peer to peer reviewer in the earliest stage this thesis was drafted. Also to my fellow Indonesian friends in Tilburg University, Abelia and Lindsay, with whom studying was always an exciting experience.

Lastly, I would like to express my deepest love to my mother who becomes the last bastion of emotional support in this trying time. I owe you more than you could ever imagine.

All remaining mistakes are my own.

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CHAPTER 1 – Introduction

1.1.Background

Fair balance is a doctrine designed to resolve the conflict between the right of property – including its derivative rules and principles- against other fundamental rights, such as freedom of expression, data protection and privacy.[1] Whilst the doctrine, in theory, has seen its common usages across various legal fields, particularly in the field of constitutional laws, fair balance presumably holds great importance to help the European Union (EU). This role in part due to its potential to abridge different degrees of intellectual property (IP) protection set by its Member States.[2] The doctrine has made it possible for the Union's supra-national judiciary -the Court of Justice of the European Union (CJEU)– not only to evaluate the adherence of IP measure carried at the national stage against other rights and economic freedoms but also to adjudicate whether the interpretation of EU's secondary legislation (i.e. directive) at the national level give due regards to those rights and freedom.[3]

Currently, one of the IP fields where fair balance frequently referred in the CJEU docket of case-laws is concerning the interpretation of EU Copyright Directives; The InfoSoc and the E-Commerce Directives. This came to no surprise since the overall picture of EU copyright regime is often characterised as –constant 'fairness check' between the interest of copyright owners, the users accessing the copyrighted works, and the intermediary who facilitate the circulation of such works–[4] fair balance offers the CJEU the possibility to mitigate overlap of their interests as result of the excessive enforcement of copyright measure.

It was commonly suggested that the concept of legal balancing had been recorded in the case-law compendium of the Court of Justice of the European Union (CJEU) long before 2008.[5] Husovec (2016), however, suggests that the increase in copyright studies on

[1] Christina Angelopoulos, 'Sketching the Outline of a Ghost: The Fair Balance between Copyright and Fundamental Rights in Intermediary Third-Party Liability' (2015) 17(6) The Journal of Policy, Regulation and Strategy for Telecommunications, p 78.
[2] See Remy Chavannes, 'Balancing in EU Copyright Law', AIPPI World Congress (Brinkhof, 2018), <https://blog.chavannes.net/2018/10/communication-to-the-public-in-europe/> accessed 3/10/2019.
[3] Nikiforos Panagis, Putting Balancing in the Balance. SSRN Electronic Journal. 10.2139/ssrn.2423378, p 1.
[4] Angelopoulos (n 1), p 78.
[5] Reference to fair balance prior *Promusicae* ruling were documented in three works. The first work attributes legal balancing as a part of balancing in the strict sense (proportionality *stricto sensu*) and proceed arguing that the doctrine has been circulated since *Cassis de Dijon* (C-120/78). See Nicholas Emiliou, *The Principle of Proportionality in European Law: A Comparative Study* (Kluwer: 1996). 192 Another work considers "nothing revolutionary about *Promusicae*" since the reconciliation of contradictory values in CJEU is already evident in

fair balance was barely noticeable after the conclusion of *Promusicae* (C-275/06) ruling in 2008.[6] Since then, the doctrine has featured in numbers of copyright-related inquiries brought before the Court–including but not limited to–the interpretation of the exclusive right of the copyright holder to communicate the work to the public; the scope of copyright exceptions and limitations, and; copyright enforcement measures.[7]

Nevertheless, despite its increasing popularity, Angelopoulos (2015) has suggested that legal scholars could hardly agree on general theoretical framework on fair balance or how to apply its analytical approach consistently amid the series of claims on conflicting copyright interests.[8] Fair balance tends to be discretionary in the sense of it might only be referred by the Court once it feels the necessity to deploy the said doctrine. Consequently, the analytical framework of fair balance always reserved by Judge's subjectivity, or at least that was being speculated by numbers of authors.[9] In this respect, both scholars and lawyers inhibited to critically review the quality of the 'fair balance' analysis raised by the Court. Scholars gated from producing sound theories on fair balance since the Court has been consistently treating the fair balance as a doctrine which operates on 'case-by-case' basis, or intrinsically based on the individual circumstances of each case.[10]

At the same time, the public should not leave the development of the doctrine unscrutinised without a certain degree of transparency. As highlighted by Griffiths (2013), the role of fair balance in copyright-related dispute should not be overlooked knowing well it is one of the frequently cited doctrines whenever the CJEU tried to understand the nature of each directive in the area of copyright and related rights.[11] In the past, the Court ruling

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earlier cases such as *Schmidberger* (C-112/00), *Omega Spielhallen* (C-36-02), *Laval* (C-341/05), and *Lindqvist* (C-101/01). Leva Kisieliute, 'A "Fair Balance" Between Intellectual Property Rights and Other Fundamental Rights' (2012), Master Thesis, Lund University, p 34. In the third work, the term 'balancing' is believed to be first referred by CJEU in *Metronome Musik* (C-200/96) in 1998. See Peter Teunissen, 'The Balance Puzzle: The ECJ's Method of Proportionality Review for Copyright Injunctions' (2018) 40(9) European Intellectual Property Review, p 583.

[6] Martin Husovec, 'Intellectual Property Rights and Integration by Conflict: The Past, Present, and Future' (2016) 18 Cambridge Yearbook of European Legal Studies, 250; M. Parker Folett, *Creative Experience* (Longmans, Green and Co, 1924), p. 301.

[7] Case C-257/06 *Productores de Música de España (Promusicae) v Telefónica de España SAU* [2008] ECLI:EU:C:2008:54, para 68; Teunissen (n 5), p 579.

[8] Angelopoulos (n 1), p 78.

[9] Angelopoulos (n 1), p 78; Bart van der Sloot, 'The Practical and Theoretical Problems with 'Balancing' (2016) 23(3) *Maastricht Journal of European and Comparative Law*, 439-59; See also Angeloupolos (n 1).

[10] Stijn van Deursen and Thomas Snijders, 'The Court of Justice at the Crossroads: Clarifying the Role for Fundamental Rights in the EU Copyright Framework' (2018) 49(9) International Review of Intellectual Property and Competition Law, p 1091; J.J. Hua, *Toward A More Balanced Approach: Rethinking and Readjusting Copyright Systems in the Digital Network Era* (Springer: 2014), p 60; Angelopoulos (n 1), p 82.

[11] Griffiths briefly discusses case-laws such as *Painer* (C-145/10) and *Scarlet Extended* (C-70/10) as those landmark cases where fair balance analysis was determinant to the outcome of the rulings. See Jonathan Griffiths, 'Constitutionalising or Harmonising? – The Court of Justice, the Right to Property and European

such as in *Scarlet Extended* (C-70/10) known to play a pivotal role to educate public on the concept of fair balance and its role to clarify the extent of liability incurred to internet service providers across Europe. In the said case, the Court develop its 'fair balance' analysis on Article 15 of the Directive 2000/31/EC [E-Commerce Directive] to conclude that the freedom for the operators of user-uploaded sites to conduct their businesses is protected, where fair balance would not be attained if such operators are forced to 'actively' monitor and filter any infringing contents uploaded to their sites.[12] However, with the recent introduction of those previously rejected obligations via Article 17 of the Directive (EU) 2019/790 [Copyright Directive on Digital Single Market],[13] the internet operators and European public at large now forced to reflect if the fair balance analysis outlined in *Scarlet Extended* (C-70/10) and others case-laws are still reliable enough to protect their interests in the wake of these newly contentious obligations.

Ultimately, despite the concurrent pessimism to produce a compelling theoretical framework on fair balance, it is the stance taken by this Thesis to suggest that such an endeavor is not wholly impossible. Over the years, empirical scholars have attempted to decipher the framework of other broadly-worded legal principles by observing the variability of texts on which such principles referred. One example of such works would be the work by Sulitzeanu-Kenan and others (2016). In this work, the authors collected 331 interviews from Israeli legal experts (lawyers and academics). They then subsequently proposed a theoretical framework of proportionality principle referred by the Israeli Supreme Court based on the common variability derived from those interviews.[14] Alternatively, one work by Favale and others is relatively near to our topical interest. While this work is only interested in observing whether the Court has pursued 'activism' goal when ruling over the 49 of [sampled] EU copyright case-laws, the work was able to

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Copyright Law' (2013) 38 *European Law Review*, 72-3. see also Case C-145/10 *Eva-Maria Painer v Standard Verlags GmbH* [2011] ECLI:EU:C:2011:798, 134; Case C-70/*10 Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)* [2011] ECLI:EU:C:2011:771, para 49.

[12] *Scarlet Extended* (n 11), paras 42-23.

[13] In this new secondary legislation, the operators are now required to "…made best efforts to prevent their future uploads [unauthorised online content] in accordance with point (b) [high industry standards of professional diligence]." See Council 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, OJ L 130, Art 17(4)(c).

[14] The authors developed an empirical model of proportional principle based on five common decision-making stages of this principle, namely *infringement of rights*, *legitimacy of act*, *suitability of act*, *necessity of act*, and *balancing of act*. See Raanan Sulitzeanu-Kenan, Mordechai Kremintzer, and Sharon Alon 'Facts, Preferences, and Doctrine: An Empirical Analysis of Proportional Judgment' (2016) 50(2) Law and Society Review, p 351.

pull a compelling conclusion by drawing a statistical inference between fair balance analysis and the harmonisation agenda.[15]

The empirical works above illustrate the prospect of extending the same empirical approach to fair balance–to deconstruct the doctrine framework by identifying the empirical variables associated closely to the doctrine. However, since these works confirm nothing other than the possibility to learn fair balance through the empirical lens, the following part of this Chapter will further investigate the merits behind our attempt to transpose the doctrine into an empirical model. In the current literature, there are at least two areas in which the consistency of fair balance judgment frequently called into question. The first area is concerning the scope of conflict in 'copyright' fair balance (Section 3.2). In the second area, this review observed the possibility to replicate CJEU's fair balance test, from one case to another (Section 3.3). Nevertheless, before reviewing the two areas of discussion, this review starts by describing the classification of the literature on fair balance (Section 3.1).

1.2.State-of-the-Art

1.2.1. Classification of the Literature

Doctrinal research on 'copyright' fair balance could be narrow into two trends; the case-law reviews and the research on the proportionality principle. The first trend focuses on discussing fair balance based on their isolated reading on the relevant CJEU case-law. Meanwhile, the second trend prioritises the development of the fair balance doctrine by reviewing its role as part of the proportionality principle.

For the legal scholarship that focuses to provide chronological review on CJEU case-laws,[16] it is believed that fair balance was effectively introduced in early 2008 through *Promusicae* ruling, and further developed through series of landmark case-laws, such as *Scarlet Extended SA* (C-70/10) *SABAM* (C-360/10), *Bonnier Audio and others* (C-461/10), and *UPC Telekabel Wien* (C-314/12).[17] The term 'effective' taken to distinguish the

[15] In this work, the authors treated fair balance as one of the teleological interpretations by the CJEU that closely attributed with its agenda of harmonisation. See Marcella Favale, Martin Kretschmer and Paul C. Torremans 'Is there an EU Copyright Jurisprudence?' (2016) 79(1) Modern Law Review, pp 31-75.
[16] See, for instance, Chavannes (n 2), p 8; Angelopoulos (n 1), p 82; Peter Mezei and Istvan Harkai, 'Enforcement of Copyrights Over the Internet: A Review of the Recent ECJ Case Law' (2017) 21(4) Journal of Internet Law; Kisieliute (n 5).
[17] *Scarlet Extended* (n 11); *SABAM* (n 11); Case C-461/10 *Bonnier Audio AB and Others v Perfect Communication Sweden AB* [2012] ECLI:EU:C:2012:219; Case C-314/12 *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft mbH* [2014] ECLI:EU:C:2014:192.

doctrine's introduction as an 'active interpretive tool' by the Court and its passive introduction in which conferred in Article 51(1) of the EU Charter and Recital 13 of the Information Society Directive (Directive 2001/29) respectively.[18]

In this line of works, the relationship between fair balance and its parental theory (i.e. constitutional balancing) is confirmed but received limited attention on the theory-building of these works.[19] Nonetheless, as noted by Czarnezki (2006), this is an expected trend, especially among the works that prioritise on developing their theories on the doctrine based on close reading to the case-laws.[20] To explain this, he adds that, in constructing their interpretation, most judges probably do not give much thought to the epistemological flow between the doctrine and its groundwork theory.[21] It merely assumed that the theory-building offered by case-law reviewers is *mutatis mutandis*, or closely resemble Judges analysis on fair balance, in order to maintain the authenticity of the Court's view.

Conversely, for the works that seek to describe operationalisation of the proportionality test,[22] the birth of fair balance was never a formal one. Rather than being acknowledged as a doctrine, fair balance linked with one of the recurring goals of proportionality principle that is, 'to respect the essence of other rights and freedoms recognised by EU Charter'.[23] In this regard, proportionality is an accepted internal hermeneutical tool developed by the CJEU to interpret secondary Union legislation (Directives) in order to achieve –among other– the balance between rights to property and other potentially conflicting rights and freedoms.[24] Therefore, the fair balance forms a 'congenial, juristic interpretation of the positive law principle of proportionality'.[25] It is

[18] Teunissen (n 5), p 583; Husovec (n 6), pp 249-50; See also *UPC Telekabel* (n 17), para 63.
[19] Kiseliute (n 3), 10.
[20] Jason Czarnezki, 'The Phantom Philosophy? An Empirical Investigation of Legal Interpretation' (2006) 65 *Maryland Law Review*, pp 847-9.
[21] Czarnezki (n 20), p 849.
[22] See, for instance, Bernt Hugenholtz and Martin Senftleben, Fair Use in Europe: In Search of Flexibilities, Working Paper (November 2011), University of Amsterdam, p 6; T. Alexander Aleinikoff, 'Constitutional Law in the Age of Balancing' (1987) 96(1) Yale Law Journal, 943-1005; Orit Fischman Afori, 'Proportionality – A New Mega Standard in European Copyright Law' (2014) 45(8) International Review of Intellectual Property and Competition Law, p 890; Matthias Jestaedt, 'The Doctrine of Balancing – Its Strengths and Weaknesses' in Matthias Klatt (eds.), *Institutionalized Reason: The Jurisprudence of Robert Alexy* (Oxford University Press: 2012), p 156.
[23] Article 52 Charter of EU; See also Griffiths (n 11), p 72.
[24] Afori (n 22), p 890; Griffiths (n 11), p 72; Husovec (n 6), p 250.
[25] Jestaedt (n 22), p 157.

seen as a sequential extension to the third component of the proportionality test, namely the balancing in the strict or narrow sense (proportionality *stricto sensu*).[26]

However, while the idea of fair balance –being interchangeable to the proportionality *stricto sensu*– is mostly uncontested to this date, it is the premise of fair balance as 'indispensable to proportionality principle' which deserve more profound investigation. Scaccia (2019) revealed that despite being structured in sequence, specific components of the proportionality test (i.e. suitability, necessity, and proportionality *stricto sensu*) might be absent or heavily featured than the rest.[27] Scaccia considers the reference to legal balancing or balancing in the strict sense is prevalent in cases in which CJEU was aiming to maximise the public benefits or minimalise the damage to rights caused by the disproportionate ruling or measure.[28] Nevertheless, Scaccia only speaks on behalf of the general trend of the proportionality test. As of now, there are no proportionality studies on EU copyright rules that extend Scaccia's theoretical claim to copyright areas, for instance, by investigating the presence of 'suitability' and 'necessity' tests in cases where fair balance analysis being raised.

1.2.2. Fair Balance and the Scope of Conflict

In line with the literal meaning of 'conflict of fundamental rights', a direct attempt to identify the scope of the conflict consists of the directly attributing the relevant copyright rules (i.e. national or secondary Union legislation) with their prescribed fundamental rights.[29] According to this approach, weighing on conflicting rights would require the CJEU to establish two vices of EU legislative rules. Under this assumption, one side of regulation presumed to promote the right to property, whereas the competing claim on such regulation backed by one or more competing fundamental rights or freedoms (e.g. rights to property vs right to the privacy, rights to property vs freedom to conduct business).[30] However, the exercise of categorically place the rules into their related rights is an over-simplistic identification task. It does not touch upon another influential aspect of fair

[26] Afori (n 22), p 896; Teunissen (n 5), p 581.
[27] Di Gino Scaccia, 'Proportionality and the Balancing of Rights in the Case-law of European Courts' (2019) 4 Federalismi.it, p 6.
[28] Scaccia (n 27), p 7.
[29] Husovec (n 6), p 250.
[30] This theoretical perspective has its origin from presumption that certain national IP rules might be treated as causing quantitative restriction to the import of goods around the Community, ergo, violating the principle of free movements and breaching Article 30 of the Rome Treaty (Now Article 34 of the Treaty Functioning of the European Union). See David T. Keeling, *Intellectual Property Rights in EU Law: Volume 1* (Oxford University Press: 2003) 28; See also Griffiths (n 8) 68.

balance analysis that is the observation of fact by the Court. To improve this, several authors started promoting certain observable 'externalities' based on the fact presented before the Court.[31] There are at least two proposed externalities suggested by authors in this field, namely *the stakeholder interest* and the *distribution of conflicting values*

The first proposition recommends focussing on the 'fact-specific to the 'stakeholders' interests' –or rather, the interplay among three stakeholders common to a copyright dispute (i.e. rightsholder, economic intermediary, and end-user).[32] Angelopoulos and Smet (2016), for instance, while reviewing *L'Oréal v. eBay* (324/09) discovered how a 'national injunction', ordering internet service providers (ISP) to introduce a system capable of filtering copyright-infringing material, had pushed the Court not only to acknowledged bilateral conflict between rightsholders (i.e. the one wishing to enforce the injunction) and the intermediary (i.e. the one whose ability to conduct business is under threat) but also between end-users, whom their personal data possibly impaired because of the legal repercussion caused by enforcing such injunction.[33] Another example even illustrates the clash between rightsholder and the public at large. In the work of Sganga and Scalzini (2017), it is explained how specific interest (e.g. rightsholder freedom to refuse copyright licensing), could, at first, be considered as valid from the standpoint of the rightsholders, but may eventually be ruled as a copyright abuse because it upsets the intra-EU's enforcement of competition laws.[34]

For the second point of observation, two studies on the proportionality principle urged to pay special attention to the added value of copyright measure, especially in light to its 'regulatory stance'.[35] It is noted by Hua (2014) that every single copyright measure embodies either one of two regulatory stances. On the one hand, the stance where copyright measure enforced to promote copyright as private property; and on the other

[31] See, for instance, Caterina Sganga and Silvia Scalzini, 'From Abuse of Right to European Copyright Misuse: A New Doctrine for EU Copyright Law' (2017) 48(4) *International Review of Intellectual Property and Competition Law*, pp 405-435; Christina Angelopoulos and Stijn Smet, 'How to Reach a Compromise Between Fundamental Rights in European Intermediary Liability' (2016) 8(2) Journal of Media Law, p 285; Hua (n 10), p 82.
[32] Afori (n 22), p 892.
[33] Angelopoulos and Smet (n 31), p 275; See also Case C-324/09 *L'Oréal SA and Others v eBay International AG and Others* [2011] ECLI:EU:C:2011:474, para 142.
[34] In Sganga and Scalzini, authors highlighted how CJEU ruling in *Magill* discovered the so-called copyright abuse based on the interest of rightholders to refusal to grant a license to certain competitor, which effectively had prevented them from releasing a new product to a secondary/downstream market, where the rightholder wanted to reserve for herself. See Sganga and Scalzini (n 31), p 423; See also Case C-242/91 *RTE and ITP v. Commission (Magill)* [1995] ECLI:EU:C:1995:98, paras 54-56.
[35] Hua (n 10), p 82; Afori (n 22), pp 890-92.

hand, the stance that positions the right to property as a public policy issue.[36] For the former stance, the focus has been to prioritise economic gains of copyright owners over the public welfare, to which deemed attainable on the long-run once high-level of protection on copyright ownership warranted. To this, Hua (2014) suggests copyright measure to be valued based on its potential to maximise all economic gains from potential markets of intellectual property.

On the contrary, Afori (2014) sees the 'public-welfare' role of copyright measure lies at its ability to allow adequate remuneration for creators while simultaneously allowing adequate public access to works. The creation of copyright system means to encourage authors to publish their creative works to inform and educate the public in exchange for public acknowledgement that these producers have a monopoly over the use and exploitation of their works.[37] Such regulatory stance, therefore, acknowledges copyright as public, but remain monopolistic in nature.[38]

1.2.3. Applying Fair Balance as Method of Legal Reasoning

When it comes to evaluating the replicability of one fair balance analysis to another one, several case-law reviews have directed their attention to the nature of fair balance as a 'case-by-case' doctrine.[39] The general attitude from these reviews seems to portray fair balance as a doctrine with particularistic nature.[40] The following attitude suggests that the fair balance is a judicial assessment combining both the 'context of the legal text' and the 'context of the reader'[41] –of which the latter refers to as judges' attempt to decipher what they perceived as the 'fact' before the proceedings. Because of this, it is often difficult to predict when the CJEU would produce a generally applicable interpretation to fair balance, instead of the interpretation of fair balance that only specific to the circumstance at hands. By enlisting 'fact' as a central factor to determine which fundamental rights carry most weight and rules, one CJEU's case-law might appear to deliver general interpretive guidance to balancing test, but only to later find out that such guidance is not widely applicable to other fair balance arguments –thus confined within the specific circumstance

[36] Hua (n 10), p 39; Afori (n 22), p 900.
[37] Hua (n 10), p 47.
[38] Hua (n 10), p 47.
[39] See, for instance, Angelopulos (n 1); Angelopoulos and Smet (n 31); Kisieliute (n 5).
[40] Aleinikoff (n 22), p 961.
[41] Kisieleute (n 3) 10.

of each case.[42] Angelopoulos and Smet (2016), for instance, refer to Court's ruling in *UPC Telekabel Wien* (C-314/12) as an example where it visibly endorses a structured interpretation to fair balance (i.e. in the form of exhaustive balancing criteria) but then limits its relevance only to those cases dealing with the permissibility of website blocking injunction, which is the subject-matter of the ruling.[43]

But to the proponent of fair balance, this relativity is not necessarily bad since leaning into a single form of balancing criteria would likely to result in the law being grossly underinclusive or insensitive to the diversity of incommensurable preferences in society, thereby undermining the legitimacy of fair balance.[44] Furthermore, from the perspective of the CJEU institutional setting, Lenaerts (2013) claims that the loose shift between 'general applicability' interpretation to the one that is 'fact-specific' is well-intended. The shifting attitudes designed to respond to the dynamic proceedings such as preliminary reference procedure.[45] For instance, when the request for preliminary reference drafted narrow and specific legal questions, the Court is more likely to provide specific, 'tailor-made', ruling to answer the reference.[46] If the question referred to it are neither of high complexity nor raise novel issues, the Court may restraint itself to recall previous case-law relevant to the reference.[47] Meanwhile, if the question raises issues of national sensitivities, the Court will opt to formulate its ruling by taking into account the concern put forward by the Member States.[48] Last but not least, when the reference involves questions of fact, or national law that remain to be determined by the referring court, the

[42] In the literature of constitutional balancing, this is also known as incommensurability issue. This issue sparked whenever specific constitutional framework (e.g. balancing criteria on website blocking injunction) being forcefully compared against another, starkly contrast, constitutional framework (e.g. balancing criteria on notice and takedown) -so different, that its practically impossible to deliver reasonable comparison between the two. See, for instance, Eva Brems (eds.), Conflict Between Fundamental Rights (Intersentia: 2008), p 28; Shyamkrishna Balganesh, 'The Pragmatic Incrementalism of Common Law Intellectual Property (2010) 63(6) *Vanderbilt Law Review*, p 1594; Aleinikoff (n 22), p 961; and Teunissen (n 5), p 584.
[43] The authors identify at least two balancing factors derived from *UPC Telekabel* ruling. Those are: 1) Whether the measure do not unnecessarily deprive internet users of the possibility of lawfully accessing the information available; and 2) Whether the measure had any effect of preventing unauthorized access to protected subject-matter, or at least, making it difficult to achieve and of seriously discouraging internet users who are using the service from accessing subject-matter that has been made available to them. See Angelopoulos and Smet (n 31), p 18. See also *UPC Telekabel* (n 17), p 63.
[44] Balganesh, (n 43), p 1594; Aleinikoff (n 22), p 961.
[45] Koen Lenaerts, 'How the ECJ Thinks: A Study on Judicial Legitimacy' (2013) 36(5*) Fordham International Law Journal*, p 1344.
[46] Lenaerts (n 46), p 1344.
[47] Lenaerts (n 46), p1344.
[48] Lenaerts (n 46), p 1345.

Court then simply offers the EU law framework in which the referring court must take its decision, and describes several possible ways EU law could be implemented in the cases.[49]

1.2.4. Different Styles of Balancing

While a handful of works tried to deconstruct the Court's reasoning to apply fair balance, little effort made to distinguish one style of reasoning from another. One author, however, had attempted to enlist different model of fair balance tailored for EU copyright laws. Chavannes (2018) proposes that 'copyright balancing' lead to at least three styles of balancing; those are; *traditional balancing*, *internal fundamental-rights balancing*, and *external fundamental-rights balancing*.[50] In the first modes, traditional balancing is made explicitly by the existing copyright rules designed to protect the interests of different fundamental rights and interests of different stakeholders.[51] The author referred to Article 5 of the InfoSoc Directive as an illustration of traditional balancing.[52] While this Article made no direct reference to fair balance, once read in conjunction with its preceding perambulatory clauses, it is then rather clear that the exhaustive list of exceptions drafted to harmonise copyright protection against various public interests.[53]

Internal fundamental-rights balancing, on the other hand, is the type of balancing which are commonly described in scholarly discussion –where the CJEU tried to justify fair balance analysis based on combined reading between the existing copyright rules (e.g. copyright exception and limitation) and contextual interpretation on fundamental rights.[54] Chavannes, unfortunately, did not further explain the rationale behind this preference over the traditional one. Luckily, he did manage to describe that in most cases, the Court resort to 'internal-balancing to answer the following merits: when defining the scope of the exclusive right, when interpreting exception and limitations, when assessing the suitability of specific enforcement measures, or when defining copyrightable subject-matter.[55]

[49] Chavannes (n 2), p 3.
[50] Chavannes (n 2), p 3.
[51] Chavannes (n 2), p 4.
[52] Article 5 explicitly provides specific requirements to invoke any of the listed exceptions and limitations (e.g. temporary acts of reproduction, parody, quotation, etc.)
[53] For instance, Recital 14 and 34 of the InfoSoc Directive justifies copyright exception under Article 5 based on education and scientific purposes (Recital 14 and 34). Similarly, Recital 32 permits Member States to opt in or off from the exceptions listed in the Article in order to promote margin of appreciation to the different legal traditions bestowed by each Member States. See Council Directive (EU) 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, Recital 14, 32, 34.
[54] Chavannes (n 2), p 10.
[55] Chavannes (n 2), p 10.

As for the fundamental rights beyond the rights of property, the CJEU resort to the extreme that is to invoke fair balance outside from the scope of exceptions and limitations permitted in Copyright Directives (i.e. InfoSoc Directive and E-Commerce Directive).[56] Chavannes sees this balancing phenomenon as 'relatively new', with *Afghanistan Papiere* [Now renamed to *Funke Medien* (C-469/17) by its official case identifier] as his only illustration.[57] The case entails a pending question on the possibility to invoke copyright exception based on freedom of information and media (Article 11 of the Charter of the EU) despite having support by one of the relevant exceptions [quotation exception] listed under Article 5(3)(d) of the InfoSoc Directive.[58] However, due to the pending nature of *Afghanistan Papiere* by the time his work was published, the Author barely treats external balancing as an outlier as compared to its more common counterpart, the internal balancing.

1.2.5. Structured vs Unstructured Fair Balance

Despite the overarching optimism provided by the supporters of fair balance, it cannot be helped that handful of case-law reviewers remain sceptical on the prospect to replicate fair balance.[59] Challenging the consistency of legal balancing is certainly not out of the ordinary in area of the general theory of legal reasoning. The criticism directed on fair balance somehow aligned to Jürgen Habermas' seminal objection on the law of balancing.[60] Habermas (1995) mainly criticises the conceptual premise of legal balancing of which he believes had offered no rationalised standard to the balancing in constitutional law.[61] The output of his argumentative stance is that the rational discourse of legal balance never meant to be fully accountable. That is inherently an implication of the doctrine designed to be discretionary and focused primarily at the task of weighing adequacy and inadequacy to its object of analysis –as opposed to justifying whether the object is correct or incorrect.[62] Thus, without rational standard taking place, weighing on conflicting rights

[56] Chavannes (n 2), p 22.
[57] See Case C-469/17 *Funke Medien NRW GmbH v Bundesrepublik Deutschland* [2019] ECLI:EU:C:2019:623, para 15.
[58] See *Funke Medien* (n 58), para 12.
[59] See, for instance, Sloot (n 9), pp 439-59; Angeloupolos (n 1).
[60] For those works that made reference to Habermas, see Sloot (n 9), p 442; Jestaedt (n 22), p 165; Angelopulos (n 1), p 83.
[61] Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (MIT Press: 1995), 259.
[62] Habermas (n 61), p 258f.

had become "either arbitrarily or unreflectively, according to customary standards and hierarchies".[63]

Furthermore, even if critics on the particularism of fair balance somewhat aligned to the core criticism of legal balance raised by Habermas, none of the current critics on fair balance have defended his [Habermas] theoretical perspective sufficiently. Habermas only represents one side of the debate on the usefulness of legal balancing. On the other side of the spectrum lies, an equally renowned classic proponent of structured balancing, Robert Alexy (2003).[64] Contrary to Habermas, Alexy rejects the claim of legal balance as an interpretive tool for an unstructured, subjective, decision-making.[65] To his account, balancing of law should be regarded as systemic by the mere fact that it is part of the principle of proportionality. Nevertheless, unlike most copyright law studies on this principle, Alexy goes further by theorising 'three-stages' of structured balancing.[66] More information on Alexy's proposition shall be address in the 2nd Chapter of this Thesis.

1.3.Research Gaps

In the above preliminary review, we observed various strands of scholarly discussion related to fair balance. The prevailing views from the case-laws reviews seem to suggest the absence of definitive understanding on how the CJEU dissects, compare, and order the conflicting rights before it could reach an optimal outcome as prescribed by the fair balance.[67] In a few occasions, such as in *UPC Telekabel Wien* (C-314/12), the Court provides the ruling with a slight hint as to how fair balance should be generally applied. However, in others case-laws, the Court would distance itself from suggesting any general approach and instead urge the national court to consider the specific circumstance "related to the main proceedings" before deciding the balancing outcome. To Lenaert (2013), this is no inconsistency on the Court's part, but rather a 'branched-out' approach responding to the varying degrees of requests from preliminary reference procedure.[68]

To set aside the impression of incoherence above, we also managed to account some critical hints to suggest fair balance more than just a hollow metaphor. The first hint implies that in most copyright fair balance ruling, the CJEU paid attention to interests at

[63] Habermas (n 61) p 259.
[64] See Robert Alexy, 'Constitutional Rights, Balancing, and Rationality' [2003] 16(2) *Ratio Juris,* pp 131-40.
[65] Alexy (n 64), pp 134-5; Cf. Habermas (n 61), p 259.
[66] Kisieliute (n 5), p 35.
[67] Angelopoulos (n 1), p 19; Griffiths (n 11), p 68.
[68] See Lenaerts (n 46), p 1345.

stake from the tripartite stakeholders (i.e. rightsholder, intermediary, and end-user). Alternatively, it may also seek to identify the stance taken by the policy or measure questioned in the preliminary reference. Either of these aspects then builds up into what the CJEU considers as the themes of conflict in a copyright dispute. The second hint –which came mainly the study of proportionality principle– asserts fair balance as derivative to the principle of proportionality as a whole. As of the third hint, we took nod at Alexy's classic theory on 'three-stages' of balancing and see how it fare in the context of CJEU copyright-related case-laws.

1.3.1. "Themes" of Conflict in Copyright Laws

First, by observing the notion of conflict in fair balance, this literature review found that the task of defining the scope of conflict would go beyond merely prescribing the relationship of copyright rules or measures vis-à-vis fundamental rights and freedoms. If we structured fair balance as an exhaustive list of balancing criteria, two themes accountable by the current state-of-the-art, those are; 'the stakeholders' interest' and the 'distribution of values' of the legislation or measure subject for fair balancing. These factors transposed the vague meaning of 'fact' into a set of measurable 'legal model' of judicial behaviour –unaffected by the subjectivity of the judges.[69] Conversely, we need to acknowledge the absence of any study on 'attitudinal model' of judicial behaviour, or the work which pays attention to the impact of the judge's ideology and preference towards the formulation of the doctrine [fair balance].[70] The only reasonable explanation to this condition might have to do with CJEU's institutional preference; which emphasises, collective, collegial-style of the ruling, as opposed to profiling the judges through their dissenting opinions.[71]

1.3.2. The Presence of Proportionality Test

Secondly, and perhaps the most striking hint of fair balance as possessing structured form is the consensus among scholars, asserting the doctrine as an extension of proportionality *stricto sensu* for the copyright-related dispute. Under this premise, fair balance applied in the last phase of the proportionality test, following Court analysis on suitability and

[69] In empirical theory of judicial behaviour, 'legal model' refers to traditional interpretive approaches familiar to lawyers and judges, such as language of legal texts, precedent, canons of construction, intent of the drafter, and legislative history. See Czarnezki (n 20), p 847.
[70] 'Attitudinal model' is perceived as the counterpoint to 'legal model'. This set of variables focuses on Judge personal preference or political views. See Czarnezki (n 20), p 848.
[71] Vlad Perju, 'Reason and Authority in the European Court of Justice' (2009) 49(2) *Virginia Journal of International Law*, 366; Favale et al. (n 15), p 13.

necessity tests, respectively. The caveat to this assumption is that it merely accepts fair balance as externally structured by the principle of proportionality as opposed to acknowledging the existence of an internal structure of legal reasoning for the doctrine.[72] Furthermore, Scaccia (2019) reminds us that, in practice, the three sub-components of the proportionality principle might not always collectively manifested in the Court's interpretation of the principle.[73] To put it into perspective, it might be useful for the future empirical endeavour to observe the relative presence of fair balance in proportionality test and vice versa.

1.3.3. Beyond Proportionality Principle

Thirdly, there is reasonable theoretical grounds to believe that fair balance in copyright dispute might involves its own novel structures. The literature review on this Chapter confirms that the theoretical exchange between Habermas and Alexy –on the prospect of structured legal balance– has not been fully translated in both, case-law reviews and the works studying fair balance on the ground of the proportionality principle. In our interest for structured fair balance, Alexy's proposal on 'three-stage balancing' offers the promise to develop the doctrine methodologically. But in order to translate such proposal into a set of observable variables (legal model of judicial behaviour), legal scholars still need to give special meaning on the proposal in light of copyright dispute.[74] For instance, in the context of conflict of rights caused by a copyright dispute, it is unclear if we should translate Alexy's 'degree of non-satisfaction' as either parameter to measure the 'transgression to certain fundamental rights' or parameter which reflect the 'transgression to regulatory stance' (i.e. stronger copyright protection vs greater public accessibility).

Alternatively, one author offers more specialised and distinct takes on fair balance for copyright disputes. Chavannes (2018) sees the novel aspect of copyright balancing not in form of sequential stages of analysis but rather than as preferential process between literal reading of fair balance as in traditional balancing, contextual balancing such as internal fundamental-rights balancing (i.e. copyright rules and fundamental rights), or isolated reading as demonstrated in external fundamental-rights balancing (i.e. exclusive interpretation on external fundamental rights). The author proposition, however, is partially flawed. I argued the following because, as per judgment delivered by the CJEU in

[72] Teunissen (n 5), p 585.
[73] Scaccia (n 23), p 7.
[74] Czarnezki held that 'there is no canonical definition of the legal model or legal interpretation, but we cannot measure something unless we can give specialised meaning to the concept. Czarnezki (n 25), p 849.

Afghanistan Papiere in 2018, the Court had reject the possibility to raise fair balance argument based exclusively on the reading of fundamental rights, to which the Court believed to "would endanger the effectiveness of the harmonisation of copyright and related rights effected by that directive [InfoSoc Directive]".[75] Hence, while we could perceived the last two models as prospective for theoretical testing, we should be cautious or outright dismiss the third model that is the external fundamental-rights balancing.

1.3.4. Call for Empirical Inquiry

Finally, it has been said earlier that normative discourse has its limitation. This review has shown that the pragmatism to observe fair balance empirically is reasonable but not outright acceptable, given the number of conceptual hints suggesting that the interpretation of the doctrine could be projected into observable variables. In the spirit to endorse empirical research, this review ended up with three potential sources of variables relevant to fair balance, namely: proportionality test, stakeholder interest, and regulatory stance. However, since these variables are conceptually broad, prospective scholars are still required to further clarify how they plan to operationalise each one as measures that both valid and reliable.[76] Assuming such descriptive task is achievable, scholars then had the opportunity to test the empirical claim of structured fair balance. This could be done by investigating the *frequency distribution* of each variables on every fair balance argument raised by the Court in its copyright-related cases.

1.4.Research Questions and Objectives

As it has been pointed through the discussion of research gap, an empirical investigation is critical to allow describing fair balance in its structured form, including identifying the "externalities" associated with the doctrine. To that end, this thesis proposes the following core research question:

> *"What is the analytical component to support fair balance and to what extent was it featured in Court's opinion related to the conflict based on the enforcement of EU copyright rules?"*

To answer this overarching question, the following sub-questions also need to be answered.

[75] *Funke Medien* (n 58), paras 54 & 62.
[76] Czarnezki (n 16), p 857.

1. *To what degree it is possible to identify the fair balance components that we had introduce in the preliminary review (i.e. precondition of balancing, conflict theme within balancing, distinct styles of balancing)? (Chapter 1 and 2)*
2. Having succeeded to identify those components, *to what extent it is possible to transform those components into (empirical) variables? (Chapter 3-4)*
3. *To what extent the variables are featured in CJEU's copyright-related case-laws? (Chapter 5-6)*

The sub-questions referred above highlights the sequential process on how we could construct our empirical claim on how fair balance analysis was formulated. Answering these questions beforehand is critical in our effort to adequately overlays the patterns of fair balance arguments, as raised by the CJEU. Having said that, this thesis central aim is to challenge the strongly held predicament asserting fair balance as non-replicable doctrine of EU copyright laws. The way this thesis seeks to confront such challenge is by developing an empirical model of fair balance [emphasise added] focused at its analytical components, or the way it being presented in text -contrary to its common scholarly presentation as an, overtly dynamic, abstraction of idea. To that end, this thesis tries to use information the we as laymen already knew –the 'fair balance arguments' as raised by the CJEU in its preliminary reference cases– to learn about the facts that currently overlooked, namely the common trends and patterns within all those arguments (i.e. the precondition to invoke fair balance, themes of the conflict, styles of balancing, prevalence of proportionality test).

1.5.Research Methods

This thesis combines both doctrinal and empirical analyses. Preference for mixed methodological approach was motivated by the interest to capture the rich context on the application of fair balance, and the interest to produce a quantifiable dataset containing the CJEU's strategies in writing fair balance opinion. The result of this thesis is a combination of qualitative insight, converted into set of variables (content categories), and the quantitative reporting, which later reported as trends on Court opinion-writing on doctrine in question.

1.5.1. Doctrinal Research

When this thesis raised the question of argumentative structuring in fair balance, it primarily seeks for an answer on whether there are discernible shared components among

all, if not, most of the various balancing arguments raised by the CJEU. Nevertheless, this is not a straightforward exercise. As noted by Epstein and Martin (2014), there is no single right way to develop observable variables,[77] or as in our case, to transform the existing theoretical concept into a coding scheme. The first three potential variables we have introduced in preliminary review –a precondition of fair balance, styles of balancing, and conflict theme– may present its novel challenge for the coming testing. Accordingly, no literature, either doctrinal or empirical, had formally developed any strategy to identify variables around those concepts.

Meanwhile, for the fourth candidate of the variables, the prevalence of proportionality principle, it can be argued that it is relatively easy to observe its presence. The reason being, numerous studies have developed their means to analyse the presence of proportionality test. Hence, the 2nd Chapter of this Thesis seeks to firstly establish the definition of those theoretical concepts, followed by description as to how the existing literature could identify those concepts within the fair balance rulings.

1.5.2. Empirical Research

The empirical research is the key to answer the central question to this thesis. Regarding its empirical approach, this thesis is a quantitative study with systematic content analysis (SCA) as its central method of empirical analysis. Content analysis is a research technique for making replicable and valid inferences from texts to the context of their use.[78] The method is particularly useful to comprehend, in a systematic way, the vast amounts of content from documents. Hall (2008) recalls the application of content analysis to a text of any kind, including such legal documents as trial court records, statutes and regulations.[79] In jurisprudential research, this method commonly used to review judicial reasoning of the Judges through the legal and factual content of their written opinions.[80] To our cause, SCA is useful to objectively trace the presence of 'fair balance' arguments in the legal text, such as in the text of preliminary ruling of the CJEU.

The use of SCA dictates third operational steps. First, to decide the standard review to select the case-law samples (sampling population). Second, to design a set of content

[77] Lee Epstein and Andrew D. Martin, *An Introduction to Empirical Legal Research* (Oxford University Press: 2014) p 34.
[78] Klaus Krippendorff, *Content Analysis: An Introduction to its Methodology*, 2nd Eds (Sage: 2004), p 18.
[79] Mark A. Hall and Ronald F. Wright 'Systematic Content Analysis of Judicial Opinions' (2008) 96(1) California Law Review, p 68.
[80] Hall and Wright (n 79), p 73.

categories based on the finding of the literature review (designing content categories). Lastly, to assign the sampled case-laws for data processing.

It is also worth noting that the working framework for this SCA will be surfaced-based analysis or manifest analysis. It means the said content analysis designed to describe any explicit statements found in the text of preliminary opinion that leads us into believing the formulation of fair balance analysis. This strategy looks into elements on the surface of the text that may indicate the presence of a particular pattern. When there are enough indicators or when the right combination of indicators is present, coders conclude that the pattern exists, and they record its presence on their coding forms.[81] Such patterns could be either technical or substantive, but had to represent, or closely associated with any points of interest we had established in research gaps. Hence, the coding categories referred by this thesis would comprise of 1) preconditions to raise fair balance argument; 2) style of fair balance argument; 3) themes of conflict in fair balance argument; and 4) the presence of proportionality test.

Finally, In order to conduct effective empirical research on this topic, this thesis needs to narrow its focus only to a single institutional court setting. This is because every court, national or supranational, may carry its own ideal of balancing. In this respect, the institutional function and setting invite peculiar dynamics into play. Hence, balancing carried out by the domestic court of Member States, and those brought by the CJEU and ECtHR might be substantially different. According to Scaccia (2019), the former operates in an environment conditioned by the immanence of the government, where balance is seen as a mean to maintain the institutional balance between government and judiciary. Supranational courts, on the other hand, is relatively free from political conditioning, thus no dialogue made between political and jurisdictional agent and more freedom to navigate judicialisation on the Court.[82]

1.5.3. Theoretical Relevance and Contribution

Theoretical Relevance: Fair Balance in the Context of CJEU Judicial Law-making

This research belongs to the EU jurisprudential research on copyright-law. Hence, the focus of our judicial discourse is limited only to the copyright-related case-laws, or those cases attributable to the EU *acquis communitaire* on copyright rules. In selecting fair

[81] James Potter and Deborah Levine-Donnerstein, 'Rethinking Validity and Reliability in Content Analysis' (1999) 27(3) Journal of Applied Communication Research, p 265.
[82] Scaccia (n 27), pp 28-29.

balance as its primary object of analysis, the thesis had to push itself to incorporates numerous theories coming from the scholarly works on methods of legal reasoning. One which has briefly discussed in the preliminary review is the interplay between fair balance and its parental doctrine, constitutional balancing by Aleinikoff, Habermas, and Alexy respectively.[83]

Fair balance analysis, or more conventionally referred as constitutional balancing, is in itself represent an area of judicial lawmaking known as 'pragmatic incrementalism', where judges engaged in lawmaking activities which favour narrow and circumstantially-tailored decision.[84] Such direction of lawmaking visibly befitting to the spirit and the dynamic interpretation of fair balance decision making. Along those lines, this Thesis should be reflective of what it could not observe from its preferred methodology. As in the case of content analysis, this thesis acknowledges its inability to incorporate any type of sample other than the preliminary opinion provided by Judges in CJEU. It implies that the relevance for thesis finding could not be extended 'horizontally' to the case-laws of ECHR and any other supranational courts dealing with conflict of rights, and 'vertically' to the opinion provided by Attorney General of the CJEU. It is because the content analysis is well known as an empirical method that works well whenever the sample population is homogenous, or only focus on one particular type of written document.[85] Carelessly combines different types of the proceeding would significantly reduce the credibility of the method's findings.

Furthermore, Content analysis is a data processing technique, where it unable to distinguish the subjective difference of value embedded in each text of the proceedings. This so-called 'value' entails any feature associated with certain content or structure which is distinct from one proceeding to another.[86] For example, one of the unique features that we may come across in various text of judgments on preliminary reference but might be absent in different proceeding is the strict limitation on the types of question the Court may facilitate. The text of the judgments would only entertain two types of questions: the question on the validity of EU law, or the question concerning the preliminary interpretation of EU law.

[83] See Aleinikoff (n 22), p 961; Habermas (n 61), p 259; See also Alexy (n 64), p 136.
[84] Balganesh, (n 43), p 1565.
[85] Hall and Wright (n 79), p 102; Krippendorff (n 78), p 216.
[86] Hall and Wright (n 79), p 77.

This suspicion should not only apply horizontally across different Court but also internally among the documents produced by the same Court's proceeding. Consider, for example, the value between Advocate General (AG) opinion and the value judgment delivered by the Chamber. Conventional wisdom suggests that the Judges in formulate their judgment in collegial and magisterial style; structured to directly answer the question referred to their Chamber.[87] Meanwhile, an Opinion by the AG framed to facilitate discourse; to quote a different set of doctrine, to outline set of permissible arguments, or to highlight the alternatives in its own opinion.[88]

In a broader picture, this exercise of a systematised approach of content analysis would further promote the use of the method to the ever-expanding research on the judicial law-making process in the CJEU and beyond. This Thesis may not bring anything new to the methodological approaches of content analysis in the legal discipline. However, when compared together with the rest of known content analysis-based studies [e.g. Favale and others (2016) and Rendas (2018)],[89] this thesis would deservingly stand out for its novelty in the field of fair balance.

Theoretical Contribution: To introduce core components of Fair Balance

First of all, this Thesis seeks to discover a way to introduce a novel set of the coding scheme, customised to formulate fair balance. Favale and others (2016) had recognised fair balance as one of the independent variables which they based to formulate an empirical model for copyright jurisprudence in CJEU. The empirical work, however, lacking the nuance needed to convey fair balance as a standalone concept. The doctrine merely treated as one category in their content analysis of which the authors merely observed the manifest presence of the fair balance (i.e. "*is there any written reference to fair balance*?"). We had previously pointed out in the preliminary review that fair balance is not an isolated doctrine exclusive only to the EU copyright rules. The term 'balance' on fair balance in some of the benchmark case-laws were often indistinguishable with one of the sub-components of proportionality principle, proportionality *stricto sensu* (balancing in the strict sense) –where it also loosely referred as 'balance'.

[87] Czarnezki (n 25), p 842.
[88] Michal Bobek, 'A Fourth in the Court: Why are there Advocates-General in the Court of Justice?' (2012) 14 *Cambridge Yearbook of European Legal Studies*, p 24.
[89] Favale et al. (n 15); Tito Rendas, 'Copyright, Technology and the CJEU: An Empirical Study' [2018] 49(2) International Review of Intellectual Property and Competition Law 153.

This Thesis, indeed, do not try to contest the underlying theory set by some scholars suggesting that both balance in the strict sense and fair balance are by theoretical concept identical. What this Thesis trying to provide is the novel means to understand balancing practice in the context of a copyright dispute, notably by introducing components of the doctrine into a series of independent empirical variables. One could even argue that, while this Thesis is not designated to produce statistical inference to establish a causal relationship between fair balance and balancing in the strict sense, our manifest approach to content analysis would allow us to see the trend on whether the Court even made an effort to distinguish the difference between one and another.

Finally, what 'ought to' be fair balance is not necessarily what 'is' fair balance in practice. Complicacy on fair balance is depicted primarily from the benchmark rulings made by the CJEU (e.g. *Promusicae, Scarlet Extended, SABAM, Bonnier Audio, UPC Telekabel Wien*, and so forth). However, with no explicit confirmation on the extent of the authoritative impact any of those rulings may cause to the future copyright-related case-laws. It is only fair to presumed these case-reviews have suffered selective bias. In any case, benchmark rulings often too small in quantity, where it most likely impossible to formulate a realistic observation, due to constant change on the fact. A way forward should be paved by empirical observation, the one that seeks to find pattern through changes in case-laws circumstance. The one that coherently unites different scholarly accounts on fair balance structuring and converges those ideas into one predictive empirical model for fair balance analysis.

CHAPTER 2 – The Identification Components of Fair Balance

2.1. Introduction

At face value, Fair balance is a broad assessment doctrine that difficult to measure in static value in a way that intended for an applicative empirical model. Its direct reliance on the fact supplied by the referring national courts would further increase the difficulty to maintain the consistency from one analysis to another. Such underlying assumption eventually drove Realist scholar such as Gunnar Beck (2012) to argue in his work, *The Legal Reasoning of the Court of Justice of the EU*, that adjudication by the CJEU is dynamic to respond to the variability of facts, but vague enough to not guide us with means to concretely evaluate judicial assessment.[90]

Fortunately, as stated in Chapter 1, developing such novel empirical model is not impossible –provided we could identify the substantive components which retconned the whole analytical structure of fair balance. This hypothetical premise is also endorsed later by Beck, who argues that "[i]n spite of there being no scientific method, there are still discernible and repetitive patters of legal and extra-legal arguments that constraint judicial decision-making."[91] Gunnar indeed does not address this specifically to fair balance. However, if we contextualised our preliminary reviews in Chapter 1, we ended up with a preliminary normative hypothesis. We assumed that themes of conflict, style of balancing and the presence of proportionality principle are some of the critical traits surrounding the formulation of the fair balance doctrine, and those components promote repeatable patterns which came across in various texts of preliminary reference delivered by the CJEU. The prevalence at which the patterns expressed in the text, however, remains to be seen throughout this Thesis. In this chapter, we focused on describing the preliminary elements to fair balance analysis, those that involve identification process, from justifying ground to invoke fair balance up to the theme behind the conflict of fundamental rights or freedoms.

2.2.*How do Judges justify their fair balance analysis?*

As an evaluative doctrine, reference to fair balance should be unreasonable without proper reasoning by the CJEU. Komárek (2015) in his theory of legal reasoning suggested that, in the context of adjudication, European courts tend to acknowledge two forms of legal reasoning; the one raised for the sake of building the *argument*, and the one raised to *justify*

[90] Gunnar Beck, The Legal Reasoning of the Court of Justice of the EU (Hart Publishing, 2012), 156.
[91] Beck (n 90) p 156.

the basis of the argument.[92] In the former scheme, the supra-institution such as the CJEU expected to incorporate normative and empirical cues to which they could use to persuade their evaluation on balance checks.[93] As of the latter, the Court also need to establish legitimacy as to why they could invoke fair balance in the first place. We recognised from previous preliminary review how little the discourse was trying to describe the justifying grounds or the precondition to invoke fair balance doctrine.

In the theory of judicial law-making, Rubin and Feeley (1998) suggested that any 'legal doctrine must have a beginning'.[94] It can be either traced by reference to previous judicial decisions, or literal interpretation of legal texts.[95] The authors understood that such 'casuistic relationship' somewhat expected by any Court treated as a public institution. The willingness to establish preconditions or justifying grounds to any doctrine driven by a general desire to act in proper fashion –to comply with a set of behavioural expectations.[96]

In the context of CJEU as an institution, the expectation came from both fronts; inward and outward. *Internally*, by justifying the use of legal doctrine, the CJEU would maintain its integrity or consistency in legal reasoning.[97] In a grander scheme, this also prevents the Court to transgress from its judicial power. The premise is relatively simple. To deliberate within the boundary of a legal text, or to exercise mandate prescribed in the text, appropriately what judges are doing everywhere to avoid the accusation of abusing power vested in their respective institutions.[98] For CJEU, whether the Court would later branched out into different methods of legal interpretation (e.g. textual, systemic, teleological, and contextual) is not an issue in so far it could legitimise the legal basis to the doctrine beforehand.

Simultaneously, the Court also aware of its *external* duty to assist the Member States to deliver consistent interpretation at the national level on the regional legal

[92] Jan Komarek, Legal Reasoning in EU Law, The Oxford Handbook of European Union Law, 2015 <https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199672646.001.0001/oxfordhb-9780199672646-e-3> accessed 5/10/2019.
[93] Komarek (n 92) <https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199672646.001.0001/oxfordhb-9780199672646-e-3> accessed 5/10/2019.
[94] Edward Rubin and Malcolm Feeley, 'Creating Legal Doctrine' (1996) *Southern California Law Rev.* 69, p 1990.
[95] Rubin and Feeley (n 94), pp 1996-9.
[96] Rubin and Feeley (n 94), pp 1996-7.
[97] Justin Lindeboom, Taking the European Court of Justice up on its Name <https://verfassungsblog.de/what-role-for-the-european-court-of-justice-integrity-regret-and-hiding-behind-a-positivist-veil-2/> accessed 10/12/2019.
[98] Rubin and Feeley (n 94), p 1996.

instrument such as EU Directives. In here, the duty of consistent interpretation in itself exclusively rested on the national court of the Member States. Nonetheless, what worth noting here is that CJEU, in some occasions, has also confirmed its external duty to supply the national courts with the right interpretive toolkit to enable them [national courts] to exercise national discretion. Such discretion expressed while remains within the boundary of objective and purpose set by the secondary legislation [Directive].[99] It started from its ruling on *Von Colson and Kamann* (C-14/83). In this case, the CJEU highlighted the need for national courts to interpret their national law consistently:

> "(...) in the light of wording and purpose of Directive" in order to support the principle of sincere mutual cooperation between CJEU and national courts [Article 4(3) of Treaty on European Union (TEU)] and to support the binding effect of Directives across all member states [Paragraph 3 of Article 288 of Treaty on The Functioning of the European Union (TFEU)].[100]"

The interpretation further developed by the Court in *Marleasing* (C-106/89), to which the Court stressed that, in order to help national courts to exercise their effective judicial review at the national level, It owes the national courts to provide the right approaches, methods, or rules of interpretation to guide the national courts to approach their legal inquiry.[101] So far, the current state of literature at least endorsed two views in legitimising the doctrine. One which based on a strict application of copyright rules (the *formalist* school) and the other half derived from the use of precedence as a means to facilitate institutional expectation (the *realist* school).

2.2.1. The Formalist views – *Preconditions based on Source of Laws*

In a doctrinal overview provided by Capurso (1998) on how 'Judges judge', he describes formalist-oriented judges as those who produce judicial decision based on two fixed elements: the facts and the rule of law.[102] In their views, a ruling should be centred on the

[99] For example in, *Marleasing* (C-106/89) judgment, the Court stated that '['[w]hen searching for an answer to the question whether consistent interpretation is possible or not, and thus when addressing the issue of the discretion of the national courts under national law, the crucial factor is the approach, or methods or rules of interpretation or construction prevailing within the Member State concerned.' See Case C-106/89, *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1990], ECLI:EU:C:1990:395, para 6.
[100] See Case 14/83 *Van Colson and Kamann*, ECLI:EU:C:1984:153; See also Sim Haket, 'Coherence in the Application of the Duty of Consistent Interpretation in EU Law', (2015) Review of European Administrative Law: Vol 8(2), p 217.
[101] Case C-106/89 *Marleasing*, ECLI:EU:C:1990:395, para 8; See also Haket (n 100), p 218.
[102] Timothy J. Capurso, 'How Judges Judge: Theories on Judicial Decision Making', (1998) University of Baltimore Law Forum 29(1)(2), p 6.

application of statutory laws, followed by the observation of fact to each case, which then built up into the normative reasoning provided by the Judges.[103] It even argued that when it comes to conflicts of rights, most courts generally concerned with, *prima facie*, normative conflict between explicit statutory rule supporting particular fundamental rights and the fundamental rights regarded as being restricted by the statutory rule.[104] Thus prospect to legitimise a legal doctrine came directly from Judge's own ability to pinpoint the applicable rule of law in developing his/her conclusion.[105] Koen Lenaerts, the current presiding President to the CJEU, had similarly put forth such argument in his 2013 *Study on Judicial Legitimacy*.[106]

If this approach applied in the sub-context of EU copyright law, the literature seems to indicate that the source of fair balance in EU copyright rules traceable in both primary and secondary EU law. Firstly, with the Charter of Fundamental Rights [hereinafter 'the Charter'] become as legally binding as the rest of the EU treaties (i.e. Treaty of the Functioning of the European Union and Treaty of European Union),[107] any fundamental rights referred in the Charter shall apply in all areas of law within EU's general competence. It includes copyright laws as one of the sub-areas in intellectual property law. Article 52(1) of the EU Charter requires the implementation of the Union laws to respect the essence of rights and freedoms recognised by the Charter. [108] While it was making no direct reference to fair balance, this article sets the stage for the doctrine by establishing the scope of the rights, including the constitutional requirement to refrain from violating the essence of those rights (and freedoms).

While there is yet any explicit reference to the doctrine, the Charter might direct the proponent of formalism to recognise the intellectual property as one of the rights potentially at odds with other rights.

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[103] Capurso (n 102), p 6.
[104] David Duarte and Jorge Silva Sampaio, *Proportionality in Law: Analytical Perspective* (Springer, 2018), 112.
[105] Capurso (n 102), p 6; In the other similar line of works, this methodological approach is also considered as 'positivism veil' –where the Court deliberately decide to use or not to use certain doctrine after narrowly reviewing the scope of such doctrine in the relevant laws. See Lindeboom (n 97) <https://verfassungsblog.de/what-role-for-the-european-court-of-justice-integrity-regret-and-hiding-behind-a-positivist-veil-2/> accessed 10/12/2019.
[106] Lenaerts argues that, "…[O]ne must define "what the law is," and only then appraise whether Court are limiting themselves to "interpreting and applying the law." He then further argues that "If the courts find themselves go beyond their duty of prescribing "what the law is", then the courts are lacking the legitimacy to intrude into the law and political process. See Lenaerts (n 46), p 1305.
[107] Treaty of European Union (TEU) affirmed that rights granted under the EU Charter have the same legal value as those established under the foundational treaties. See European Union, TEU, Art 6(1).
[108] See European Union, *Charter of Fundamental Rights of the European Union*, 26 October 2012, 2012/C 326/02, Art 52(1).

As a result, Article 52(1) of the Charter serves as normative grounds to counter overlap of rights and freedom in EU laws. In our case, we are fond as to how Article 17(2) of the Charter secures intellectual property as fundamental rights. However, as indicated in Article 52(1), the right to property is not entirely inviolable. On the contrary, if read in conjunction with its previous provision, Article 51(1), both provisions seems to the possibility for the national authority to circumvent the measure that enforces the property rights, provided that there is a *public-interest ground* to justify such derogation. This provision [Article 17(1) of the EU Charter] alone does not contain greater description as to what considered as acceptable public-interest ground. However, upon looking into the Charter as a whole, it is then apparent that some provisions are indicative of what deemed as grounds for public-interest. For instance, Article 11 of the Charter urges the Member States to publicly protect the freedom of expression and information of individuals in their jurisdiction. Article 7 and 8 of the Charter, on the other hand, recognised the duty to respect privacy and protection on individual personal data. In addition, the Court, in numerous instances, had mentioned the need for the Member States to protect the freedom of internet service providers in conducting their digital operation under Article 16 of the Charter.

As for the secondary source of legislations, doctrinal review by Chavannes (2018) suggests us to revisit the Information Society (InfoSoc) Directive [Directive 2001/29], specifically on its two perambulatory clauses –Recital 3 and Recital 31 respectively.[109] The author considers two clauses acted as the gateway clauses in legitimising fair balance application in the context of EU copyright laws.[110] Accordingly, Recital 3 of the InfoSoc Directive imposes similar effect to Article 52 of the EU Charter in the sense of establishing a *goal-setting* for the doctrine which is to promote harmonisation between rights to property and other rights. The latter, however, expands from the previous scope set by Article 52(1) by incorporating the harmonisation on four freedoms of the internal market (i.e. freedom of movement, goods, services, and capital). On the other hand, Recital 31 of the InfoSoc Directive hold special formal status to fair balance doctrine since it is the only clause which made direct reference to the doctrine. As stated in Recital 31:

[109] Chavannes (n 2), pp 10 & 22; See Council Directive (EU) 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, Recitals 3 & 31.
[110] Chavannes (n 2), pp10 & 22.

> "A fair balance of rights and interest between the different categories of rightholders, as well as between different categories of rightholders and users of protected subject-matter must be safeguarded."

Here, the clause recognises two layers of balancing – rights and interests– which then applies not only to the creators of protected works but also towards the users of the works. Formalist could argue that Recital 31 of the InfoSoc Directive may become a compelling ground to invoke the doctrine. Nevertheless, as Lenaerts (2013) put it, the literal interpretation of a legal provision does not always capture its true meaning.[111] Some Commentaries suggest that, if read plainly, Recital 31 seems to exclusively permit balancing check between rightsholder and the users while being silent on the inclusion of other relevant stakeholders. However, that is only true if Recital 31 read in isolation. As suggested in *Deckmyn* (C-201/13), fair balance should be brought on a broader social context. It needs to account the interests of authors, users, and the concerned third parties – which in this case involves the freedom for Mr Deckmyn and his publishing company, *Vrijheidsfonds*, to produce parody illustration and to rely on Belgium's statutory copyright exception on parody.[112] The term 'intermediary' by itself deserved broader contextualisation since the term could encompass a different set of actors, thus making it difficult for Judges to comprehend it from a mere formalist lens.[113] Eventually, the major concern in this respect is that by strictly referencing fair balance on written laws, there is minimum leeway for the doctrine to reflect into conflicting social and political values set in each copyright dispute brought under preliminary reference.[114]

2.2.2. The Realist views – *Justifying Fair Balance through Precedence*

[111] Koen Lenaerts and José A. Gutiérrez-Fons, 'To Say What the Law of EU Is: Methods of Interpretation and the European Court of Justice, European University Institute Working Papers, AEL 2013/9, p 5.
[112] In regard to Directive 2001/29, CJEU observes the application of Article 5(3)(k) of the said Directive and argues that " It follows that the application, in a particular case, of the exception for parody, within the meaning of Article 5(3)(k) of Directive 2001/29, must strike a fair balance between, on the one hand, the interests and rights of persons referred to in Articles 2 and 3 of that directive, and, on the other, the freedom of expression of the user of a protected work who is relying on the exception for parody, within the meaning of Article 5(3)(k)". See Case C-201/13, *Johan Deckmyn and Vrijheidsfonds VZW v Helena Vandersteen and Others* [2014], ECLI:EU:C:2014:2132, para 27. For reference to Belgium's copyright exception. See Belgisch Staatsblad, 27 July 1994, p. 19297, Art 22(1).
[113] For instance, there are numerous cases of which the Court recognized the presence of intermediaries as those who might affected by the effective protection of copyright, or even the non-conventional users of copyright works (e.g. academics, librarians, governmental usages). See Stephen A. Merrill and William J. Raduchel (eds.), *Copyright in the Digital Era: Building Evidence for Policy* (National Research Council: 2013), p 46.
[114] Alexander Aleinikoff, in his 1987 seminal contribution in *Age of Balancing*, also disfavour restrictive application to balancing test. He stated that, "[b]alancing suggested a particularistic, case-by-case, common law approach that accommodated gradual change and rejected absolutes. See Aleinikoff (n 22), p 961.

Realists approach on legal reasoning, on the other hand, came as a counter-response to formalist or positivist legal reasoning. Realists would outrightly reject the role of statutory laws proposed by the formalists being the dominant force to legitimise judicial doctrine -as such as the doctrine of fair balance.[115] Jerome Frank (1932), one of leading Realist author in judicial decision-making, claims that normative reasoning offered by the Judges came less likely from the rigid application of the written text, but rather through their intuition or "judicial hunch".[116] Haines (1922), describes this intuitive hunch as, "[T]he judge's view of public policy and by the personality of the particular judges". This personal view, according to Haines, is driven by several externalities such as Judge's awareness on political, economic and cultural movements, or judge interpersonal traits (e.g. temperament, personal impulses, lifelong experience, and so forth.).[117]

For supranational Court such as CJEU, however, it is rather challenging to identify the role of individual views in shaping one's legal reasoning. That is particularly the case in terms of legitimising a doctrine. We have briefly described in Chapter 1 of the Thesis on the restriction faced by the CJEU judges in showing their individual takes on the cases. Collegiality, which is the working principle on this court organisation, favours collective, unified, view in a written ruling as opposed to personal individual takes from every single participating judge.[118] Consequently, there are no separate, concurring or dissenting, opinions at the Court.[119] It does not mean that the CJEU judges are incapable of producing their personal judicial opinion creatively. Collegiality, as described technically by Turrene (2017), means that all Judges were taking collective responsibility to formulate a judgment.[120] Often numerous drafts were floored before the final decision reached. Within that process, all members for the Court are responsible, up to the last minute, for drafting their judgment as good as it can be. It then up to the entire chamber to vote the draft in a majority vote, if consensus agreement was unattainable.[121] However, for the sake of this

[115] To support the position of both Realists and Pragmatists on scholarly discourse for balancing test, Aleinikoff further argues that the [a]bandonment of the goal of formal certainty did not necessarily entail nihilism; on the contrary, it liberated scholars to develop and test a new rule for new social condition. See Aleinikoff (n 22), p 957.
[116] See Jerome Frank, *The Law and the Modern Mind*, in (eds) George C. Christie and Patrick H. Martin, Jurisprudence: Text and Reading on the Philosophy of Law (1932), 844, 845; as cited in Capurso (n 102), p 6.
[117] Charles Grove Haines, 'General Observations on the Effects of Personal, Political, and Economic Influences in the decisions of the Judge', [1992] 17 IL. L. Rev. 102, as cited in Capurso (n 102), p 6.
[118] Sophie Turenne, 'Institutional constrains and collegiality at the Court of Justice of the European Union: A sense of belonging', [2017] Maastrict Journal of Euroepan and Comparative Law 24(4), p 576 .
[119] Turenne (n 118), p 579.
[120] Turenne (n 118), p 578.
[121] Turenne (n 118), p 579.

empirical progression, it is almost impossible to identify the creative outlook, or 'individual hunch', of each individual without having access to Court's deliberation process, which made in private.

In their publication on *Creating Legal Doctrine*, Rubin and Feeley (1989), aware on the issue mentioned above and suggested that judges, especially those chained by strict institutional code of conduct, should not be observed as generic persons with motivations like self-interest, but rather as individuals making their decision under certain institutional expectation.[122] What is required for a realist to understand from the pragmatic reality of judicial decision is the reality that centred on the institution itself, or as the authors put it, the institutional expectation.[123]

To Rubin and Feeley (1989), judges operate in a highly political Court environment tends to decide cases by following consistent precedence of existing legal doctrine. It enumerates their general desire to act in proper fashion based on the internal expectation set by the institution.[124] The desire allows the judges to communicate and engage in collective action even when dealing with highly contentious or complex cases.[125] Both authors, however, emphasises that what happened to be 'internal' force of expectation is not directly originate from the institutional own pre-set rules, such as code of conduct. Rather, Judge reflects such expectation from other individuals who also involved within the same institution. To quote Rubin and Feeley (1989):

> "Each individual responds to the expectation of others, and also project expectations to which others must respond. These expectations are learned, but they are learned from others who project them and thus transmit them over space and time. They constitute a network of relations that, in a very real sense, constitutes the institution."[126]

From an empirical standpoint, one could argue that it is possible to discern the realist idea of 'networked expectation' by observing the past case-laws that seeks to legitimise the referral to a fair balance. A legal doctrine heuristically belongs to a specific set of case-laws if it continuously referred in those cases. At the same time, those cases also recognised the existence of the cases that mentioned it beforehand. It is similar to what

[122] Rubin and Feeley (n 94), p 1997.
[123] Rubin and Feeley (n 94), p 1996.
[124] Rubin and Feeley (n 94), p 1996.
[125] Rubin and Feeley (n 94), p 1997.
[126] Rubin and Feeley (n 94), p 1998.

Favale (2018) perceived as copyright jurisprudence. In his idea, The CJEU uses principles and doctrines to induce policy reform in the currently unharmonised of European copyright regime, which in turn underpin further European jurisprudence, in a virtuous circle.[127] The author made no mentioned of networked expectation, but in his writing, he theorises the existence of embedded motivation by the Court to promote harmonising agenda. This interaction eventually translates into the Court usages of varying degrees of doctrines to advance a pro-harmonisation preliminary ruling.[128]

Literature sees the contribution made by certain case-laws to evolve fair balance into a unique copyright-specific doctrine we saw today. Mezei and Harkai (2017) claims that both *Scarlet Extended* (C-70/10) and *SABAM* (C-360/10) have allowed the CJEU judges to confirm that copyright laws do not work as *primus inter pares*, or the first and absolute rules when other fundamental rights and freedoms (i.e. protection of personal data and freedom to conduct a business) could be gravely injured.[129] Kucrezawi (2017) indirectly implies the only reason we started to associate the doctrine with the Charter in the first place is that the Court had developed an argument in *Promusicae* (C-275/06) to recognise the existing positive obligation to protect various fundamental rights against the right to property -through the means of balancing check.[130] Husovec (2016) subsequently added that in *Coty Germany* (C-230/16), the Court referred back to *Promusicae* to legitimise further their stance that the positive obligation to protect other rights should not only be recognised but also effectively enforced.[131] Hence, a practical realist would see the dynamic of a judicial hunch, not necessarily from the individual personality of CJEU judges, but from their collective conscious decision to select which case(s) is the most viable one to advance their reference to a fair balance.

2.3.Themes of conflict

In Chapter 1, we discovered the discussion seeking to conceptualise 'conflict' which then lead to a greater discussion on fair balance analysis is relatively scarce. Scholars would often adopt a common assumption that a copyright conflict, by its very nature, involves the clash of values between rights to property and other rights and freedoms. While that

[127] Favale et al. (n 15), p 4.
[128] Favale et al. (n 15), p 5.
[129] Mezei and Harkai (n 15), p 17; *Scarlet Extended* (n 11); *SABAM* (n 11).
[130] Aleksandra Kuczerawy, The Power of Positive Thinking: Intermediary Liability and the Effective Enjoyment of the Right to Freedom of Expression, [2017] JIPTEC 10(2), p 232 .
[131] Husovec (n 6), p 11; See C-230/16 *Coty Germany GmbH v Parfümerie Akzente GmbH* [2017], ECLI:EU:C:2017:941, para 3.

remains true at the core of the current state of the art, more contributions had come out and shed lights on different themes carried in copyright conflict.

First, we took aspiration from the doctrinal study carried by Giovanella (2017) on conflict of rights in which she described that conflict embodies two dimensions of conflict; the intra-rights conflict and inter-rights conflict.[132] It followed by his introduction of two thresholds of intensity in the conflict of rights: total conflict and partial conflict. Secondly, the emerging literature also suggests that conflict is not only represented by rights but also by the interest vested enumerates within different stakeholders. Therefore, for those who associate conflict with the clash of stakeholders' interest, the focus is centred around the relevant stakeholder when conflict took place.

2.3.1. Dimensions of Conflict: *Intra-Rights, Inter-Rights, Partial, and Total*

The literature at least recognises two general situations to which conflict of rights are prevalent. In the first instance, the conflict might happen exclusively within a single area of fundamental rights. This internalised conflict also referred to as *intra-rights conflict*. [133] The conflict denotes a condition where two aspects of law in tension despite being protected under the same umbrella of fundamental rights.[134] Hence, consider a hypothetical situation where the enforcement of copyright measure considered as violating other aspects of law protected under the rights of property, such as trademark, patent, geographic indication.

An example of this would be one of the recent preliminary rulings, *Cofemel* (C-683/17).[135] In this case, the Court confronted with a question on the interplay between copyrights and design rights. To shed some lights, design rights protect the functional appearance of products, whereas copyright generally meant to protect the novel and artistic aspect of work. The referring court [Portugal Supreme Court] in *Cofemel* asked the Court of Justice on the possibility of copyright subsisting in the clothing line design of one of the parties of the dispute, G-Star Raw. In here, the Court recalls its opinion that, in principle, the "works" which are the result of human intellectual creations are potentially protectable by the existing copyright system. However, in order to attain such protection, the clothing line in question should demonstrate beyond its distinct 'aesthetic effect', since such feature

[132] Frederica Giovanella, The thorny issue of balancing rights, in Frederica Giovanella (eds.) *Copyright and Information Privacy* (2017), p 8.
[133] Giovanella (n 132), p 8.
[134] Giovanella (n 132), p 9.
[135] See Case C-683/17 *Cofemel – Sociedade de Vestuário SA v G-Star Raw CV* [2019], ECLI:EU:C:2019:721.

is highly subjective and does not foster sufficient legal certainty.[136] The intra-rights tension, in this case, expressed by the Court attempt to prevent the protective scope of design right from being intruded by the copyright.[137]

The second situation, or also known as *inter-rights conflict*, prescribes a situation where two different rights collide.[138] This situation is more commonplace in fair balance analysis, as it perfectly captures the essence of the doctrine, which is the judicial tool to mitigate conflict between one right against one or more rights and freedom. However, there is more nuance to this state of conflict. According to Giovanella (2017), an inter-rights conflict could affect the different rights either directly or indirectly. In this respect, the author describes that conflict is *direct* if there is no pre-existing rule(s) seeking to balance competing rights. Suppose we look back at our previous discussion on a formalist precondition to fair balance [Chapter 2, Section 2(2)], this degree of tension hardly known in CJEU's case-laws repository. Accordingly, most of rights and freedoms enshrined in the Charter have been supported with its own balancing rules, be it from the Charter itself (Article 17(2) of the EU Charter), or the secondary legislation (Recital 31 of InfoSoc Directive). However, it is yet to see if this situation is applicable in a condition where rights to property rights coincide with rights protected outside the scope of the EU Charter, i.e. human rights –which is beyond the scope of this thesis research.[139]

Alternatively, the conflict of *inter-rights* is treated as *indirect* when the law has already regulated the interaction between these rights, but then still requires a

[136] With the current absence of English translation, The summary of this case is based on case-law reviews by the following op-eds articles. Eleonora Rosati, 'BREAKING: CJEU rules that only requirement for copyright protection of design is their originality (IPKAT, 12/10/2019), http://ipkitten.blogspot.com/2019/09/breaking-cjeu-rules-that-only.html; Maria Sol Porro, European Union: Copyright Doesn't Wear Prada (Moeller IP Advisor, 4/11/2019) http://www.mondaq.com/Argentina/x/859680/Copyright/Copyright+Doesnt+Wear+Prada; Tom Oliver, Copyright clarification from Europe's top Court (i-am, 25/10/2019), https://www.iam-media.com/copyright/cjeu-copyright-cofomel accessible 20/12/2019.

[137] Alternatively, there are at least single instance in *Mengozzi v. Eureopean Union Intellectual Property Office* [EUIPO] (T-510/15) where the Court lower chamber, the General Court [Court of First Instance] have entertained the conflict between two intellectual property rights. In this case, the General Court ruled in favour with the EUIPO's board of appeal decision to cancel the registration of trademark brand 'TOSCORO', which according to both EUIPO and the General Court would likely to be confused with 'TOSCANO', an edible vegetable oils and olive oils affiliated to Tuscany region in Italy. Case T-510/15 *Mengozzi v. Eureopean Union Intellectual Property Office* (EUIPO) [2017] ECLI:EU:T:2017:54.

[138] Giovanella (n 132), p 8.

[139] It is a conventional wisdom where human rights are considered not mutually exclusive to fundamental rights, specifically against those rights enlisted in the EU Charter. Búrca explains that this is because by the formulation of the EU Charter, human rights were considered unrelated to the project of economic integration and the task of human rights protection was left, instead, to the Council of Europe's ECHR. Gráinne de Búrca, 'The Road Not Taken: The European Union as Global Human Rights Actor' [2011] 105(4) The American Journal of Int. Law, p 650.

supplementary balancing check.[140] Here the supplementary balancing needed when the Court considers the application of balancing rules could not satisfy the norms surrounded the competing rights. On this account, conflict is inherently encompassing two axiomatic hierarchies; the conflict on rules, then followed by the conflict on principles, which supersedes the hierarchy of the latter.[141] The latter characterised as 'broad norms', often vague and indeterminate, and possessed value of high generality –the features that represent the fundamental rights. Hence, once balancing rules considered to be insufficient to facilitate the protection of conflicting principles, then the Court could subsequently utilise the meta-balancing tool that is fair balance analysis.

Literature does not stop there. To give nuance to the intra-rights and inter-rights, few authors suggest that in each situation, a conflict could translate into either *partial* or *total* conflict.[142] A *total conflict* came into play when certain rights must prevail in order to satisfy the other competing rights.[143] Consider, for example, a classic example of hypothetical 'constitutional dilemma' involving two conjoined twin babies.[144] If baby A considered as parasitic to baby B, then saving baby B would mean demise for baby B. Here, a total conflict came with the right to life of baby A being pitted against baby B. The lack of room for concession attributed by the fact that the measure in question invites opposing claims which are mutually exclusive and symmetrical.[145] In the context of the CJEU, Husovec (2016) describes that the Court has to declare the incompatibility of national or Union provision directly associated with other fundamental rights or freedoms. It means the Court can only recourse its review on the two following outcomes: (1) to proclaims a national provision as incompatible; or (2) directly overturn a provision of secondary Union law, as per instruction made by Article 267 TFEU.[146]

As to how his theory could expandable to copyright conflict, Husovec cites *Deutsche Grammophon* (C-78/70) alongside *Phil Collins* and *Tod's and Tod France* (C-92/92), as two exhibits of cases where the Court confronted with total conflict to EU-wide

[140] Giovanella refers this situation as the 'second order' balancing, or 'meta-balancing'. See Giovanella (n 132), pp 8-9; See also Brems (n 43), p 8.
[141] Giovanella (n 132), p 10
[142] Husovec (n 6), p 240.
[143] In words of Brems, "if we support one claim, we extinguish the other forever". Brems 27.
[144] , Brems (n 43), p 23.
[145] Brems (n 43), p 27.
[146] See Consolidated Version of the Treaty on the Functioning of the European Union (TFEU) [2016] OJ C202/1, Art 267; See also Husovec (n 6), p 240.

copyright issue.[147] In *Deutsche Grammophon*, The Court confronted with a reconciliation task for the rightholders ability to prohibit the import of goods in order to organize the import according to national markets vis-à-vis, the principle of free movement to distribute goods irrespective of Member State borders. Instead of finding a compromise between the two vices, the Court acted as a negative legislator and denounced the national legislation set by the Member State (Germany). It eventually permits the manufacturers of sounds recording to prohibit the sale of their products to other Member State provided that it already distributed in the territory of first Member State [Author's country of origin].[148]

Meanwhile, in the latter case, the Court preclude the validity of injunction seeks by Phil Collins and its affiliated phonogram distributor.[149] The injunction based on German law that would permit the national authority to deny those who has been granted of exclusive rights by the author [Phil Collins] from marketing his work to the certain Member States –provided that the designated Member State(s) for distribution has not ratified the 1961 Rome Convention on the Protection of Performers, Producers of Phonograms, and Broadcasting Organization. In such similar fashion to *Deutsche Grammophon* (C-78/70), the Court finds the measure in question in *Phil Collins* cannot co-exists with the internal market regime as it violates the essence to the free movements of goods, the principle of non-discrimination, that prohibits the selective distribution of creative works.[150]

Partial conflict, on the other hands, suggests a threshold of conflict where it is possible to reconcile competing rights to a certain degree, as opposed to 'win or lose' situation illustrated in total conflict. In intra-right conflict scheme, partial clash may occur when two or more supporting norms of the same rights overlap while simultaneously not entirely negating each other valued essence. We refer back to *Cofomel* case as an example to *partial*-type of *intra-conflict*. The case concerns two sub-types of property rights – copyrights and design rights– which were at odds to one another for offering legal

[147] Husovec (n 6), pp 255-257; Case C-78/70, *Deutsche Grammophon Gesellschaft mbH v Metro-SB-Großmärkte GmbH & Co. KG* [1971], ECLI:EU:C:1971:59; Case C-92/92, *Collins and Patricia Im- und Export v Imtrat and EMI Electrola* [1993], ECLI:EU:C:1993:847.

[148] Case C-78/70, *Deutsche Grammophon Gesellschaft mbH v Metro-SB-Großmärkte GmbH & Co. KG* [1971], ECLI:EU:C:1971:59, para 13.

[149] Case C-92/92, *Collins and Patricia Im- und Export v Imtrat and EMI Electrola* [1993], ECLI:EU:C:1993:847, para 33.

[150] However, it should be noted that in *Phil Collins* ruling, CJEU clarifies that selective distribution would be in compliance with the free movement of goods when such distribution carried uniformly and applies with objective criteria of select its distribution target unless it could be supported with uniform and objective criteria over such limited distribution. See *Coty Germany* (n 131), para 42.
Case C-683/17 *Cofemel – Sociedade de Vestuário SA v G-Star Raw CV* [2019], ECLI:EU:C:2019:721

protection to the same object of creative works, the clothing lines. However, upon closer inspection, the Court finds that none of the rights needs to predominate others in order to thrive. Thus, to put delicate balance to the conflict, the Court only need to describe the limit to how each sub-types of rights enforceable against the object in question (e.g. clothing line).

There is not much of difference between partial intra-rights conflict and partial inter-rights other than the latter conflict would incorporate two or more different rights or freedoms. In the general scheme of partial inter-rights conflict, neither of two or more opposing rights necessarily need to be entirely disregarded.[151] As a result, overlaps in partial conflict generally need to be investigated on a case-by-case basis. Not only by looking at the externalities of facts within case but also on a teleological interpretation of the regulation in question.[152]

2.3.2. Stakeholder Interests

As seen from the Chapter 1 preliminary review, there is a recurring view to see the conflict of rights beyond the tension between the exhausted list of rights and freedom enshrined in EU primary laws. The Court also need to underline the overlap of stakeholder interests caused by practical implementation of the copyright legislation across Europe. The issue with incorporating stakeholders review in the current literature, however, is that, more than often, legal scholars failed to elaborate who these actors are and what they represent in the ongoing conflict.[153] Textbook definition of stakeholders offered in the work of Friedman and Miles (2006). They define stakeholders as 'any natural persons, groups or legal entities' to which they can 'influenced by, or can itself influence, the activities of the organization'.[154] In retrospect to EU as a public institution, such activities may encompass the creation of the law or the measure to judicially review the law from its corresponding body, such as the CJEU. Specifically, in the context of copyright laws, Macmillan (2007) identifies at least three primary stakeholders: The creator, corporate bodies, and consumer.[155]

[151] Giovanella (n 132), pp 8-9; Brems (n 43), p 8.
[152] Brems (n 43), p 27.
[153] Trisha Meyer, *The Politics of Online Copyright Enforcement in the EU: Access and Control* (Springer: 2017), 132.
[154] A Friedman and S. Miles, *Stakeholders: Theory and Practice* (Oxford University Press: 2006), pp 8-10.
[155] Fiona Macmillan, *New Directions in Copyright* Law (Edward Elgar: 2007), p 128.

Creators are individuals responsible for the creation of protected work. They benefited from the dissemination of their creation, and may even benefit even more for providing access to their works to a bigger market audience.[156] *Corporate bodies*, on the other hands, possessed different category of roles in copyright market. It can serve as an entity entrusted by the creators to collect copyright revenues on behalf of the creators (collecting agencies), an industry to foster the production of the works (e.g. recording labels) or an intermediary to disseminate the works (internet service providers, user-uploaded service provider). Here, distinction matter. While the first two entities tend to associate themselves as the beneficiary to the significant enforcement of copyright, the last one would often fall victim to excessive enforcement of copyright protection (e.g. broader intermediary liability to host protected goods) –rendering their ability to exercise the freedom to conduct business effectively.

Finally, the group of '*consumers'* includes people who are currently paying to purchase copies or otherwise acquire authorized access to copyright works for purposes of consuming and, or creatively building upon those works. On the broader definition, a consumer could cover the commercial and non-commercial firms that make use of copyrighted works in the process of supplying other goods and services.[157] Think, for example, a motion picture firms supplying a movie while incorporating licensed music, or library which supplied the public with access to copyrighted books.

One doctrinal research theorizes the CJEU deep-engagement with different stakeholders' interest in creating their preliminary rulings. That is, according to Mathieu and others (2018), because the Court not only bound to handle the judicial law-making process of producing preliminary reference but also, crucially, to maintain the policy environment within which they act.[158] Often, we consider national courts as the only figure that relevant to the Court for their role in supplying relevant fact in the preliminary proceeding. However, a more groundwork observation by the authors shows that it was those stakeholders mentioned beforehand who are responsible for inviting the Court and national court to intervene by pursuing their interest through litigation. In this respect, these stakeholders are in a position to navigate the development of fair balance as doctrine

[156] Macmillan (n 155), p 129.
[157] Merrill and Raduchel (n 113), p 38.
[158] Emmanuelle Mathieu, Christian Adam and Miriam Hartlapp, From High Judges to Policy Stakeholders: A Public Policy Approach to the CJEU's Power, (2018) Journal of European Integration 40(6), p 654.

by determining which conflict of interest the CJEU need to resolve.[159] Conversely, if stakeholders conspire not to activate review, judges will accrete no influence over the doctrine or the EU copyright rules in general.

[159] Mathieu et al. (n 158), p 654

CHAPTER 3 – Evaluative Components to Fair Balance

If the identification components serve as the foundation to invoke fair balance in the first place, then the evaluative components function to deliver the final output to the balancing test. In this Chapter, variability to fair balance analytical approach observed, starting from the classic weight formula model introduced by Robert Alexy and up to a contemporary review of the fair copyright balance offered Caterina Sganga.

3.1.Style of Balancing

To confront the underlying pragmatism of unstructured fair balance, this Section will describe two styles or models of balancing. The first model, commonly known in the theory of constitutional balancing as the Weight Formula, which was endorsed by Robert Alexy (2003). Following the classical take from Alexy, we then proceed to a more specialized one provided by Caterina Sganga based on three evolutionary phases of 'copyright fair balance'.

3.1.1. Original Theory on Structured Balancing: Alexy's Weight Formula

As we had discussed in the preliminary review, Alexy's contribution to judicial weighing and balancing has been considered as one of the groundwork treatises in constitutional legal balancing. His 'Weight Formula', has shed light on the epistemological process in weighing over the German Constitution, in particular on its catalogue of fundamental rights (*Grundrechte*). He understands that values and principles tend to collide, which then can only resolve through balancing exercise.[160] On his account, balancing consist of three stages. First, it started when courts need to establish the degree of nonsatisfaction of, or detriment to, measure in question. Second, when the importance of satisfying the competing principle established. Finally, when courts came into the conclusion on whether or not the importance of satisfying the competing rights justifies the detriment to, or non-satisfaction of, the base rights.[161]

Within those three phases, Alexy further argues that judges would put categorical values –*light*, *moderate*, and *serious*– to measure the degree of satisfaction and dissatisfaction of rights.[162] Satisfaction entails the weight of argument in favour of specific rights. Meanwhile, dissatisfaction corresponds to the intensity of interference caused by the

[160] Alexy (n 64), p 133.
[161] Alexy (n 64), p 136.
[162] Alexy (n 64), p 136.

measure in question. To elaborate on this, He gave us illustration on public regulation of smoking. Accordingly, there is a higher risk of seriously hurting people's rights to health without smoking regulation. The argument to support interference on smoking sale, therefore, weight heavily.[163] A measure that restricts the sale of tobacco might be treated as *light*, while a total ban on all tobacco products would count as *serious* interference. Hence, if the intensity of interference or dissatisfaction identified as *light*, and the degree of satisfaction from mitigating health risk treated as *serious*, which lead the Court to opt supporting the sale restriction on tobaccos. However, if the measure of interference stood at equal value to satisfying the rights, then judges should reconsider the availability of less intrusive options. This rationale is corresponding to Alexy's maxim of balancing which is: "The greater the degree of non-satisfaction of, or detriment to, one principle, the greater the importance of satisfying the other."[164]

3.1.2. *New Takes on Weight Formula:* The Epistemic Quality of Weigh Formula

In the contemporary review on Alexy's Weight Formula, Lindalh suggests a new approach to Alexy's existing Weight Formula, or as he refers it –the "complete formula". The formula is as follows:

$$W_{1,2} = \frac{I_1 \cdot W_1 \cdot R_1}{I_2 \cdot W_2 \cdot R_2}.$$

Notes:
I = Intensity of Interference
W = Weight of the Claim
R = Reliability of Empirical Assumption

Figure 1. Lars Lindalh's Proposed Formula to Robert Alexy's Balancing Test[165]

With this arithmetic structure, Lindalh tried to transpose Alexy's classic formula by putting two competing claims ($W_{1,2}$) as quotient obtained from multiplication and division from three numerators; $I_1 \cdot W_1 \cdot R_1$ for the primary claim and $I_2 \cdot W_2 \cdot R_2$ for the secondary one. In here, Letter *I* stand for *intensity of interference* against the specific principle or fundamental rights (While absent from the formula, Lindalh's denotes this as P_1).[166] Akin to Alexy's theory, the intensity assigned with categorical values of serious, moderate, and light. W represents the abstract weight of a claim, or in Alexy's terms, the importance of satisfying principle or rights. The intensity of abstract weight also adopts the same

[163] Alexy (n 64), p, 136.
[164] Lars Lindalh, 'On Robert Alexy's Weight Formula for Weighing and Balancing' in Augusto D. Silva (ed.), *Liber Amicorum de José de Sousa e Brito* (Edicoes Almedina: 2009), 173-93
[165] See Lars Lindalh, (n 164), p 174
[166] Lars Lindalh, (n 164), p 174.

categorical value as Interference (i.e. serious, moderate, light). What is rather novel is Lindalh's decision to incorporate third variable into Alexy's existing model (i.e. interference of rights vs satisfaction of rights). He took specific nods to Alexy's position on fact or empirical assumption. Accordingly, Alexy's held that: "[T]he more heavily an interference with a constitutional right weigh, the greater must be the *certainty of its underlying premises* [emphasis added]".[167] Lindalh seems to suggest that the overall Alexy's formula are not only tied around the substantive quality of interference and satisfaction of rights but also the epistemic quality of fact.

If we refer back to his formula, Lindalh's denotes R as the *reliability of empirical assumption* in which he later assigned into three parameters: *reliable*, *plausible*, and *not evidently false*.[168] These seem relatively self-explanatory. An interference or claim of satisfaction considered as *reliable* if there is direct proof of causality between interference and the harm inflicted against the certain opposing rights, or direct proof of the relationship between interference and greater protection it seeks to achieve against other rights.[169] The interference, alternatively, could be treated as *plausible* if there is a degree of empirical uncertainty that it would either protect certain rights or derogate the rights. Meanwhile, *not evidently false* indicates the fact presented before the Court to be less maintainable to support the legal claims.[170]

3.1.3. Sganga's Model of Balancing: *A Decade Look into Fair Balance Doctrine*

Whereas Alexy and Lindalh offer us more generalized views of balancing test with the use "Weigh Formula", Caterina Sganga in her 2018 publication, provides more direct takes to the structured evolution of fair balance. Caterina claimed that fair balance possesses a certain degree of structure which traceable from three periods of EU copyright jurisprudence. The first period which Sganga refers as prehistory phase started in 1999 up to 2008. In this era, fair balance presence in copyright cases has not directly confirmed, but the CJEU had set up starting analytical method to support the doctrine's growth in the future. Two cases referred to influence this era: *Metronome Music* (1998) and *Laserdisken* (2006).[171] In *Metronome Music*, the Court started to develop the identification mechanism

[167] Alexy (n 64), p 132; Lars Lindalh, (n 164), p 178.
[168] Lars Lindalh, (n 164), pp 178-9.
[169] Lars Lindalh, (n 164), p 190.
[170] Lars Lindalh, (n 164), p 191.
[171] Case C-200/96, *Metronome Musik GmbH v Music Point Hokamp GmbH* [1998], ECLI:EU:C:1998:172; Case C-479/04, *Laserdisken ApS v Kulturministeriet* [2006], ECLI:EU:C:2006:549.

by firstly qualifying IP rights as part of the general principle of EU laws.[172] It then subsequently evolved in *Laserdisken* when the Court formally assigned IP rights as a component of the right to property.[173] In this period, the Court attest to the validity of copyright measure by firstly identify the right or freedom conflicting with copyright, to which commonly based on the suggestion of the referring Court.[174]

The follow-up phase referred by Sganga as '*Promusicae and its progeny'* phase. The phase premiered from 2008, the years *Promusicae* (C-275/06) ruling initially introduced and up to 2013.[175] The period primarily revolves around the introduction of *Promusicae* ruling and the case-laws that subsequently follows. Accordingly, *Promusicae* introduces two interpretive prescriptions to copyright-related adjudication by the CJEU. One, it requires Member States to interpret EU secondary laws on copyright (Directives) in a way that enable fair balance to be struck between various fundamental rights.[176] Second, it demands the national authorities and courts to evaluate the fairness of national measures based on prescriptive reading on those secondary laws by also paying attention to the relevant fundamental rights and other general principles of Community law.[177]

What is novel from Sganga's observation is not so much about the two significant steps she described. Those steps frequently become objects of discussion whenever *Promusicae* ruling deconstructed in the literature.[178] Instead, the author distinctly concludes that identification of conflict of rights might not be necessary to warrant the reference to fair balance.[179] She offers an example from *Painer* (C-145/10) ruling.[180] The case concerning the unauthorized publication by the third parties, the newspaper publishers, on photographs portraying the abduction of an Austrian minor in 1998. In this case, the CJEU acknowledges the potential clash between rights to property and freedom of expression, based on facts initially established by the Viennese Commercial Court (*Handelsgericht Wien*) referring court established initially from national court referral. The case, according to Sganga remains truthful to *Promusicae* with the preliminary focus to

[172] Case C-200/96, *Metronome Musik GmbH v Music Point Hokamp GmbH* [1998], ECLI:EU:C:1998:172, 21;
[173] Case C-479/04, *Laserdisken ApS v Kulturministeriet* [2006], ECLI:EU:C:2006:549, 62
[174] 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 (August 1, 2019). European Intellectual Property Review 11, p 2. Available at SSRN: https://ssrn.com/abstract=3414642
[175] Sganga (n 173), pp 2-3.
[176] *Promusicae* (n 7), para 68.
[177] *Promusicae* (n 7), para 70.
[178] Teunissen (n 5), p 579; Husovec (n 6), p 250.
[179]Sganga (n 173), p 3
[180] *Painer* (n 11).

identify the conflict of rights. However, *Painer* went beyond its predecessor by urging the referring court to observe whether the EU provision(s) of which the parties relies on, would accommodate fair balance in the first place. It happens not to be the case in *Painer*, where the defendant relies on Article 5(3)(e) of Directive 2001/29 which solely aimed to grant the member states powers for the protection of public security and not to facilitate freedom of expression to the news outlet.[181] Hence *Painer* serves as important delineation where the Court decidedly narrowed down the scope of *Promusicae* by accepting the interpretation based exclusively on rights to property, with secondary consideration on the protection of public security.

The final phase in Sganga's model involves two evaluative components. It firstly verifies whether the contested provision affected the core content (or essence) of the rights and freedom protected by the Charter. This verification application two-ways for both right to property and the other opposing rights or freedoms. Then the CJEU moved to the assessment of the presence of a fair balance. These methodological steps could easily refer jointly as the *proportionality test* phase. Here Sganga refers to *Sky Österreich* (C-283/11) and *UPC Telekabel* (C-314/12) rulings to conclude that balancing assessment adopted similar adjudication process to proportionality assessment which comprises of four prongs test: (i) the legitimate aim of the measure; (2) appropriateness, or the effectiveness and adequacy to reach its policy goals; (3) necessity, or to oversight the availability of less restrictive measure to achieve the same goals; (4) strict proportionality, which require the Court to consider whether the measure managed to strike a proportionate balance between protection of competing freedoms or rights at stake.[182]

3.2.Presence of proportionality test

The proportionality test is a methodical approach to manifest the principle of proportionality. Like the principle itself, it encompasses two facets. One that concern with the relationship between means and ends in law and policymaking while also providing normative reflection to such relationship (e.g. would there be an intrusion on higher normative values as a result of implementing the laws or measure).[183] Afori (2014) suggest that the proportionality test would manifest in copyright-related adjudication, whenever the

[181] Painer (n 11), para 163.
[182] Case C-283/11 *Sky Österreich GmbH v Österreichischer Rundfunk* [2013] ECLI:EU:C:2013:28, 50, 54, para 55; *UPC Telekabel* (n 17), para 47.
[183] Rob van Gestel and Peter van Lochem, 'Evidence-Based Regulation and the Translation from Empirical Data to Normative Choices: A Proportionality Test', (2018) ELR 2, p 121.

Court confronted with preliminary questions on copyright exception and limitation. These inquiries [exceptions and limitation] often have to be answered by the Court with broad discretionary so that the national courts could resolve their cases, from a pragmatic and fact-driven standpoint.[184] For this, the proportionality principle akin to the fair balance for being the 'trade-off' discretionary tools of reconciliation between competing norms, principles, and values.[185]

However, just like Sganga's description on the proportionality principle, discussion on the proportionality test thus far been theoretical. It lacked the practical insight to actualize strategy in transposing the components of proportionality test (i.e. legitimacy, suitability, necessity, strict proportionality) into an empirically-grounded model. The only current study which stood out is the study on empirical analysis of proportionality judgment by Sulitzeanu-Kenan and others (2016).[186] The authors' work does not directly address the operationalisation of the proportionality test in the CJEU.[187] However, if we understood proportionality principle as part of a universally known general principle of laws, then their works should be treated novel and considered as a parameter to formulate our empirical model. This Section, therefore, discussed the manifestation of proportionality within the text of Court judgment as hypothesized by Sulitzeanu-Kenan. According to the authors, the model of proportionality judgments comprises of four steps: legitimacy, suitability, necessity, and balancing in the strict sense (proportionality *stricto sensu*).

3.2.1. Infringement of Rights

The first step offered by Sulitzeanu-Kenan's model of empirical analysis of proportionality judgment is to assess the values on the 'Infringement of Rights'. The initial step requires the analyst to observe the extent to which the Court evaluate if the policy or measure in question infringes one or more constitutionally protected rights.[188] According to the authors, the rights under review should be absolute, that is, placed above the mundane cost-benefit policy considerations, but simultaneously relative, in the sense of being

[184] Afori (n 22), p 909.
[185] Gestel and Lochem (n 183), p 123.
[186] Sulitzeanu-Kenan et al. (n 14), pp 348-82.
[187] Sulitzeanu-Kenan and others developed an empirical model to assess the formation of proportionality judgments devepoled by Israeli Surpreme Court on its landmark ruling, *The Public Committee against Torture in Israel vs. The Government of Israel*. The experiment relies on external samples of Israeli legal experts (n = 331) and focus on observing expertise general perception on the proportionality test used by the Supreme Court on this case. Sulitzeanu-Kenan et al. (n 14), pp 348-82.
[188] Sulitzeanu-Kenan et al. (n 14), p 351.

indifferent on the primacy other competing rights and freedoms.[189] Sulitzeanu-Kenan's parameter on infringement of rights seems to take the same approach as to formalist's take on the source of fair balance, except with the different premise than the latter. For infringement check, Sulitzeanu's proposed to look explicitly at the formal source of rights (e.g. primary laws) which has allegedly been infringed by the measure in question as opposed to observing the reference on the same source which permit the balancing check (e.g. Article 17(1) of the EU Charter).

3.2.2. Suitability

For its subsequent steps, the model instructs the examination of regulatory aim. More specifically, Judges expected to reflect on the counterbalance of negative value imposed by the infringement of rights. The revolving theory is that during this phase, the courts pushed to put into consideration if the measure and its intended aim are relevant and worth to implement.[190] In Sulitzeanu-Kenan's model of proportionality analysis, the respondents asked if the measure or policy could rationally lead to the desired outcome through a nominal scaling of 'yes and no'.[191] Thus if applied to the context of judicial review, Sulitzeanu-Kenan empirical transposition on the concept of suitability can be understood as follows: A measure or policy had the potential to be further evaluated for proportionality check if it possesses a minimum degree of effectiveness. Meanwhile, an ineffective measure cannot be further reviewed. It is due to the reason of measure in place is considered irrelevant and not being able to contribute to the pursued aim.[192]

3.2.3. Necessity

Once infringements of rights and regulatory aim have established, the principle test proceeds to evaluate the 'necessity' or 'least restrictive means'. It examines whether the measure does not curtail a right any more than an available alternative measure equally capable of attaining the stated goal.[193] The general premise of necessity is a quest for effective policy or measure.[194] The national authorities are required by the CJEU to refrain

[189] Sulitzeanu-Kenan et al. (n 14), p 351.
[190] Sulitzeanu-Kenan et al. (n 14), p 351.
[191] This nominal 'yes and no' query also replicated in other variables of proportionality test, to which he worded as follows: "1*) is the goal that plan intended to achieve a worthy goal? 2) Is the […] plan adequate and effective for achieving the goal? 3) Is the […] plan a practical means to achieve the goal with minimal infringement of human rights? 4) Is the proportion between the advantage to be gained by implementing the military plan and the expected infringement of human rights adequate?*". Sulitzeanu-Kenan et al. (n 14), p 361.
[192] Teunissen (n 5), p 583.
[193] Sulitzeanu-Kenan et al. (n 14), p 351.
[194] Afori (n 22), p 910.

from opting for policy or measure, which lead to more severe harms to fundamental rights when there is a least onerous measure accessible to them.[195] In Sulitzeanu-Kenan's model of proportionality analysis, the authors narrowed the broad meaning of 'least restrictive means'. To do so, the authors tried to enlist a handful of relevant alternative measures, which the authors presume could attain the same goal as with the measure in question.[196]

3.2.4. Balancing in Strict Sense

The fourth step, balancing in the strict sense (proportionality *stricto sensu*), took place at the final phase of proportionality assessment. If necessity dictates possible alternative, balancing in a strict sense demands the Court to assess whether the benefit of policy or measure justifies the costs of infringement. According to Sulitzeanu's and others, this phase combines all three initial tests in order to deliver the concluding analysis on the proportionality principle. As a result, falling to pass the initial steps would lead the Court to dismiss this final phase of the test.[197]

[195] Teunissen (n 5), p 582.
[196] Sulitzeanu-Kenan et al. (n 14), p 357.
[197] Talya Stainer, Mordechai Kremnitzer, and Andrej Lang, 'Proportionality in Action: Comparative and Empirical Perspectives on the Judicial Practice', (2018) Israel Democratic Institute Working Paper, p 4.

CHAPTER 4 – Systematic Content Analysis

4.1.Introduction

It stems from the previous two chapters [Chapter 2 and 3] that literature has set the foundational grounds necessary to identify the substantive components of fair balance. The components divided into two categories, preliminary or identification components, which factors the validity and legitimacy to invoke fair balance, and merits or evaluative components, which assert quality behind the fair balance analysis by the CJEU. The question that follows is whether it is practically feasible to transform these components into fully-functioning empirical variables.

4.2.Methodological Approach: Systematic Content Analysis

I rely on systematic content analysis (SCA) as the primary empirical testing method to answer the third sub-question (i.e. *to what extent the variables are featured in CJEU's copyright-related case-laws?*). Legal texts are lengthy and dense, making it challenging to underline the presence of variables or components of fair balance in the texts. Fortunately, content analysis allows us to systematically compress the raw information contained in the vast amount of texts, such as CJEU preliminary rulings, and weave the information into theories, much akin to inductive reasoning.[198] The preference of content analysis over the conventional, case-law reviews,[199] is aligned with our objective to provide holistic, non-discriminatory, reporting on the key trends behind the formulation of fair balance analysis.[200] Unlike case-law reviews, this method unsuitable for singular, or isolated overview the doctrinal case-law reviews would offers.[201] For our cause, the method

[198] The advantage of SCA is that it can produce both qualitative and quantitative results by enabling researcher to compress' […] many words of text into fewer content categories based on explicit rules of coding. See Maryam Salehijam, 'The Value of Systematic Content Analysis in Legal Research', (2018) 23(1) Tilburg Law Review, p 35; See also Mariette Bengtsson, 'How to plan and perform qualitative study using content analysis' (2016) 2 NursingPlus Open, pp 9-10; Epstein and Martin (n 77), p 81; Krippendorff (n 78), p 3.

[199] As Hall put it, "Studying opinions [case reviews] simply as vessels for bare outcomes or case holdings, while insightful, is not fully satisfying because such studies do not take full advantage of the rich reservoir of information within judicial opinions. Hall and Wright (n 79), p 90.

[200] See Krippendorff (n 78), p 84.

[201] While both methods inquire the rationale behind the creation of a judgment, Derlen and Lindholm (2014) argues that, "[T]he case law analysis often looks into specific case-law, or the compilation thereof to theorize the importance of certain rules or principles." See Mattias Derlén and Johan Lindholm, '*Goodbye van Gend en Loos, Hello Bosman?* Using Network Analysis to Measure the Importance of Individual CJEU Judgments' (2013) 20 European Law Journal 5, p 3.

expected to expand our perception of the doctrine beyond the doctrinal discussion offered in reviewing benchmark case-laws. [202]

4.2.1. Coding Scheme

The *manifest analysis* opted as the preferred strategy to code this SCA exercise. The analysis itself seeks to describe what the informants, or as in our case, Judges, 'actually say' within the medium of preliminary ruling texts. It paid close attention to the explicit reference in the text, the usages of words in the text, and description made visible and evident in the text.[203] The coding scheme for this thesis not predictive.[204] Instead, the coding instructions made to highlight if a certain condition(s) has been met for the corresponding variable to exist. It is closely similar to the Rendas (2018) work on content analysis on the flexibility of CJEU judgments on copyright exceptions.[205] To observe the CJEU attitude towards technology-enabled usages in copyright disputes, Rendas developed a simple coding of 'infringing or non-infringing' when the Court was explicitly stated that it was considering the technology-enabled use to be covered (or not) covered by exclusive right or exception. In a similar fashion, I will use coding instruction to determine whether certain words (or its synonymous words) are present in the text and then deduce it as my claim that specific component or variable to the fair balance analysis has been, in fact, present. By synthesizing scholarly literature in both Chapter 2 and 3, I suggested the following coding schematic of fair balance analysis.

[202] To quote Chang and Wang, "[…], if one case related case-law is treated as one case study, such case study cannot fully provide reliable information to the entire group of cases. See Yun-chien Chang and Peng-Hsiang Wang, 'The Empirical Foundation of Normative Arguments in Legal Reasoning' (2016) Chicago Pub. Law & Legal Theory Paper Series 561, p 8.
[203] Bengtsson (n 199) p 10.
[204] An earlier example of this would be the predictive analysis by Fred Kort in 1957 to predict the outcome on decisions made by the U.S. Supreme Court. The author recorded frequent presence or usage of specific words to which the Court would perceive as statements of fact. From there, he developed a scoring system that would help the reader to forecast the outcome of other similar cases in the same Court venue with 86% of accuracy rate. See Fred Kort, Predicting Supreme Court Decisions Mathematically: A Quantitative Analysis of the "Right to Counsel" Cases, 51 AM. POL. Sci. REV. 1, 11 (1957), as cited in Hall and Wright (n 79), p 68.
[205] Rendas (n 153), pp 13-14.

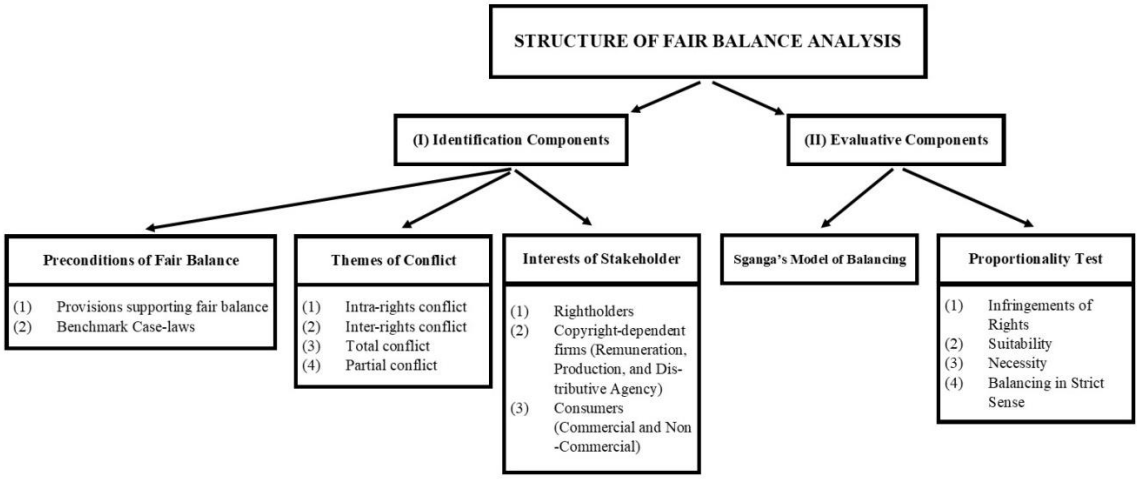

Figure 2. Schematic of Fair Balance Analysis

The figure is relatively self-explanatory. The coding tasks divided by two coding themes; the identification components (I) and evaluative components (II). Three components set to cover identification phases, ranging from preconditions to invoke fair balance doctrine up to the identification of relevant actors or stakeholders. For evaluative phase, I will only focus on two components. The first one which derived from Caterina Sganga's proposed model of fair balance analysis (2018) and the second one, which addresses the attribution of proportionality test within the overarching analysis. The reasoning to exclude Alexy's weight formula, including Lindalh epistemological proposition to the formula further elaborated in section 4.2.4. and 4.2.5. respectively.

4.2.2. Coding Fair Balance Analysis: Identification Components

We maintain how judges base their usage of principles and doctrines on two preconditions: "the presence of supporting legal provisions" and the "existence of precedent", or *stare decisis*. The instrument-based or *formalist* justification is derived directly from the presence of the Primary and Secondary EU legislations. For this category of precondition, the literature endorses the following instruments:

1. **Article 51(1) EU Charter** (*Establish a general goal for fair balance*)
2. **Recital 3 of Directive 2001/29** (*Establish a specialized goal for fair balance*)
3. **Recital 31 of Directive 2001/29** (*Formulate the general concept of fair balance*)
4. **Recital 41 of Directive 2000/21** (*Describe the role of fair balance in industrial agreements*)

5. **Article 3 of Directive 2004/48** (*Establish the Member State duty of balancing when enforcing intellectual property rights*)

The secondary preconditions of fair balance observable from the practice of precedent set by the Court, more specifically, the use of preliminary references to resolve the issue of fair balance in copyright claims. By the conclusion of Chapter 2, we learned that no widely agreed benchmark cases related to copyright fair balance. However, some of the following cases stood out among others due to its high-frequency of citation in the existing studies.

1. **Case C-275/06, *Promusicae* (2008)**[206]
2. **Case C-145/10, *Painer* (2011)**[207]
3. **Case C-70/10, *Scarlet Extended* (2011)**[208]
4. **Case C-360/10 *SABAM* (2012)**[209]
5. **Case C-314/12, *UPC Telekabel* (2014)**[210]
6. **Case C-230/16, *Coty Germany* (2017)**[211]
7. **Case C-324/09, *L'Oréal v. eBay* (2011)**[212]

As discussed in Chapter 3, Judges tends to examine deeper social context before resorting themselves to fair balance analysis. In this respect, judges provide background information to fair balance by describing the 'nature of the conflict'; the clash of normative values; the dimension of conflict; and also the stakeholders which involved in each of the copyright claims. To describe the distribution of values in CJEU's copyright cases, I organized the following list of values based on keywords found across all the sampled case-laws.

Baseline Values – Copyright and property rights

- Article 17(2) of the EU Charter – Core provision to the right to intellectual property rights *(Direct reference to the property rights)*
- Bundle of rights *(Copyright)*
  - Right to distribute work
  - Right to license
  - Moral right

[206] Sganga (n 173);Teunissen (n 5); Angelopoulos and Smet (n 31).
[207] Sganga (n 173);Griffiths (n 11).
[208] Sganga (n 173);Mezei and Harkai (n 15); Angelopoulos and Smet (n 31); Griffiths (n 11).
[209] Sganga (n 173);Mezei and Harkai (n 15); Angelopoulos and Smet (n 31).
[210] Sganga (n 173);Teunissen (n 5); Mezei and Harkai (n 15); Angelopoulos and Smet (n 31).
[211] Sganga (n 173);Angelopoulos and Smet (n 31).
[212] Angelopoulos and Smet (n 31).

<table>
<tr><td colspan="2">- Right to reproduce the work
- Performing right
- Right to publicity (Communication to public)</td></tr>
<tr><td colspan="2">Opposing Values – Exception and Limitations (As listed by Article 5(1) of Directive 2001/29)</td></tr>
<tr><td>- Photocopying/photo reproduction
- Private copying
- Reproduction by libraries
- Reproduction of press or Communication to the public
- Ephemeral recordings by broadcasters
- Reproduction of broadcasts by social institutions
- Illustration for teaching or scientific research
- Use for the benefit of people with a disability
- Quotation for criticism or review
- Public security</td><td>- Public speeches and public lectures
- Religious or official celebrations
- Works of architecture or sculpture in public spaces
- Incidental inclusion
- Use for advertising the exhibition or sale of works of art
- Use for the purpose of caricature, parody or pastiche
- Use for the demonstration or repair equipment
- Use for research or private study
- Reproducing and making available of orphan works</td></tr>
<tr><td colspan="2">Opposing Values – Other Intellectual Property Rights</td></tr>
<tr><td>- Trade mark
- Industrial designs
- Patents
- Utility models</td><td>- Trade secrets
- Database
- Domain names
- Geographical indication</td></tr>
<tr><td colspan="2">Opposing Values – Other Fundamental Rights and Freedom</td></tr>
<tr><td>- Free movement of goods
- Freedom of establishment and to provide service
- Freedom of expression and information
- Freedom to conduct business
-</td><td>- Fundamental Right to privacy and family life
- Fundamental Right for personal data protection</td></tr>
</table>

Table 1. List of identifiable conflicting values in preliminary reference of the CJEU (Author's made table)

The variety of values listed in Table 1 compiled in close reference to the built-in search filter provided by the Court official case-laws database, CURIA. The table above highlights four (4) dimensions associated with the notion of conflict, particularly in a copyright dispute. The first dimension, *intra-rights* conflict involves two or more principal values protected under a single banner of rights (copyright vs other intellectual property rights). The first model of intra-rights conflict is the tension caused by rules enforcing high-level protection of copyright and against the copyright exceptions and limitations

listed by Article 5(1) of Directive 2001/29. The second type of conflict is the conflict among sub-rights to the right of the property itself. Take, for instance, the clash between design rights and copyrights where both equally protected by rights to property enshrined in Article 17(2) of the EU Charter.

The second layer of dimension, *inter-rights* conflict, is commonly considered the default *raison d'être* to invoke fair balance. Here, the balance between fundamental rights and fundamental freedoms accounted for by the Court. In inter-right conflict, tension may arise as a result of fundamental rights being used as the basis of justification when a Member State wished to derogate from any of the fundamental freedoms, and vice versa.[213] Furthermore, this dimension incorporates conflict of two or more different rights with two different forms, direct and indirect. Inter-rights conflict possesses direct form if no EU rules available to resolve the conflict between the conflicting rights and freedoms. For instance, if there is no copyright exception and limitation provided to support the competing rights. However, assuming such rules exists, then inter-rights conflict shifted into indirect form, where fair balance treated as supplementary balancing tools to support the existing balancing provision. If that is the case, then the researchers should focus on observing whether judges would weight over the extent balancing rules permit derogation against the baseline rights.

The last two dimensions of conflict, total and partial conflict, could manifest simultaneously in either intra-rights or inter-rights conflict. In total conflict, judges approach the resolution of conflict by acknowledging that in order for one right to prevail, other rights need to be suppressed. Meanwhile, judges treated conflict as partial if they consider the possibility to compromise the competing rights. If that is the case, then the researchers could expect judges to proceed forward to their fair balance analysis.

If dimensions of conflict provide normative justification to fair balance, then stakeholders interest offers the empirical background not only for the conflict but also a point of reference to balancing test. Literature acknowledges the following stakeholders in copyright conflicts:

1) **Creators:** as the exclusive author to the protected works

[213] Tamas Szabados, 'Conflict Between Fundamental Freedoms and Fundamental Rights in the Case Law of the Court of Justice of the European Union: A Comparison with the US Supreme Court Practice' (2018) European Papers 3, p 567.

2) **Copyright-dependent agencies:** firms which can be breakdown into Remuneration agency, Production agency, and distributive agency (i.e. internet service providers)
3) **Consumers:** The end-users of protected works. They can be either commercial consumers in copyright market or non-commercial consumers, who rely on reproduction of rights (e.g. library, movie review, and so forth)

While it is relatively easy to identify stakeholders, less so for their embedded interests, there is no doubt that the notion of 'interest' matters when assessing stakeholder relationship with copyright legislation. Unfortunately, even the current state-of-art is slightly blurry to describe the difference between rights and the vested interest for stakeholder. Take, for instance the work of Angelopoulos and Smet (2018), to which this Thesis consider as pivotal in supporting its claim on the existence of *stakeholder identification* in fair balance analysis.[214] In their observation on all cases involving intermediary liability in the CJEU, they came into conclusion that Court was, in actuality, recognized the so-called 'tripartite dynamic of stakeholder' which involves: rightholders, intermediaries, and (internet) users. They further describe that each stakeholder interest manifested through into a set of fundamental rights and freedom.[215] However, as later criticized by Duarte and Sampaio (2018), this alone is not enough because fundamental rights and freedoms are inherent principles, and as principles, they also riddled by peculiar (empirical) indeterminacy.[216]

If rights and interests are two distinct variables, then the correct way to respond to Duarte and Sampaio criticisms is to come up with a precise unit of measurement between the two – which is currently absent from the existing copyright studies, be it doctrinal and empirical. As we retract back to the work of Angelopoulos and Smet (2016), their work indeed has been useful to pinpoint which one is the relevant stakeholder relevant to a copyright dispute. Nevertheless, they also failed to clarify the meaning behind embedded interests. This recurring lack of clarity demonstrates that the existing literature could either find it too menial to distinguish rights vis-à-vis interests or it considered the latter as being too subjective and only observable through case-by-case review. In conclusion, the current state-of-art not saturated enough to produce compelling variable based on stakeholder interests. Whereas it remains possible for us to identify whom the CJEU judges treated as

[214] Angelopoulos and Smet (n 31), pp 266-301.
[215] Angelopoulos and Smet (n 31), p 275.
[216] Duarte and Sampaio (n 104) p 112.

relevant stakeholders, the less can be said –at least for now– with regards to stakeholders' novel interests.

4.2.3. Coding Fair Balance Analysis: Evaluative Components

The current state of the literature suggests two styles, or in their words, the models for fair balance. One derived from the classical theory of constitutional balancing, the Weight formula, which was introduced by Alexy in 2003 and later modified by Lindalh in 2009. The second and a recent one provided by Caterina Sganga in 2019 based on a reflective review on three phases of 'historical evolution' in fair balance analysis throughout the years. In the scheme of preliminary coding (*a priori* coding), we cannot combine the two theoretical models collectively to our coding dataset, especially if our goal is to maintain the reliability of our overall coding process.[217] Hence, testing the systematic nature of content analysis should be a theory by theory exercise. Putting that into consideration, I opted for Sganga's model of evolutionary fair balance as my preferred theoretical model to code the evaluative aspect of fair balance analysis. Critical overviews on the viability of the two models to be part of my content analysis provided below.

4.2.4. Objections to Weight Formula

The issue I would like to highlight in operating Robert Alexy's weight formula is twofold. First, when it comes to its infringement testing (See Section 1 of Chapter 3), the taxonomy of infringements (i.e. light, moderate, and serious) is relatively subjective as there is no objective way to define what constitutes light, moderate, and serious infringement. Even if the researchers could conveniently pinpoint the specific point in the text when the Judges would assess the severity of the infringement, to discern the three categorizations would remain a challenging task. It is because of the highly abstract concept of severity; a Judge could come up with different variability of 'severity check' from the previous one. It is simultaneously challenging for those seeking to assign code on 'infringements'. Having no golden rule of thumb to describe the mundane, or vice nature of an infringement, could means that coder needs to cast unnecessary wide nets of 'relevant' words only to satisfy different theories in regards to infringement testing.

[217] In regards to efficiency in analysing data on SCA. Weber argues that coding categories need to be, "[t]ightened up to the point that maximises mutual exclusivity and exhaustiveness. See Weber, Basic Content Analysis, 2nd Ed. (Newbury Park, 1990), as cited in Steve Stemler, 'Practical Assessment, Research and Evaluation, An overview of content analysis, 2001, p 4.

The second issue, which also covers my issue with Lindalh's epistemological take on weight formula, is the highly-mechanical nature of the formula. One of the core tenets derived from Robert's Alexy weight formula is the presumption that fair balance could be established by weighing over the severity of infringement (See Section 1.1. of Chapter 3). In this aspect, we offered by the author an illustrative depiction of a scale weighing over two potential infringements possibly caused by engagement or disengagement of policy measure –one for the baseline right (e.g. the rights to property) and the other one toward the competing right. The reality of copyright dispute, however, suggest otherwise. In few CJEU cases, enforcement of copyright measure could bolster the rights of property, while also hampering more than single fundamental rights and freedom (See Section 3.1. of Chapter 2). Weight formula, as Kisieliute (2012) describes it, it is difficult to apply in the cases where more than two principles conflict with each other, especially considering there are no standards as to what is fair or not even for the Judges.[218] My coding sheet should ideally focus on giving explicit and comprehensible instruction while simultaneously offer exhaustive room to record more than single finding, for instance, by enlisting two or more infringements of rights.

Furthermore, In Lindalh's epistemological takes on weight formula, the criticism on bicameralism from the original model remains unaddressed. It also incorporates greater mechanical pressure by requiring a reliability check on the weight test under the theoretical premise of 'reliability of fact'.[219] Almost identical to infringement test, authors argue that judge would engage in case-by-case basis review, which in this case, to determine if the underlying infringement is either *reliable*, *plausible*, or *evidently false*. However, unlike the original iteration of the formula, this epistemological test treats reliability checks as exhaustive components in the overall weight testing. For this, I would argue that in the same manner as infringement test, there is the underlying concern on 'case fact' as a subjective-driven empirical factor, as it possesses the indeterminate value of information from one sample of case-law to another. Such concern equally extendable to coding categories such as 'fact-checking' or 'test of evidence'. Ultimately, it is simply not possible to identify richness of case fact by only relying on single coding instruction, be it infringement test initially endorsed by Alexy, or the subsequent reliability check suggested by Lindalh.

[218] Kisieliute (n 5), p 34.
[219] See Thesis, Section 3.1.2.

4.2.5. The 'simple' and 'explicit' appeals of Evolutionary Fair Balance Model

I present my case in favour of Sganga's model of evolutionary fair balance on two fronts. One, I am on the opinion that this specialized model of fair balance captures the novel characteristics of the doctrine as highlighted by existing jurisprudence. In its primary phase, it recalls the importance to establish the base rights, the rights of property, while also validates its presence through a formalist lens (i.e. by recognizing copyrights or any of its bundle of rights as protected terms within the scope of the rights of property). In its secondary phase, it introduces another identification component we familiarized with from Chapter 2, namely a formal source of balancing. Add that with the inclusion of 'breach of essence test' to determine the extent of breach against core values of copyright or any other fundamental rights and freedom.

Arguably, the core breach test proposed by Sganga poses less nuance in comparison to Alexy's infringement test for his Weight Formula. If Alexy urged us to determine whether a particular breach categorically 'minor' or 'superfluous',[220] Sganga's test merely required us to identify the presence of said test. Putting Alexy's model to manifest-styled content analysis may affect the reliability of our outputs. It is because our findings hang on the plain, explicit, statements written in the text. The Court rarely made self-explanatory remarks, especially if it concerns the analytical subject such as the severity of a breach. Even if we assigned specific instruction(s) to assume that breach existed, it would be a highly contentious endeavour, assuming no widespread agreement on how to define both 'minor' and 'superfluous'.

Sganga's simplified core breach test excels in this regard. It focused on questioning the presence of the test rather than its output, which befitting to this content analysis approach to code most of its prospective components. It gave us the leeway to self-made the coding instruction for core breach test.[221] For instance, in my coding scheme, I generally consider an evaluative component as positively present when the Court wrote

[220] Alexy (n 64), p 136.
[221] Sganga linked the idea of breach in values with breach on legal provision. She stated that once the rights of property has been confirmed, …[I]t [CJEU] it linked it with the provision(s) or injunction(s) at stake, based, to the extent possible, on the legislative intent. If there was no connection, the fundamental right or freedom was not used in the assessment. See Sganga (n 173), p 8.

specific keywords, synonymous words to the keywords, or reference to specific legal provisions tied to the corresponding component.[222]

The second point of appeal to this model came from its inclusion of the proportionality test and its derivative tests as parts of fair balance evaluation process. It has been the overarching aim of this thesis to determine the extent of which proportionality principle tied to fair balance. To include proportionality test in the evaluation process of the docrine, the model gave us the possibility to decide whether fair balance –a doctrine– and balancing in a strict sense –one of the sub-tests of the proportionality test– are two separate concepts. If we refer back to Alexy's infringement test, Alexy offered a different conception of the proportionality test, namely the 'disproportionality test'. Accordingly, this test seeks to describe the relationship between real and hypothetical interferences of policy measure rather than engaging with its suitability and necessity of the measure to achieve its legislative aim. This shifted form of test is incompatible to our overarching aim related to the proportionality principle.

4.2.6. Coding Sheet

In adopting manifest-style content analysis, most of the assigned coding instructions are made literal, with little room for coder's cognitive interpretation. The coding sheet requires the coder to focus on detecting the presence of specific keywords and taking notes on those words; this later built up into an assumption that specific variable in question existed. We should, however, bear in mind that the risk of taking this 'word frequency' approach. Paunio and Lindross-Hovinheimo (2010) warn researchers on words frequency on the nature of words as "open-ended" with undefined borders of meaning. This mean, researcher could either be distracted by the indeterminacy of words or overlooked the most relevant keywords, in favour of other synonymous words.[223]

[222] For instance, to determine whether core-test was taken in place, coder is required to consult beforehand the presence of legal instrument associated with each of the values. Hence, a test on breach to the core values existed if the Court evaluate infringement on the following provisions: Article 17(2) of the EU Charter (rights to property), Article 28 of TFEU (free movement of goods), Article 11 of the EU Charter (Freedom of expression). The list goes further in accordance to all fundamental values we have introduced in our coding instruction. See Coding Sheet, Appendix C, Questionnaire 1.

[223] Words counting, according to Paunio and Lindross-Hovinheimo (2010), is prone to indeterminacy. By 'indeterminacy', the authors refer to "such properties of natural languages as linguistic vagueness, generality, and ambiguity. See Elina Paunio and Susanna Lindroos-Hovvinheimo, 'Taking Language Seriously: An Analysis of Linguistic Reasoning and Its Implications in EU Law', [2010] 16(4) European Law Journal, p. 396; See also Stemler (n 221) p, 3.

Having that in mind, I refrain from selecting multi-meanings keywords and instead focus specifically on 'cue' terms coming from *formal source of laws* or *informal source of laws* such as precedence. The presumption is that cue term is static and rarely led to different meaning beyond its literal meaning. In utilizing the cue terms, we give the coder the freedom to connect the sentences or the relevant paragraphs and later evaluate whether it fits the assigned coding question. I developed 11 coding instructions, with nine focuses on identification components and the remaining two on evaluative components.[224]

This strategical use of cue terms is in line with the assumption that CJEU method of legal reasoning is generally a teleological model of reasoning, where judges refer to specific legal provisions back and forth to find the meaning of EU law it has to interpret.[225] For example, if Judge cited Article 17(2) of the EU Charter, then there is a great likelihood that the Court going to describe in few sentences about his opinion regarding the rights of property which deemed as central issue in that provision. As for precedence, I maintained the realists account we had discussed in Chapter 2 who convinced that institutional expectation persists and to some extents affect the Court's legal reasoning in the form of reference to pre-existing case-laws.

4.3.Sample and Sample Characteristics

The sample for this research will be the judicial opinion by the CJEU, more specifically, the written text of the judgment delivered by the Chamber regarding a reference for a preliminary ruling. I took particular attention to those references made between 2008 to 2019. 2008 being the publication years of *Promusicae* (C-275/06), the first known preliminary reference to ever introduced the concept of fair balance in a copyright dispute, whereas 2019 being the last recorded year where preliminary references explicitly stated fair balance in their text. That said, I exclude any proceedings other than the request for a preliminary ruling. The reasoning to such exclusion is twofold. Firstly, the content analysis relies on the structural consistency of its sampled text.[226] It means that it is desirable to focus only on a single unit of analysis.

[224] See Coding Sheet, Appendix C, Questionnaires 1-11.
[225] Elina Paunio and Susanna Lindroos-Hovvinheimo, 'Taking Language Seriously: An Analysis of Linguistic Reasoning and Its Implications in EU Law', [2010] 16(4) European Law Journal, 399.
[226] As Dyevre puts it, "[T]o control for the influence of context […] the dimension of interest should be dominant in the text, […] this entails that the texts should all focus on this policy issue. Artur Dyevre, 'The promise and pitfalls of automated text-scaling techniques for the analysis of judicial opinion, p 9.

Secondly, other proceeding does not possess enough sample to qualify for quantitative testing. We recognized at least 4 (four) proceedings currently in place by the Court, the reference to the preliminary ruling, annulment, infringement review, and proceeding on the failure to act. However, upon investigation on CURIA (official repository database of CJEU case-laws), only two proceedings, reference to the preliminary ruling and failure to act, ever addressed the claim based on EU copyright acquis. The latter proceeding, unfortunately, barely got enough sample to yield statistically significant quantitative result.[227]

4.3.1. Sampling Strategy

In order to avoid selection bias on our sample case-laws, I decided to filter the sample selection by resorting to search engine filtering system built-in within CURIA website -one of the official sites handling case-depository of CJEU. I conducted three separate filterings, with each submission having difference reference to a legal source of fair balance (i.e. Charter of EU, Directive 2001/29, and Directive 2004/48) (See Appendix A).[228]

According to the search result, filtering based on InfoSoc Directive (Directive 2001/29) generates the highest number of case-laws for roughly 24 repositories, followed by Article 17 of the EU Charter with 14, and Enforcement Directive (Directive 2004/48) with the least amount repository of 8 repositories. However, upon closer examination, some cases are redundant and listed more than once, even as we assigned different filter navigators.[229] In the end, I managed to discover 30 novel case-laws from these three variations of filtering (n = 30).

4.3.2. Sub-Conclusions

To deconstruct the 'invisible structure' of fair balance, 30 preliminary references –from 2008 to 2019– will be observed. Considering how lengthy and dense the written text on

[227] Accordingly, within the interval of 1971 to 2017, there are only two proceedings –preliminary reference and failure to act– which generate case-laws on the issue of copyright protection and enforcement. But between the two, it is the former who dominates the copyright dispute environment with the highest quantity of repository (n=92). Failure to act proceeding, on the other hand, only hold minor amount of repository (n=11) which insufficient enough to generate consistent finding from content analysis.

[228] I set the following navigators in CURIA's advanced search filter: 1) Subject Matter = "Fair Balance"; 2) Proceedings = "Reference for a preliminary ruling", "Preliminary reference - urgent procedure"; 3) Court = "Grand Chamber; 4) Period = From 01/01/2008 to 01/01/2020 (Per date of delivery). For the 1st Category = "Treaty", "Charter of Fundamental Rights of the EU (2007)", "17"; 2nd Category = "Directive", "48"; "2004"; 3rd Category = = "Directive", "29"; "2001". For access to CURIA's advanced search filter. See Case-law, InfoCuria, <http://curia.europa.eu/juris/recherche.jsf?language=en> accessible 10/7/2020.

[229] For example, both *Scarlet Extended* (C-70/10) and *SABAM* (C-360/10) have been associated by the search engine, CURIA, as the case-laws that dealt with the interpretation of EU Charter, Directive 2001/29, and Directive 2004/48 respectively. See List of Filtered Case-Laws, Appendix A.

each of their corresponding rulings, then the most viable empirical solution is to process the data using a systematical content analysis. Content analysis could indiscrimately monitor all the sampled preliminary references without the risk of being overwhelmed by a vast amount of raw information contained in the text. Manifest content analysis, in particular, designed to describe those components, in full actuality, based on the actual statements found in preliminary reference.

The analysis presented in the following result section focused on simple frequency counts or reporting based on the numbers of component that manifest in the texts of the preliminary ruling. I would mainly focus on discussing two groups of component, the identification and evaluative components. First, with the identification components of fair balance, I described the distribution of EU laws (primary and secondary laws) and CJEU's benchmark case-laws in each sample as the grounds for the Court to invoke fair balance analysis. I also coded other identification components of fair balance that is 'conflict'. The overview on the conflict in fair balance analysis comprised of three trends; 1) the distribution between baseline copyright values and other competing values (i.e. exceptions and limitations, other IP rights, and other fundamental rights and freedoms); 2) Dimensions of conflict (i.e. intra-right conflict, inter-right conflict, partial conflict, and total conflict); and stakeholders identification (i.e. right-holders, copyright-dependent firms, and consumers). Having done with preliminary components to fair balance, we proceed to its evaluative counterparts.

The first evaluative component of the doctrine tied to the proportionality principle. Here, I determine the presence of the principle based on the outputs made by five derivative tests of proportionality test: infringement reviews, policy aim reviews, effectiveness reviews, necessity reviews, and balancing (in a strict sense) review. For the final evaluative components, I measure the prevalence of Sganga's model of evolutionary fair balance being present in each sampled case-laws. I opted for Sganga's model over Alexy's model of weight formula for two overarching reasons. First, by concept, Snganga's model accommodates two components, the proportionality principle and core breach test, to which the literature regard as highly influential to the evaluation process of the doctrine. Second, Alexy's weight formula created to provide a mathematical solution to the legal balancing in general. Such a design decision may pose a few coding issues. Weight formula unable to estimate the degree of a breach when it involves more than two competing rights. The model champions mathematical evaluation based on the degree of infringement made by each competing values while

overlooking various, preliminary observations made by the Court before it delves deeper into the evaluation process.

CHAPTER 5 – Results

5.1.Introduction

As previously stated, the coding process for this systematic content analysis relies on *manifest-styled coding*. It means that we focus on identifying the presence of a variable in the sample by consulting to specific predetermined words, terms, or series of statement provided in coding books. The list of all 30 sampled case-laws can be seen in Appendix A. Appendix B and C and contains coding book and coding sheet, respectively. Being a manifest-styled content analysis, the results in this section estimates its statistic output by using a simple frequency count. Extensive accounts on all the frequency distribution of all the components available in Appendix D.

5.2.Legal Grounds to Invoke Fair Balance

I begin by showcasing the overall presence of the grounds used to justify fair balance. Figure 2 below illustrates the frequency count of both legal instruments and benchmark case-laws associated with copyright fair balance. The initial observation reveals that reference to these sources as not mutually exclusive. There were cases where both EU copyright rules and past precedence were collectively mentioned,[230] or absent altogether.[231] The most striking trend emerged from the variable is that both sources eventually shared a high rate of referrals, with approximately 30 counts for past-precedence and 27 counts for EU copyright rules. Do keep in mind that the numbers were not reflective of the total percentage of referral for the entire sampled cases. Some cases did encounter more than one reference of either legal instruments or case-laws. A slightly better means to determine the constant presence of both type of sources is by counting the numbers of cases where no reference made in either of the sources. With this approach, I found that the EU legal instruments more consistently referred across all sampled case-laws (n = 21 or 70%) as opposed to CJEU's benchmark case laws (n = 13 or 43%).

[230] *Scarlet Extended* (n 11); *SABAM* (n 11); *Sky Österreich* (n 182); *UPC Telekabel* (n 17); *Deckmyn* (n 112); *Coty Germany* (n 131).
[231] *Promusicae* (n 7); Case C-283/10 *Circul Globus Bucureşti (Circ & Variete Globus Bucureşti) v Uniunea Compozitorilor şi Muzicologilor din România - Asociaţia pentru Drepturi de Autor* (UCMR - ADA) [2011] ECLI:EU:C:2011:772; Case C-277/10 *Martin Luksan v Petrus van der Let* [2012] ECLI:EU:C:2012:65; Case C-360/13 *Public Relations Consultants Association Ltd v Newspaper Licensing Agency Ltd and Others* [2014] ECLI:EU:C:2014:1195.

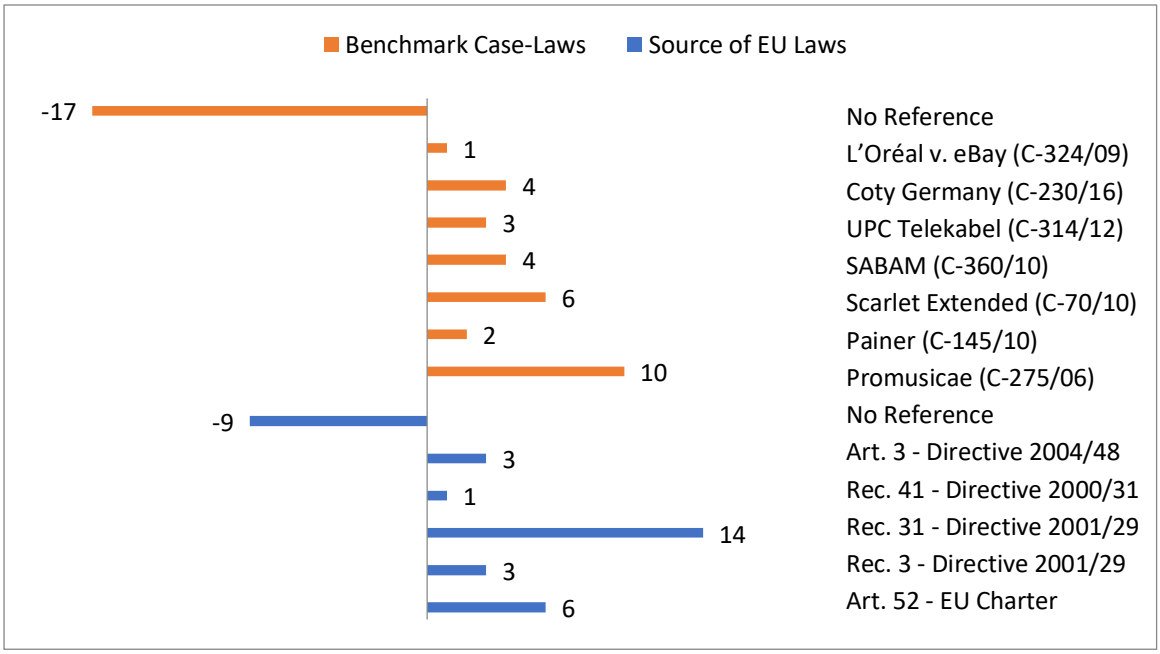

Figure 2. Frequency distribution of CJEU's legal grounds for fair balance. Orange lines or the first eight lines represent all accounted reference on the previously selected benchmark case laws whereas blue lines or the six remaining lines were those individual references made on the listed source of the EU laws. The negative numbering shows the number of case-laws which did not refer either case-laws or the source of EU laws.

Another highlight from Figure 2 is the lack of variability for each type of legal grounds. Recital 31 of Directive 2001/29 stood as the most cited EU (secondary) laws with 14 counts, or more than twice the amount of referral on fair balance only source of primary laws, Article 52 of the EU Charter (14 to 6). The same can be said with the case-laws referral, with *Promusicae* (C-275/06) being present in 10 out of all 13 cases which gave reference to past precedence.

5.3.Themes of Conflict

As discussed in Chapter 4, the construction of conflict in copyright-related dispute could be summarised in three major overviews. 1) the distribution of normative values between baseline values (copyright and the rights of property) and other competing values (i.e. exceptions and limitations, other IP rights, and other fundamental rights and freedoms); 2) the dimensions of conflict (i.e. intra-right conflict, inter-right conflict, partial conflict, and total conflict); and the stakeholders' identification (i.e. right-holders, copyright-dependent firms, and consumers).

5.3.1. Distribution of Normative Values

The sort of dimensions a conflict could bring on the preliminary references can only be disclosed once every conflicting claim has been established. Figure 3 below demonstrates the frequency distribution of various normative claims (or as we code it 'values') across all the sampled case-laws. Few stray observations to be made. First, similar to our coded outcome on the grounds to justify fair balance, the values, be it baseline or the opposite, can be stacked. In *Luksan* (C-277/10), *Renckhoff* (C-161/17), and *Funke Medien* (C-469/17), I found that the Court tied its fair balance arguments by directly referring to the right to property, or per the coding instruction, by citing the source of the right in question –Article 17(2) of the EU Charter– while also accounted the copyright's bundle of rights.[232] Alternatively, in *Mc Fadden* (C-484/14) and *UPC Telekabel* (C-314/12), the Court instead identified more than one opposing values. Bear in mind, however, that these stacked references only happened when it belong within the same group of values.[233] Hence, no cross-groups reference, for example, between any of non-IP fundamental rights and any of copyright exceptions and limitations, is to be found in all of our coded cases.

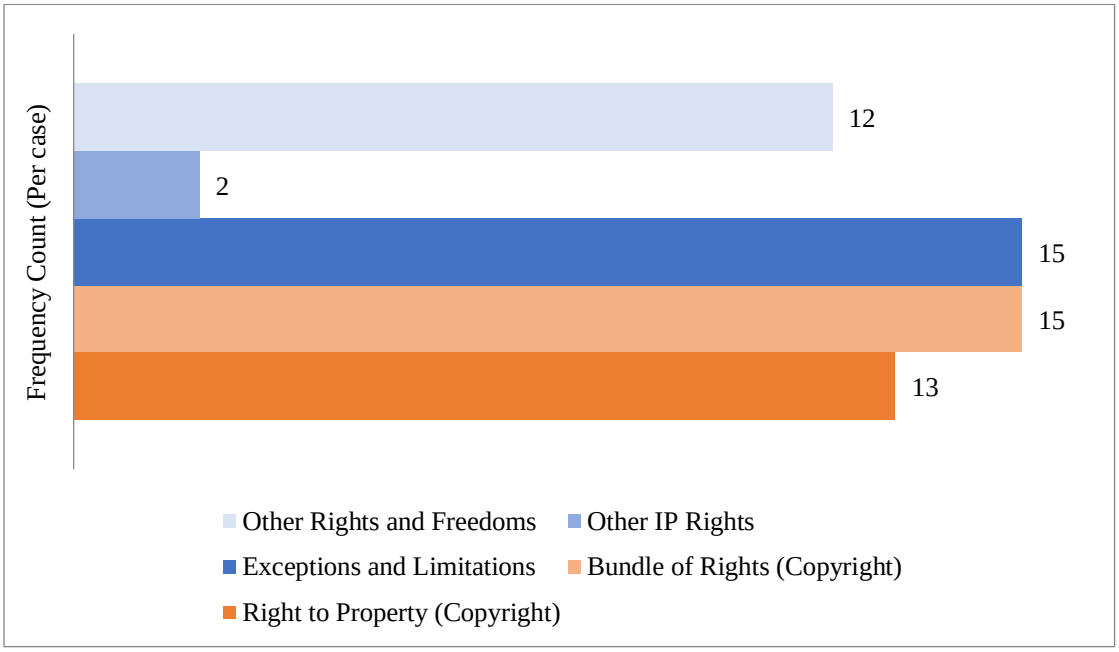

Figure 3. Frequency distribution of normative values (claims) The number shows reference per case. The presence of baseline value (copyright) indicates either directly, through reference to Article 17(2) of the EU Charter (fifth line),[234] or indirectly, through reference

[232] For reference to Article 17(2) of the EU Charter see *Luksan* (n 252) para 90; C-161/17 Land Nordrhein-Westfalen v Dirk Renckhoff [2018] ECLI:EU:C:2018:634, para 41; *Funke Medien* (n 58) para 18.
[233] Case C-484/14 *Tobias Mc Fadden v Sony Music Entertainment Germany GmbH* [2016] ECLI:EU:C:2016:689, para 82; *UPC Telekabel* (n 17), para 47.
[234] For detailed coding instructions to this component, see Coding Sheet, Appendix C, Questionnaire 4.

to any of copyright's bundle of rights (fourth line).[235] The opposite spectrum of baseline value comprises of defence based on copyright exceptions and limitations (third line),[236] statement in regards to the protection of other rights of property (second line),[237] and statement in regards to the protection of other fundamental rights or freedoms (first line).[238]

Unlike the previous result on grounds to invoke fair balance, figure 3 demonstrates substantial variability, if not, nearly even distribution of baseline and competing values across all cases. Two values, bundle of rights (n = 15), alongside exceptions and limitations (n = 15), stood up as the most referred values in their respective groups, baseline and competing values respectively. With the exception to minor reference on other IP rights (n = 2), the remainders of the values –the rights to property and other rights and freedoms– did not fall short from the highest referral rates (13 to 12). That said, the abysmal rate on the reference against IP-rights other than copyright suggested that the CJEU barely come across any conflict involving copyright and the other rights similarly guarded by the rights of property.

5.3.2. Dimensions of Conflict

Generally, the Judges at the CJEU rarely provides a verbal or written statement to confirm the presence of conflict –despite explicitly acknowledges the tension arising from different claims brought before the Court. Our sampled cases are no exception to this institutional approach. Therefore, rather than searching for the keyword "conflict", or novel terms such as "intra-rights conflict" or "inter-rights", this content analysis instead focus on aligning the normative values which have been previously coded. With this approach, I found that conflict, be it intra-rights or inter-rights, most likely to be present in every copyright-related of the preliminary references. It was with exception to 5 samples which I

[235] List of copyright's bundle of rights: right to distribute work; right to license; roral right; right to reproduce the work; reforming right; and right to publicity. For detailed coding instructions to this component, see Coding Sheet, Appendix C, Questionnaire 3.
[236] List of copyright exceptions and limitations: photocopying/photo reproduction; private copying; reproduction by libraries; ephemeral recordings by broadcasters; reproduction of broadcasts by social institutions; illustration for teaching or scientific research; use for the benefit of people with a disability; quotation for criticism or review; public security; public speeches and public lectures; religious or official celebrations; works of architecture or sculpture in public spaces; incidental inclusion; use for advertising the exhibition or sale of works of art; use for the purpose of caricature, parody or pastiche; use for the demonstration or repair equipment; use for research or private study; and reproducing and making available of orphan works. For detailed coding instructions to this component, see Coding Sheet, Appendix C, Questionnaire 5.
[237] list of relevant IP-related rights: trade mark; industrial designs; patents; utility models; trade secrets; database; domain names; and geographical indication. For detailed coding instructions to this component, see Coding Sheet, Appendix C, Questionnaire 6.
[238] List of relevant external fundamental rights and freedoms: free movement of goods (Article 28 of TFEU); freedom of expression and information (Article 11 of the EU Charter); freedom of establishment and to provide service (Article 26 of TFEU); right to privacy and family life (Article 7 of EU Charter); and right for personal data protection (Article 8 of EU Charter). For detailed coding instructions to this component, see Coding Sheet, Appendix C, Questionnaire 7.

categorized as the outliers. In three of these outlier cases, *L'Oréal and Others* (C-324/09), *Deckmyn* (C-201/13), and *Circul Globus Bucureşti* (C-283/10), the baseline values were missing. Its opposing values simply replaced the claim on copyright and its bundle of rights to which we treated by default as the baseline value. I discovered that the remaining two outlier cases, *McDonagh* (C-12/11) and *Huawei Technologies* (C-170/13), were unqualified to be treated as copyright-related preliminary references for not making any claim related to EU copyright rules. A possible explanation was that these latter two cases were inadvertently included into the sample as a result of CURIA's search filter detecting the frequent usages of the term "fair balance" in their respective texts of the preliminary rulings.

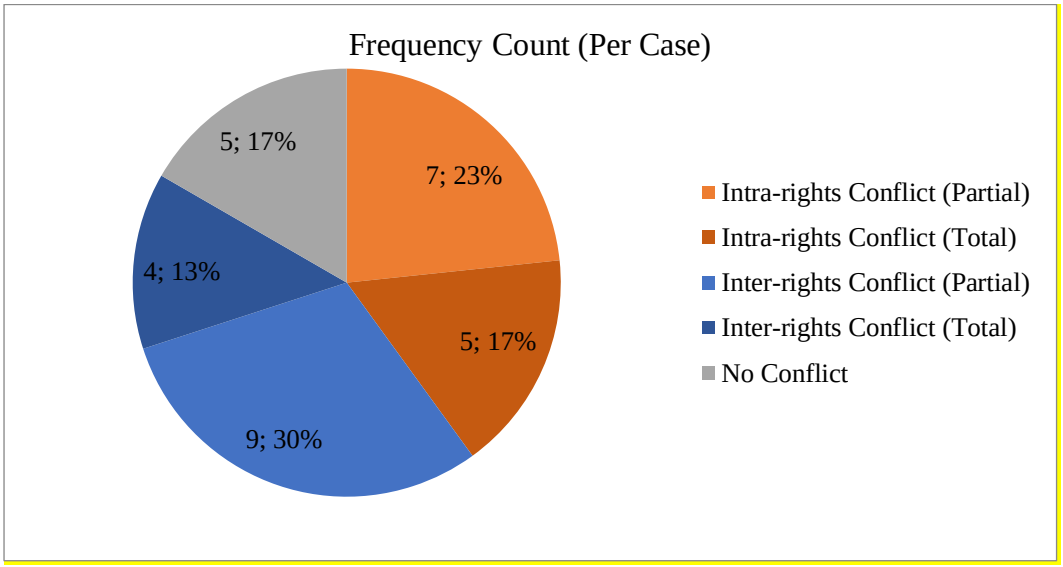

Figure 4. Frequency distribution of normative values. The pie charts comprise of 30 case laws. Orange slices represent the number of intra-right conflict (conflict between copyright and its exceptions and limitations OR copyright against other IP rights) found across cases. Meanwhile, blue slices were those cases confronted with the inter-rights dispute (conflict between copyright against other fundamental rights or freedoms). Dark slices of each corresponding colours denote the occasions where Court unable to establish fair balance without having to override one or two rights in favour to others (total conflict). Conversely, lighter slices of each corresponding colours show the number of times the Court use fair balance to negotiate equilibrium between the competing values (partial conflict). Percentages applied to showcase that each conflict occurred in isolation, meaning that a single case could not yield more than a single variant of conflict.[239]

In respect to intra-rights and inter-rights conflict, Figure 4 highlights near even distributions to both types of conflict –12 counts for the former (40%) and 13 counts for the latter (43%). Nevertheless, within the intra-rights categories, there was zero instance of intra-rights conflict based on other IP rights, despite two cases, *L'Oréal and Others* (C-

[239] For detailed coding instructions to this component, see Coding Sheet, Appendix C, Questionnaire 8.

324/09) and *Huawei Technologies* (C-170/13), endorses reference on property rights other than copyright (trademark and patent respectively). Meanwhile, my observation on the outcome of each conflict reveals the strong preference by the Court to resolve the conflict 'partially' or by means of values consolidation (n = 16), as opposed to 'total' resolution, which led the Court to denounce either baseline or opposing values to resolve the conflict (n = 9). Furthermore, in its relationship to intra-rights and inter-rights conflict, there were no significant statistical numbers to infer that total conflict was uniquely tied to a specific type of conflict.

5.3.3. Stakeholder reference

The last facet of conflict involves the Court's effort to identify relevant stakeholders. Stakeholders contribute to the creation of different normative values, which then intertwined into conflict. Figure 5 indicates the distribution of referrals on three groups of stakeholders: rightholders, copyright-dependent firms, and consumers. However, notably from all three groups, it was rightholders and consumers who both shared a high rate of referrals, with 24 to 25 counts respectively. It came to no surprise because most of these preliminary references revolved around the 'copyright infringement' theme –a theme commonly explores the relationship between rightholders, who seek for protection to their creative works, and consumers, who subsequently accused of unlawfully exploited the protected works.

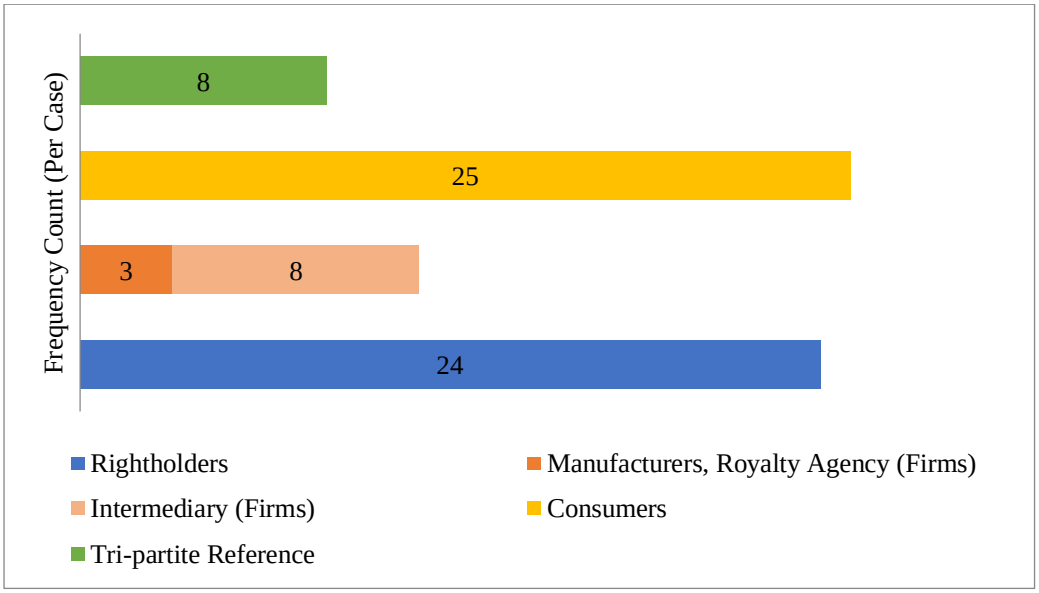

Figure 5. Frequency distribution of stakeholder reference. The first line (green) shows the number of cases where the Court collectively recognized the interests of three groups (i.e. rightholders, copyright-dependent firms, and consumers) were at stakes. The second line (yellow) records the Court recognition of interests on those actors who consume the

protected works (i.e. end-user, consumer, performer, and licensee) per case. The third line (orange) records the interest of two categorical groups of firms; highly-copyright dependent and neutral copyright dependent firms. Darker orange line accounts the former firms (i.e. manufacturers and royalty agency) and the lighter line for the latter firms (i.e. intermediary, website host, internet service provider). Lastly, the fourth line indicates the number of cases recognized the interests of the holder of rights for the disputed works (i.e. rightsholder, author, creator, exclusive owner, and licensor).[240]

Consequently, the copyright-dependent firms thus being the least referred group in our sample population with mere 11 counts. The Court, however, demonstrates an eagerness to accept variability in copyright-dependent firms. The coding sheet reveals that while most referrals in the group came from intermediaries (n = 8), there were minor instances where it refers to manufacturers (of copyright), or royalty agency appointed by the authors (n = 3).

Another key observation is to describe the frequency of tri-partite reference or the point at which the Court collectively prescribes all the three stakeholder groups in their fair balance analysis. In this regards, the presence of tri-partite reference in fair balance analysis could be confirmed; however, such presence was rather low and inconsistent to be confirmed as novel component of fair balance (n = 8). Interestingly, there was consistent theme at which the tri-partite reference being made. There was at least 7 (seven) tri-partite reference on conflict-related to online copyright enforcement (digital rights management).

5.4.Proportionality test

Having done reporting the preliminary components to fair balance above, we proceed to its evaluative counterparts. Existing literature suggested that fair balance is strongly tied to the principle of proportionality, in particular to its 5 (five) derivative tests: Infringement test, policy aim test, effectiveness test, necessity test, and balancing test (proportionality *stricto sensu*).[241] Trends presented in Figure 6 support this theory. All derivative tests, in exception to effectiveness test, were present in more than half of the total cases. Of all the tests, the balancing test stood out as the highest referrals test with 24 counts.

[240] For detailed coding instructions to this component, see Coding Sheet, Appendix C, Questionnaire 9.
[241] For detailed coding instructions to code each of these derivative tests, see Appendix C, coding sheet, questionnaire no. 10.

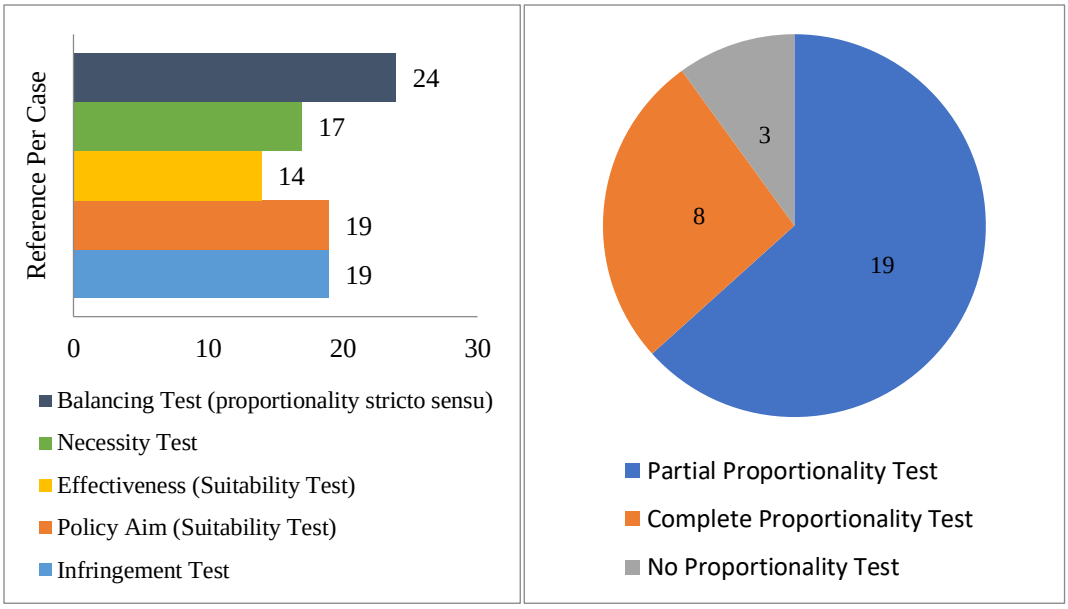

Figure 6. Frequency distribution of the proportionality test. Line charts on the left comprise of five different sub-components of the proportionality test. The first line accounts total cases which employed balancing review (proportionality *stricto sensu*). The second line accounts the necessity test; the third line accounts the effectiveness test; the fourth line accounts review on the policy aim, and the fifth line accounts the infringement test. All of these lines were counted in isolation and per single case referral. Meanwhile, the pie chart on the right summarises the number of cases which applied the proportionality test thoroughly (orange slice), incomplete (blue slice), or not at all (grey slice).[242]

Bear in mind that the Line Chart of Figure 6 estimated the frequency of each derivative test in isolation. Upon closer inspection, the major disparity could be reported from the cases which implement proportionality loosely, and those that fully incorporate all of the derivative tests (see pie chart above). From all 27 confirmed presence of the proportionality test, roughly 70% were implemented partially (n = 19). Whilst such discrepancy may not denounce the deeply-rooted ties between fair balance and proportionality principle, it does extend Scaccia's (2019) claim of selective usages on proportionality tests into the field of copyright claims.[243] In other words, it is in high likelihood for the CJEU to attributed fair balance with the exercise of the proportionality test. However, it still has creative freedom to use the latter derivative tests selectively or in a curated manner in order to complement the evaluation process in fair balance analysis.

5.5.Style of Fair Balance – Evolutionary Model of Balancing (Sganga)

Figure 7 illustrates the distribution to Sganga's evolutionary model of balancing. In hindsight, most the proposed components were consistently present in more than half of

[242] For detailed coding instructions to this component, see Coding Sheet, Appendix C, Questionnaire 10.
[243] Scaccia (n 27), p 7.

the total population. A qualified majority of cases (70% or 21 Counts) showcased the Court attempt to evaluate the copyrightability of the subject matter and also consulted the issue with associated fair balance provisions (i.e.). Such dominant trends subsequently extended by a lesser scale with 17 cases acknowledge the importance on the right to property. This is notwithstanding with the near, full majority presence of proportionality test in the total sampled that previously has been reported (90% or 27 counts).

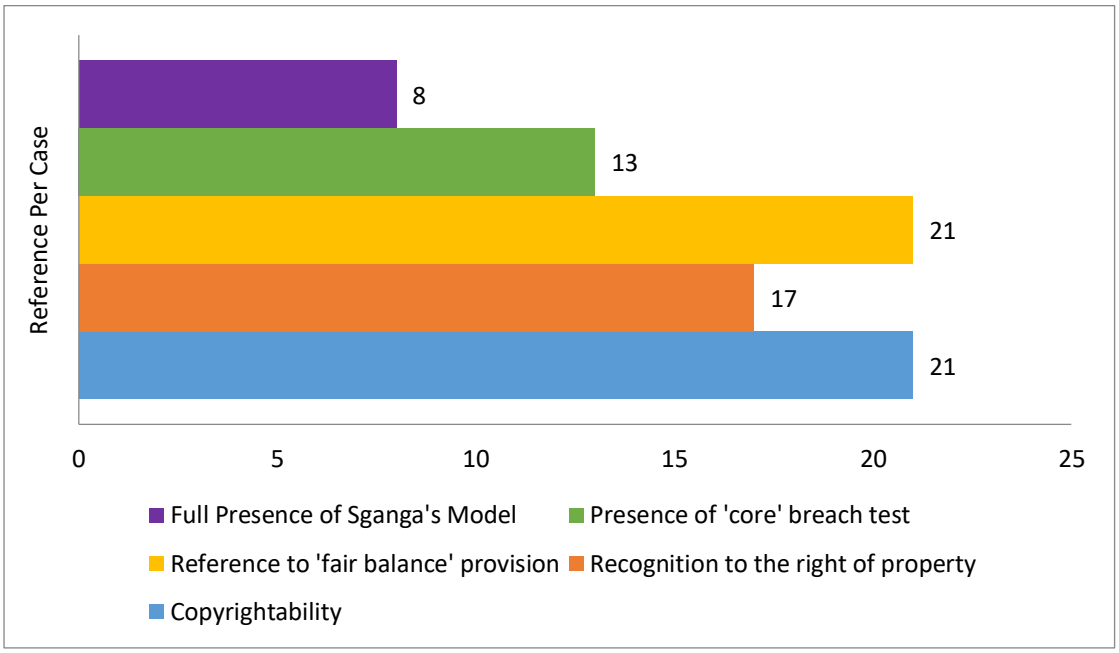

Figure 7. Frequency distribution of Sganga's proposed components on fair balance analysis. First-line (purple) shows the number of times the Court fully implemented Sganga's evolutionary model of fair balance in the case-laws. The remaining lines show per case isolated presence of every single component derived from Sganga's model of fair balance. The second line (green) accounts the numbers of 'core' breach tests were taken; third line (yellow) for the explicit reference on fair balance provisions (i.e. Article 52 of the EU Charter, Recital 3 of Directive 2001/29, Recital 31 of Directive 2001/29, Recital 41 of the Directive 2000/31, and Article 3 of Directive 2004/48); fourth line (orange) for the explicit statement mentioning the rights of property (or directly referencing Article 17(2) of the EU Charter); and fifth line (blue) for the times the Court assess the copyrightability of the subject matter, or whether the issue at hands could be discussed using the existing EU copyright legislation.[244]

However, if we to expect that each proposed components to complement each other naturally, then the weakest component may hinder the statistical significance for the rest of its components. In weighing the outcome to fair balance argument, the Court only deployed a serious infringement check (core breach test) in less than half of the total cases (n = 13). Ultimately, there were barely 8 (eight) cases where Sganga's model was fully

[244] For detailed coding instructions to this component, see Coding Sheet, Appendix C, Questionnaire 11.

implemented. Two of its weaker components, copyrightability and core breach test, contributed with this drastic reduction, as a result of the two being highly sporadic.

5.6. Sub-conclusions

The results in this section show that the components (or variables) which I claimed as potential parts of the fair balance doctrine were featured to a certain degree in the sampled case-laws. Regarding preconditions of fair balance, it was commonplace for the Court to start their reference to the doctrine by either citing relevant IP legislations –primary or secondary– or its past jurisprudence tied to the doctrine. The referrals on these types of sources are relatively high (30 counts for the past cases and 27 for the legal instruments) and have been cited altogether in handful of cases. The lack of variability, however, shown among those sources to represent each type of the source, with the most cited legal instrument went to Recital 31 of Directive 2001/29 (14 out of 21 counts) and for case-laws to *Promusicae* (C-275/06) (10 out of 13 counts).

Conflict also encountered in most of these sampled preliminary references (25 counts), even though there were minor instances where it [conflict] may absent while fair balance analysis remained discussed in the case-laws (5 counts). A possible explanation is that in the first three outlier cases,[245] the Court finds no tangible conflict, but rather the need to interpret the scope of certain copyright exceptions and limitations by referring to the doctrine. The remaining two cases were unqualified to be considered cases that entertained fair balance analysis in the field of copyright.[246] It is possible that CURIA's search filter to includes the two over their frequent usages of the term 'fair balance' in their own written preliminary rulings.

Among all the values that stood in opposition to copyright, I found the copyright's exhaustive list of exception and limitation being the most recurring sources of defence (15 counts). This trend subsequently followed by a higher prevalence of intra-rights conflict (17 counts). Next, in retrospect to the fair balance role to resolve the conflict, I found that different outcomes lead to different styles of balancing analysis. In a situation where the Court resolve the conflict strictly or by winning one value over the others (total conflict), fair balance predominantly incorporated infringement test from proportionality test and the core breach test suggested in Caterina Sganga's style of fair balance. Meanwhile, in cases

[245] *L'Oréal and Others* (n 33); *Deckmyn* (n 112); and *Circul Globus Bucureşti* (n 255)
[246] Case C-12/11 *Denise McDonagh v Ryanair Ltd* [2013] ECLI:EU:C:2013:43; Case C-170/13 *Huawei Technologies Co. Ltd v ZTE Corp. and ZTE Deutschland GmbH* [2015] ECLI:EU:C:2015:477.

of the partial resolution, all four derivative tests to the proportionality test were relatively present. Bear in mind that it is not within this thesis competence to generate claim of dependence between these variables.

That said, it appears that proportionality test, whether applied in full or partial, was mostly consulted to evaluate the outcome of balancing. It is especially the case once the identification components we associate to the doctrine were highlighted by the Court (27 counts). For the less stellar outputs, I find the overall references to tripartite stakeholders or reference of three essential groups of stakeholders (i.e. rightholders, copyright-dependent firms, and consumers) struggled to yield statistically significant result tied to stakeholder components. Finally, I found most components of Sganga's model evolutionary fair balance persisted in near half of the total sampled cases (13 counts). The current estimates, however, could be significantly lower depending on the threshold we set for proportionality principle to be considered 'real proportionality assessment' –the terms Sganga has described for the test but gave little clarity on it. If real proportionality assessment requires the full implementation of the proportionality test, then Sganga's model barely existed with only eight counts.

CHAPTER 6 – Discussions

6.1.Concluding Remarks: *More than a Figure of Speech?*

Could we see fair balance beyond a figure of speech? Yes. I would argue that analytical components of fair balance indeed exists but to a degree. To incorporate the doctrine into judicial reasoning, the Court relies on clusters of related components or as we empirically recalls it –variables. It justifies the doctrine usage before the Court. It contextualizes the doctrine's role in a predetermined conflict setting. It added socio-legal nuance of the referred conflict under the lens of its relevant stakeholders. More importantly, it facilitates the implementation of general EU principle such as the principle of proportionality by incorporating the principle in the doctrine's evaluation process.

However, those were all but hints on the systemic uses of fair balance analysis in the past. Along those lines, the components mentioned above also contribute to different styles of fair balance. In those preliminary references with partial conflict resolutions, we have seen the extensive presence of the proportionality principle under the framework of the proportionality test. Here, most of the derivative tests coming from the proportionality test being featured throughout the evaluation process of the fair balance analysis. Meanwhile, in cases tied to defence on copyright exception and limitation, we found that the proportionality principle has not been incorporated as comprehensive as the former. The Court instead favours narrower assessment by focusing on the infringement test, followed by teleological inquiry in the form of review on the core breach against the key EU provisions in question. Furthermore, as suggested from the outlier cases,[247] the doctrine may not even be framed by the Court to resolve a conflict but to offer grounded interpretive guidance to the concept of balancing.

That said, these different iterations of fair balance come with few caveats to our research undertaking. First, by having identified these different iterations, we knew that fair balance does not rely on a singular model or style. Because of this, our attempt to verify Sganga's model of evolutionary fair balance as the most prevalent style of analysis has been met with a mixed result. Whereas most 'unique' components proposed by Sganga's (i.e. copyrightability test, reference to fair balance provision, recognition to the right of property)

[247] In *L'Oréal and Others*, the Court addresses how to strike fair balance in the context of trademark protection. See *L'Oréal and Others* (n 33), para 143; In *Deckmyn*, the Court mentioned fair balance briefly to discuss the scope of parody. See *Deckmyn* (n 112), para 27; and in *Circul Globus Bucureşti*, the Court also raised fair balance doctrine to measure the scope of exception based on communication to public. See *Circul Globus Bucureşti* (n 255), para 30.

were relatively present in the sampled preliminary references, such presences were not presented sequentially by the Court –not akin to what has been envisioned by the Author. What qualifies as 'presence' in itself offer its own contained issue. We highlighted in the discussion on Sganga's lack of clarity to measure the presence of its component, particularly the proportionality principle. It consequently resulted in a duality of outcomes. If one employed loose presence of proportionality principle (not all sub-tests of proportionality tests were present) we ended up with higher rates of cases supporting Sganga's proposition – ergo more consistent presence to the evolutionary fair balance. To impose draconian standards for proportionality principle (all sub-tests were present), on the other hands, would yield less presence of the author's model, thus making it unsubstantiated proposition to meet our empirical standards.

6.2.The Starting Line of Fair Balance Doctrine

So far, I have analysed the points of origin of fair balance, and found a recurring pattern: The CJEU tends to express its intention to employ the doctrine by consulting to either relevant legal provisions or past precedence. It was mostly done prior to the Court's engagement to fair balance analysis. It was even commonplace for the Court to stack the two types of source all together by the time fair balance was first mentioned. From the perspective of judicial reasoning, this demonstrates fair balance as well-functioning doctrine for legal reasoning. It has foundational bases, which not only come formally through primary and secondary laws but also reflected in the Court's past works (jurisprudence). On an epistemological level, it also weakens the claim of fair balance being solely an amalgamation of the proportionality principle.[248] From our coding results, the Court seems to be aware of the new grounds to invoke the doctrine. For instance, rather than referring to the legal source of the proportionality principle, namely Article 5 of the Treaty, the Court instead deviate away to the other general (i.e. Article 52 of the EU Charter) or IP-related provisions (i.e. Recital 3 and 31 of the Directive 2001/29, Recital 41 of the Directive 2000/31, and Article 3 of the Directive 20004/48).

While there was relatively even distribution between reference from the source laws and benchmark case-laws, such distribution was somewhat homogenized. For the sources of laws, most fair balance arguments were started with reference to Recital 31 of the InfoSoc Directive (Directive 2001/29) as opposed to the higher available source of laws, namely

[248] Teunissen (n 5), p 579; Favale et al. (n 15), pp 4-5; Tito Rendas (n 153), pp 13-15.

Article 52 of the EU Charter. In my interpretation, the Court seems opted for clarity over hierarchy. While the latter source serves as the higher legal ground to fair balance, it does not provide enough clarity as to what constitute fair balance. Conversely, Recital 31 offers a 'text-book' definition to the concept, which provides more functional purpose if the Court intention is to introduce the fair balance.

Meanwhile, the distribution of case-laws was predominated by *Promusicae* (C-275/06) (10 out 13 counts). This might be driven by *Promusicae* status as the first 'fair balance' case on the field of a copyright dispute. Such dependency on pioneer-ism, however, presents a conceptual issue. If fair balance, as suggested by Sganga, is an ever-evolving doctrine made to answer the growing social issues behind the enforcement of EU's copyright rules, then the least the Court had to do was to present more varied takes to the doctrine – instead of relying only to its forefather case-law. Alternatively, there is a possibility to discover more variability of reference, provided we expanded our existing list of benchmark cases. Currently, I incorporate only seven benchmark cases, based on snow-ball referencing of the cases which scholars treat as pivotal to fair balance. In fact, throughout coding process, I found one case, in particular, *Stichting de Thuiskopie* (C-462/09), stood out as one of the most referred case-laws behind *Promusicae,* especially among cases with intra-rights conflict (7 out of 13). The conducted snow-ball reference may possibly fail to capture this case due to the recurring view in the literature to overlook the potential of fair balance to resolve the intra-rights conflict.

Finally, my empirical findings also affect certain theoretical premises. Kucrezawi (2017) nominates *Promusicae* as the only pioneer case-laws who would establish the relationship between fair balance and the EU Charter.[249] I would treat this as partly true. As we have discussed before, we can easily confirm the pioneer status of *Promusicae* for having the most consistent presence of all the enlisted benchmark case-laws. However, there were instances where reference on *Promusicae* were present while no reference on the source of primary laws, Article 52 of the EU Charter, to be found (and vice versa).[250] In such a vacuum, two cases –*Scarlet Extended* (C-70/10) and *SABAM* (C-360/10)– appears to be also extensively featured whenever Article 52 was present. These two cases commonly presented to echoes the idea of the inviolability of rights raised by the provision in question. Our empirical findings eventually had to support Mezei and Harkai (2017) depiction of the two

[249] Kuczerawy (n 130), p 232.
[250] Few examples of cases that cited Promusicae (C-275/06) but made no reference to Article 52 of the EU: *L'Oréal and Others* (n 33); *Bonnier Audio* (n 17); *Tobias Mc Fadden* (n 257).

cases, as cases who denounced the *primus inter pares* status of copyright laws, or its status as first and absolute rules to other fundamental rights and freedom.[251]

6.3.Conflict and Fair Balance

The existing literature considers conflict as an integral component to fair balance. The coding results can support this claim. First, I can positively confirm that fair balance analyses have been employed not only in a conflict between rights to property against different rights or freedoms (inter-rights conflict) but also internalized one (intra-rights conflict), between the property rights and its derogative rules (exception and limitation). Throughout all confirmed cases with identified conflict, 13 cases suit the criteria of inter-rights conflict while 12 other cases were leaning towards intra-rights conflict. In my view, such results highlight the branched usages of fair balance. On the one hand, the doctrine used as an analytical tool to harmonize the principal clash between different fundamental rights and freedom as a result of the enforcement of copyright measures. On the other hand, the doctrine acted as substantial guidance in transposing the exceptions and limitations, so that it would always strike a balance between higher values (fundamental rights and freedoms) protected by the Community legal order.

It has also been established by the literature that there is a second variant to intra-rights conflict, the one which involves a clash of values between subcategory of rights protected by property rights. Unfortunately, the coding outputs reveal no presence of that type of conflict. Nevertheless, I would not outright reject the idea that fair balance could potentially address the conflict in the future. I reason that, in at least two case-laws, *L'Oréal and Others* (C-324/09) and *Huawei Technologies* (C-170/13), the Court had mentioned fair balance alongside the other IP rights (e.g. trademark and patent). It was done despite giving no reference on copyright enforcement. These cases provide unique coding results in the sense that it uses fair balance not specifically to resolve a conflict of rules coming from the interpretation of exceptions and limitations. Rather, it provides interpretive guidance to the concept of balancing when it was applied to other IP rules. Thus, it offers a novel take to fair balance and conflict –the one where the notion of conflict pose significant ties with the doctrine but not necessarily prerequisite to the doctrine.

6.3.1. Partial and Total Conflict

[251] Mezei and Harkai (n 15), p 17; See also *Scarlet Extended* (n 11), para 43; SABAM (n 11), para 41.

Next, the content analysis highlights the overall propensity to the conflict resolution which was leaning towards the partial resolution. A small majority of sampled case-laws were deliberately used fair balance to provide concession between different values (partial conflict), as opposed treating it as a means to overrule the exercise of other values (total conflict) (16 to 9 counts respectively). The partial conflict has been recorded in both intra-rights and inter-rights conflict. It affirms the idea of high-level protection to copyright (baseline value) as absolutely inviolable.[252] If anything, it appears that the Court managed to compromise copyright enforcement with other opposing values by focusing on the shared commonality between the two vices. Such commonality is not exhaustive, but if we are to take a deduction based on the coding results, then it may take the form of shared purposes, such as economic integration (e.g. internal single market or single digital market) or safeguarding the autonomy of all stakeholders.

Conversely, as mentioned before, there were higher numbers of case where fair balance was imposed to suppress other values. My findings suggest that this was mostly frequent in the case-laws, which involve the copyright rules on exceptions and limitations (intra-rights conflict). Again such rules, the Court tends to display a more restrictive application of fair balance. Derogation to copyright enforcement is only permitted provided that the exception (or limitation) had fulfilled the requirements set formally within Article 5(1) of Directive 2001/29 or informally through the past precedence. Here, fair balance positioned to lean heavily to the baseline value (copyright). If the Member States failed to fulfil the requirement set forth from options above, Then the Court may consider serious infringement existed, thus leading up to imbalance of interests. While this reveals a different approach of fair balance analysis, the notion of strict interpretation on copyright limitations in itself is nothing new in Europe. Literature recalls the Court's affinity to interpret copyright derogation rules with the rule of narrow construction.[253] It aligns to Europe's recurring legal philosophy on authorship, which put greater emphasis on natural rights.[254] In essence, if protecting author's rights is essentially a matter of fairness, limitations to this right must remain 'exceptions'.[255]

6.3.2. Fair Balance and its Reference to Stakeholders

[252] Mezei and Harkai (n 15), p 17;
[253] *Jean-François Canat and Lucie Guibault, and Elisabeth Logeais,* Study on Copyright Limitations and Exception, World Intellectual Property Organization Working Paper (June 2015), p 18.
[254] Hugenholtz and Senftleben (n 22), 7.
[255] Hugenholtz and Senftleben (n 22), pp 7-8.

Continuing with the role of stakeholder in fair balance analysis, I can confirm the presence of three actors to which the literature considers as the stakeholders for copyright industry, namely rightholders (creators), firms (corporate bodies) and consumers (end-users).[256] The high referral rates between rightholders and consumers should not be an indicator of how firms were given lesser priority for their interests. Instead, this was merely a traditional depiction of copyright dispute which had occurred for years. At its crux, a copyright dispute entails a proper arrangement of authorship in society. In this respect, the issue of authorship has always revolved around establishing duty and obligation on those who create the work and those who exploited it. Such conventional dynamics of stakeholders eventually reflected in numerous accounts of Union's copyright rules. Being a neutral judicial body that it is, the CJEU was not at the luxury to include potential third-party without the risk of being accused of delving into judicial activism. Hence, the minimum referral to the group of firms (n =11) was a direct consequence of the Court engages in minimalist interpretation –to focus mainly on the stakeholders narrowly prescribed the rules, unless otherwise stated.

By having relatively small reference to corporate bodies, this also means lesser frequency for a tri-partite referral or collective reference to all three influential stakeholders. With only eight counts of referrals or less than half of the total sample population, it is an arduous task to maintain the claim of tri-partite reference as a novel component to fair balance. It also means that statistically speaking; the doctrine was not impactful enough to bring attention to the overlooked stakeholders, such as firms, into its judicial reasoning, despite what the literature had suggested us on the doctrine impact to invites more social cohesion into its copyright precedence.[257]

6.4.Proportionality Principle and Fair Balance

In construing the evaluation components of fair balance, I attest to the strong involvement of the proportionality principle, by its medium of the proportionality test. My coding estimation reveals a staggering 27 counts of case-laws which incorporate the proportionality test. Bear in mind, however, that the individual presence of its derivative tests (i.e. infringement, policy aim, effectiveness, necessity, and balancing reviews) was relatively sporadic. Full implementation of the derivative tests only found in eight cases. It signifies two things. One, nothing in our coded results could be interpreted to refute the

[256] Macmillan (n 155), p 128.
[257] Mathieu et al. (n 158), p 654.

general claim that the doctrine significantly tied to the principle.[258] Even in cases where there is an explicit reference to the proportionality principle, we can still encounter specific components of its test being made by the Court. It leads us to the second factor –a disclaimer if one will– that even if both concepts were commonly found tied together, it does not warrant that it wholly depended to each other. Out of all 30 cases, there were only eight cases where the proportionality test was made a whole. Nowhere in the coding results indicate that proportionality test being explicitly treated as the main test to resolve copyright dispute. Conversely, I discovered that the Court had been selectively added specific components of the proportionality test to complement its final fair balance overview. In cases where it leads to total conflict outcome, there was a greater presence of infringement reviews. Meanwhile, in partial conflict, balancing reviews seems to be the recurring feature of the proportionality test. The results, therefore, maintains the Scaccia's (2019) claim that 'despite being structured in sequence, specific components of proportionality test might be absent or heavily featured than the rest.[259]

6.5.Revisiting Sganga's Model of Evolutionary Fair Balance

The question of the systemic nature of fair balance is yet to be answered. As previously discussed, a deliberate research design decision had to be made. In that respect, I choose Sganga's model of evolutionary fair balance as my central reference to showcase the degree at which the doctrine being systematic and possess its own stylized analytical approach. According to Author's model, the first order of business entails verifying if subject-matter or the question(s) referred was fall within the scope of copyright regulation. I can confirm the presence of copyrightability test provided the Court formally tied the preliminary question with any of EU's copyright rules or if the Court had described the subject-matter as an issue related to the protection of creative works. The final empirical results could uphold this claim as there were at least 21 counts of such test found across the cases. Along this line, Sganga's also stated that there ought to be explicit reference to the provision(s) relevant to fair balance doctrine. I confirm this pattern by linking it back to our discussion on formal sources of fair balance. There we found that vast majority (n =21) of the sampled population indeed cited specific provisions to support the doctrine.

The next preliminary phase proposed by the Author is conceptually similar to what has been coded on 'distribution of normative values'. Here, Sganga's suggests that we ought to

[258] Teunissen (n 5), p 579; Favale et al. (n 15), pp 4-5; Tito Rendas (n 153), pp 13-15.
[259] Scaccia (n 27), p 6.

identify the right or freedom conflicting with copyright and then linked it with the relevant provisions. Again, as per our discussion on conflict, the dissemination between baseline values vis-à-vis potentially conflicting values is commonplace in the sampled preliminary reference (n = 25). The issue, however, is that the Court's deconstruction of values was not a 'clear-cut' task as what Sganga's had described in her proposition. These values often found dispersed, instead collectively put within single paragraph or series of related paragraphs. To add further complication, the Court seems not strictly confined to directly tied-in the identifiable values with their respective relevant provisions.

Once the conflicting values have been determined, Sganga's then theorize that the Court would undertake serious infringement check, or to check whether the measure negatively affects the essence of the values involved. If read in isolation, this is the least consistently present component in all the sampled cases. The 'core' breach test seemed pervasive only in those cases that resort to total conflict resolution, which was coincidentally small in numbers. In Sganga's proposition, she also claimed that only when core breach test is present, the Court may undergo the final evaluation phase, namely the real proportionality assessment. My coded results on proportionality test had proven otherwise. Proportionality test remains present in certain case-laws, even in its partial form, despite such cases failed to incorporate the core-infringement tests. Hence those two components are not mutually tied to one another.

Shifting the focus to proportionality principle, this is where it may be tricky to attest the validity of Sganga's proposed model. According to the Author, fair balance is expected to be concluded with evaluative assessment, a phase that incorporates proportionality assessment. Depends on the threshold we set to consider proportionality test has been made, we can either confirm Sganga's model as steadily present across most of fair balance analyses or the opposite. If we treat the implementation of proportionality test as lax and strategical, then we can include cases where proportionality test was applied partially, or bits-by-bits based on the Court necessity to evaluate the weight to each conflicting values. This preference resulted in almost half of the cases being considered to fully incorporate Sganga's model of evolutionary fair balance (n = 13). On the other hand, if we set the bar high and expect all the derivative tests of proportionality test to be present in each case, then the model in question was barely present in 21% of the total cases (n = 8).

Sganga's herself label the final phase as 'real proportionality assessment'. She then subsequently acknowledged that such an assessment should be based on criteria given by

Article 52 of the EU Charter. The criterion fundamentally revolves around the presence of all the derivative tests, infringement, suitability (i.e. policy aim and effectiveness), necessity and balancing in the strict sense. The Author, unfortunately, left no indication if these tests ought to be mutually exclusive or otherwise. If we ascribed to Scaccia's (2019) position which treats the principle as a loose, on-demand, decision-making tool, then the way forward should be to see proportionality test as a situational test by taking into account the case fact and nature of the conflict. However, by opting for Scaccia's position, one needs to be cautious not to fall into a slippery slope, and treat the operation of fair balance and proportionality principle as a mere cost-benefit analysis set by the Court. Both concepts, after all, involves high-level of abstraction. Hence, there may be a point at which the two concepts require more robust evaluation, as reflected through complete proportionality tests, in order to minimize the abstraction behind the Court decision-making process.

6.6.*The Way Forwards*: Shortcomings and Future Recommendations

In the end, the findings of this study have to be seen in the light of certain limitations. The first most vivid restriction is the lack of interpretive depth in assuming the presence of evaluative components. Manifest-oriented content analysis was ill-equipped to identify the abstract forms of inquiry presented by proportionality tests. For instance, to identify the presence of the infringement test, the researchers could not solely rely on the keyword 'infringement' alone. There were numerous instances where the infringement check has been made even without making any explicit reference to the aforementioned keyword. The difficulty was further scaled up once we realized no existing literature had tied these sub-tests with specific EU provisions or case-laws. Causal links made on these tests were mostly directed to the proportionality principle, which is fair considering them to be epistemologically related to the principle. But just like the keyword itself, we found that again and again, proportionality tests could be present in the written text regardless the Court plainly mentioned the proportionality principle.

Hence, to cast the wider net, the coding instructions need to compile list of words synonymous to the keyword in order to optimize this model of content analysis.[260] Nevertheless, with the absence of theoretical reference on the words or manners the Court took to indicate the tests, this coding task may subject to cognitive bias. Assigning as many synonyms to one component may also inconsequentially hinder the reliability of other

[260] For example, for the word 'infringement', researchers may consider the following, but not limited to synonyms; violation, breach, infraction, contravention, transgression or non-compliance).

components. Such is the case of interchangeability of the word 'balance' from the terms 'fair balance' and 'balancing in the strict sense', or the word 'breach' which is the assigned keyword for 'core breach test' and the synonym for infringement test. In the default setting, I tried to mitigate possible coding confusion by adding supplementary identifiers to these components (e.g. additional synonyms, or related case-laws, or relevant EU provisions). However, for components such as proportionality tests –with no known reliable supplementary identifier– the possible strategy to distinguish the overlapping components is by adding negative identifiers.[261]

The second general limitation to my result is the inability of content analysis to describe the order of fair balance analysis accurately. The content analysis for this research exclusively made to detect the textual, literal presence of all identifiers and their corresponding components. Such identification, however, mostly isolated. By design, this means no causality or dependency test between variables could be inferred. To acknowledge this, I tried to steer the empirical reviews on Sganga's proposed fair balance into the question regarding the presence of the whole components suggested by the Author. Hence, the sequential claim on Sganga model of evolutionary fair balance was left unresolved in this thesis. One way to fill the gap on this aspect in the future is to include sequential check as part of the coding dataset. It can be done by taking notes on the paragraphs at which the components were assumed present and subsequently check whether they appear in the correct orders (for example, by Sganga's sequential standards).

Finally, future researchers may consider the following. One, this research may become a point of reference only for the fair balance analyses circulated within the CJEU, and not at the national level. It is a critical disclaimer because of not only content analysis incapable of handling different format of written proceedings reliably, but also nothing could warrant that the CJEU's analytical approach on said doctrine would similarly enforced at the national levels. Existing literature had suggested there still a slight possibility that the national courts would not comply with the outcome of preliminary rulings, even if the said courts were those who submit the reference.[262]

[261] For example, in case of the written passage mentioned the word 'breach', researchers should treat the passage as positive presence of infringement test unless the said passage include negative identifier words such as 'core' or 'essence'.
[262] Takis Tridimas, 'Knocking on heaven's door: fragmentation, efficiency and defiance in the preliminary reference procedure' 40 (2003) Common Market Law Review 9, p 37.

Second, If researchers up to the task to replicate this research, then they should consider adding more identifiers to the components. For example, as per our discussion on benchmark case-laws, my claim on the lack of variability in case-laws reference could potentially be challenged if coders incorporate case-laws such as *Stichting de Thuiskopie* (C-462/09), which lacked referrals in the literature but highly cited in our sampled case-laws. Potential new research could also flourish from altering the identifiers to the specific setting of copyright enforcement. Focusing content analysis on Directive 2001/29 alone could provide us with a focused insight on recurring digital copyright issue such as the liability of intermediary, or internet service providers.

Finally, like many other studies based on content analysis, this research offers no revolutionary praise or criticism against its observable subject, or in our case, the doctrine of fair balance. Within the current study of fair balance, my research meant to provide the useful summary of information, specifically, input on trends of fair balance that close to the Court's reality, with minimal loss of information from the original data. Lawyers could use my empirical outputs to potentially predict the possible iterations of fair balance to which the CJEU may use in the future. Results on the presence of stakeholder may give the public a glimpse on the actors the Court perceived as the most affected stakeholders in a copyright dispute. To the existing literature, I would argue that based on my deconstruction of conflict, the role of conflict should not be overlooked, especially in shaping the styles of fair balances.

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APPENDIX

APPENDIX A – *List of Sampled Case-Laws (CURIA's Search Engine)*

No.	Case ID	Search Filter (EU Legislations)
1	C-275/06, *Promusicae* (2008)	Directive 2001/29, Directive 2004/48
2	C-5/08, *Infopaq International* (2009)	Directive 2001/29
3	C-403/08, *Football Association Premier League and Others* (2011)	Directive 2001/29
4	C-467/08, *Padawan* (2011)	Directive 2001/29
5	C-324/09, *L'Oréal and Others* (2011)	Directive 2001/29, Directive 2004/48
6	C-462/09, *Stichting de Thuiskopie* (2011)	Directive 2001/29
7	C-70/10, *Scarlet Extended* (2011)	EU Charter, Directive 2001/29, Directive 2004/48
8	C-145/10, *Painer* (2011)	EU Charter, Directive 2001/29
9	C-283/10, *Circus Globus Bucureşti* (2011)	Directive 2001/29
10	C-277/10, *Luksan*, 2012	EU Charter, Directive 2001/29
11	C-360/10, *SABAM*, 2012	EU Charter, Directive 2001/29, Directive 2004/48
12	C-461/10, *Bonnier Audio and Others*, 2012	Directive 2004/48
13	C-283/11, *Sky Österreich*, 2013	EU Charter
14	C-12/11, *McDonagh*, 2013	EU Charter
15	C-521/11, *Amazon.com International Sales and Others*, 2013	Directive 2001/29
16	C-314/12, *UPC Telekabel Wien*, 2014	EU Charter, Directive 2001/29
17	C-435/12, *ACI Adam and Others*, 2014	Directive 2001/29, Directive 2004/48
18	C-117/13, *Eugen Ulmer*, 2014	Directive 2001/29
19	C-201/13, *Deckmyn and Vrijheidsfonds*, 2014	Directive 2001/29
20	C-360/13, *Public Relations*	Directive 2001/29

	Consultants Association (2014)	
21	C-170/13, Huawei Technologies, 2015	EU Charter, Directive 2004/48
22	C-580/13, Coty Germany, 2015	EU Charter, Directive 2004/48
23	C-463/12, Copydan Båndkopi, 2015	Directive 2001/29
24	C-419/13, Art & Allposters International, 2015	Directive 2001/29
25	C-572/13, Hewlett-Packard Belgium, 2015	Directive 2001/29
26	C-484/14, Mc Fadden, 2016	EU Charter, Directive 2001/29, Directive 2004/48
27	C-161/17, Renckhoff, 2018	EU Charter, Directive 2001/29
28	C-149/17, Bastei Lübbe, 2018	EU Charter, Directive 2001/29, Directive 2004/48
29	Funke Medien NRW, 2019	EU Charter, Directive 2001/29
30	14. C-516/17, Spiegel Online, 2019	EU Charter, Directive 2001/29

APPENDIX B – *Coding Book*

General Instructions

1. Coding based on questionnaire. To complete the coding assignment, coder should answer all questions listed in the coding questionnaire below.
2. Coding sheet. Coder could answer the questionnaire in the coding sheet below or directly into the online coding sheet.[1]
3. Structure of the coded text. A preliminary reference judgment consists of 4 sections: 1) Legal Context; 2) Question referred for a preliminary ruling; 3) Consideration of the Referred Question; and, 4) Cost (Prayer for Relief). While both 'Legal Context' and 'Question referred for a preliminary ruling' are those sections which can be useful as a starting point to investigate the reference to certain legal provision, those sections, however, only offer non-discursive information on the case-law. Hence, information in question should not be recorded in the coding sheet. Instead, coder should focus to record the reference on the more discourse-oriented part of the text that is the, 'Consideration of the Referred Question' Referred'.
4. *In vivo* coding. In exception to question #11, coders should focus on recording 'actual words' being written in the text (*in vivo* codes) as opposed to what the text may seem implied. For question #11, coders should focus on certain paragraphs that 'best described' the situation being investigated (e.g. whether the Court explains the aim of the policy measure).
5. Automated word search. For the sake of coding convenience, coders could rely on 'find words' feature [Ctrl + F] commonly provided by the web browser or built-in software for pdf reading (e.g. adobe reader) to locate certain keywords instructed by coding questionnaires.
6. Citing in-text reference. When filling the coding sheet. Please write down your preferred answer first, followed by in-text proof to support your claimed answer.

Example

> **Comment on question no. 1**
>
> Reference to Recital 31 of Directive 2001/29. "Finally, such a presumption enables a fair balance of rights and interests between the different categories of rightholders referred to in recital 31 of Directive 2001/29 to be maintained." – *Promusicae* (C-484/18), paragraph 44

APPENDIX C – *Coding Sheet*

CODING GUIDE	LABEL
Identification Components	
1. *Does the Court mention any of the "legal balancing" provision listed in the following list of relevant primary and secondary EU legislation?* (Tick all the relevant answers) Primary EU laws: ☐ Article 52 of the EU Charter Secondary EU laws: ☐ Recital 3 of the Directive 2001/29 ☐ Recital 31 of the Directive 2001/29 ☐ Recital 41 of Directive 2000/31 ☐ Article 3 of Directive 2004/48	Use of Source of Laws
2. *Does the Court mention or cite any case law listed in the list of relevant case-laws?* (Tick all the relevant answers) Relevant case-laws ☐ Case C-275/06, Promusicae, 2008 ☐ Case C-461/10, Bonnier Audio, 2012 ☐ Case C-145/10, Painer, 2011 ☐ Case C-70/10, Scarlet Extended, 2011 ☐ Case C-360/10 SABAM, 2012 ☐ Case C-314/12, UPC Telekabel, 2014 ☐ Case C-230/16, Coty Germany, 2017 ☐ Case C-324/09, L'Oréal v. eBay, 2011	Use of Precedence
3. *Does the Court mention exclusive rights or any term associated with its "bundle of rights"?* (Tick all the relevant answers) Bundle of Rights ☐ Copyright ☐ Right to distribute work ☐ Right to license ☐ Moral right ☐ Right to reproduce the work ☐ Performing right	Presence of copyright

☐ Right to publicity 4. *In addition, does the Court mention the right to property or cite Article 17(2) of the EU Charter?* (yes/no)	
5. *Does the Court refer to any copyright exception or limitation or mentioned its relevant provision, Article 5(1) of Directive 2001/29?* (Tick all the relevant answers) List of Exception and limitation ☐ Photocopying/photo reproduction ☐ Private copying ☐ Reproduction by libraries ☐ Ephemeral recordings by broadcasters ☐ Reproduction of broadcasts by social institutions ☐ Illustration for teaching or scientific research ☐ Use for the benefit of people with a disability ☐ Quotation for criticism or review ☐ Public security ☐ Public speeches and public lectures ☐ Religious or official celebrations ☐ Works of architecture or sculpture in public spaces ☐ Incidental inclusion ☐ Use for advertising the exhibition or sale of works of art ☐ Use for the purpose of caricature, parody or pastiche ☐ Use for the demonstration or repair equipment ☐ Use for research or private study ☐ Reproducing and making available of orphan works 6. *If NOT, does the Court refer to other intellectual property rights?* (Tick all the relevant answers) Relevant intellectual property rights ☐ Trade mark ☐ Industrial designs ☐ Patents ☐ Utility models ☐ Trade secrets ☐ Database ☐ Domain names	Presence of Conflict

☐ Geographical indication 7. *If NOT, does the Court refer to any of the following rights or freedoms?* (Tick all the relevant answers) Competing Fundamental Rights or Freedoms: ☐ Free movement of goods (Article 28 of TFEU) ☐ Freedom of expression and information (Article 11 of the EU Charter) ☐ Freedom of establishment and to provide service (Article 26 of TFEU) ☐ Right to privacy and family life (Article 7 of EU Charter) ☐ Right for personal data protection (Article 8 of EU Charter)	
8. *Which type of conflict described or implied by the Court?* ((Tick only one answer) ☐ If the Court made reference between copyright/any bundle of right and copyright exception and limitation. ☐ If the Court made reference between copyright/any bundle of right and other rights of property. ☐ If the Court made reference between copyright/any bundle of right and other non-copyright related right.	Typology of Conflict
9. *Does the Court mention any of the following stakeholders?* (Tick all the relevant answers) Relevant stakeholders ☐ Rightsholder, Author, Creator, Exclusive Owner, Licensor ☐ Manufacturer, Distributor ☐ Collecting agency, royalty agency ☐ Intermediary, medium platform, service provider ☐ End-user, consumer, performer, licensee	Stakeholder identification
Evaluative Components	
10. *Does the Court engage with any of the following action(s)?* (Tick all the relevant answers) ☐ Evaluates if infringement of any rights (copyright or any other non-copyright related rights) has occurred or might	Presence of proportionality test

had occurred from the implementation of the [copyright] policy in question (Infringement review) ☐ Describes the goal of the policy in question (Suitability review) ☐ Evaluates the effectiveness of policy in question (Suitability review) ☐ Evaluates if there are any other alternative policy to replace the policy in question (Necessity review) ☐ Describes that 'balance has been struck down' between policy in question and rights being infringed (balancing review)	
11. *In line with result above, confirms if the Court engage with any of the following action(s)?* (Tick all the relevant answers) [263] ☐ Identifies relevant copyright ☐ Recognizes copyright as right protected by property right/ right of property ☐ Recognizes relevant provision(s), primary or secondary, which permit balancing of rights/ fair balance ☐ Describes if "core" or "the essence" of rights, either on behalf of rights of property or the competing rights, being breached ☐ Applies proportionality principle partially (See questionnaire 10) ☐ Applies proportionality principle completely (See questionnaire 10)	Evolutionary Model of Fair Balance (Sganga)

[263] If we recall Scaccia (2019) discussion on the embeddedness of proportionality test (See Section 2.1. of Chapter 1), he argues that the test has not always present itself as a whole, with all of its features being present (i.e. infringement check, suitability, necessity, balancing in the strict sense). Often specific features might be absent or heavily featured than the rest. Taking this into account, this questionnaire recognized two possibilities, one where proportionality principle being applied partially, or when it was applied in its fullest potential (infringement review, suitability review, necessity review, and balancing review are present). See Scaccia (n 27), p 7.

APPENDIX D – *List of Frequency Distribution Tables*

Table 1: Frequency Distribution of Legal Source

No.	Legal Source	Case Numbers[264]	Total
1	Art. 52 of the EU Charter	13, 16, 22, 28, 29, 30	6
2	Rec. 3 of Directive 2001/29	16, 19, 27	3
3	Rec. 31 of Directive 2001/29	2, 3, 4, 6, 8, 15, 17, 19, 23, 24, 25, 27, 29, 30	14
4	Rec. 41 of the Directive 2000/31	26	1
5	Art. 3 of Directive 2004/48	7, 11, 28	3
6	No Reference	1, 5, 9, 10, 12, 14, 18, 20, 21	9

Table 2: Frequency Distribution of Benchmark Case-Laws

No.	Case Laws Reference	Case Numbers	Total
1	*Promusicae* (C-275/06)	5, 7, 11, 12, 13, 16, 22, 26, 29, 30	10
2	*Painer* (C-145/10)	19, 27	2
3	*Scarlet Extended* (C-70/10)	11, 16, 22, 26, 29, 30	6
4	*SABAM* (C-360/10)	16, 22, 29, 30	4
5	*UPC Telekabel* (C-314/12)	26, 29, 30	3
6	*Coty Germany* (C-230/16)	26, 28, 29, 30	4
7	*L'Oréal v. eBay* (C-324/09)	7	1
8	No Reference	1, 2, 3, 4, 6, 8, 9, 10, 14, 15, 17, 18, 20, 21, 23, 24, 25	17

Table 3: Frequency Distribution of Baseline (Copyright) Claims

No.	Baseline Claims	Case Numbers	Total
1	Article 17(2) of the EU Charter (Right to property)	1, 7, 10, 11, 12, 13, 16, 22, 26, 27, 29, 28, 30	13
2	Right to Distribute Work	24	1
3	Right to License	N/A	N/A

[264] For the case ID referred in case numbers below, please consult to the list of sampled case laws. See List of Filtered Case-Laws, Appendix A.

4	Moral Right	N/A	N/A
5	Right to Reproduce Work	2, 3, 4, 6, 8, 10, 15, 17, 18, 20, 23, 25	12
6	Right to Authorize Performance	N/A	N/A
7	Right to Publicity	27 29	2
8	No Reference	5, 9, 14, 19, 21	5

Table 4: Frequency Distribution of Opposing Claims

No.	Case Laws Reference	Case Numbers	Total
1	Exception and limitations	2, 3, 4, 6, 9, 10, 15, 17, 18, 19, 20, 23, 24, 25, 27	15
2	Other IP Rights	5, 21	2
3	Other Fundamental Rights and Freedoms	1, 7, 8, 11, 12, 13, 16, 22, 26, 28, 29, 30	12
4	No Reference	14	1

Table 5: Frequency Distribution of Conflict

No.	Type of Conflict	Conflict Outcome (Case Numbers)		Total
		Partial	Total	
1	Intra-rights I (Exception and Limitation)	3, 4, 6, 10, 18, 20, 23	2, 15, 17, 24, 27	12
2	Intra-rights II (Other IP rights)	N/A	N/A	N/A
3	Inter-Rights	1, 8, 12, 13, 22, 25, 26, 28, 30	7, 11, 16, 29	13
4	No Conflict	5, 9, 14, 19, 21		5

Table 6: Frequency Distribution of Stakeholders

No.	Case Laws Reference	Case Numbers	Total
1	Rights holders	1, 2, 4, 5, 6, 7, 8, 10, 11, 12, 13, 15, 16, 17, 19, 20, 23, 22, 24, 25, 26, 27, 28, 29	24
2	Copyright-dependent firms	1, 24, 25	3

	(Manufacturers, Royalty agency)		
4	Copyright-dependent firms (Intermediary)	3, 5, 7, 11, 12, 16, 20, 26	8
5	Consumers	2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 15, 16, 17, 18, 19, 20, 22, 23, 25, 26, 27, 28, 29, 30	25
6	Tri-partite Reference	5, 7, 11, 12, 16, 20, 25, 26	8
4	No Reference	14, 21	2

Table 7: Presence of Proportionality Test

No.	Type of Proportionality Test	Case Numbers	Total
1	Infringement	1, 3, 4, 5, 7, 9, 10, 11, 12, 13, 15, 16, 17, 22, 23, 25, 26, 27, 28	19
2	Policy Aim (Suitability)	1, 3, 4, 5, 6, 7, 8, 9, 10, 11, 13, 16, 18, 23, 25, 27, 28, 29, 30	19
3	Effectiveness (Suitability)	5, 7, 11, 13, 15, 17, 18, 19, 23, 25, 26, 27, 28, 29	14
4	Necessity	1, 2, 3, 4, 5, 8, 10, 11, 13, 15, 16, 17, 18, 23, 26, 28, 29	17
	Balancing Review	1, 3, 4, 5, 6, 7, 8, 10, 11, 12, 13, 15, 17, 18, 19, 20, 22, 23, 25, 26, 27, 28, 29, 30	24
	No Proportionality Test	4, 21, 24	3

Table 8: Presence of Evolutionary Model of Fair Balance

No.	Type of Proportionality Test	Case Numbers	Total
1	Copyright nature of the issue	1, 3, 4, 6, 7, 8, 9, 11, 12, 15, 16, 17, 20, 22, 23, 24, 25, 27, 28, 29, 30	21
2	Recognition of Property Right	1, 3, 5, 7, 10, 11, 13, 15, 16, 17, 22, 23, 26, 27, 28, 29, 30	17

3	Reference to balancing provision	2, 3, 4, 6, 7, 8, 10, 11, 13, 15, 16, 17, 19, 22, 23, 25, 26, 27, 28, 29, 30	21
4	Presence of core breach test	7, 10, 11, 12, 13, 15, 16, 17, 18, 19, 22, 26, 28	13
5	Implementation of proportionality test (Partial)	2, 4, 6, 7, 8, 9, 12, 15, 16, 17, 18, 19, 20, 22, 25, 26, 27, 29, 30	19
6	Implementation of proportionality test (Total)	1, 3, 5, 10, 11, 13, 23, 28	8

Table 9: Presence of Evolutionary Model of Fair Balance

No.	Type of Proportionality Test	Case Numbers	Total
1	Copyright nature of the issue	1, 3, 4, 6, 7, 8, 9, 11, 12, 15, 16, 17, 20, 22, 23, 24, 25, 27, 28, 29, 30	21
2	Recognition of Property Right	1, 3, 5, 7, 10, 11, 13, 15, 16, 17, 22, 23, 26, 27, 28, 29, 30	17
3	Reference to balancing provision	2, 3, 4, 6, 7, 8, 10, 11, 13, 15, 16, 17, 19, 22, 23, 25, 26, 27, 28, 29, 30	21
4	Presence of core breach test	7, 10, 11, 12, 13, 15, 16, 17, 18, 19, 22, 26, 28	13
5	Implementation of proportionality test (Partial)	2, 4, 6, 7, 8, 9, 12, 15, 16, 17, 18, 19, 20, 22, 25, 26, 27, 29, 30	19
6	Implementation of proportionality test (Total)	1, 3, 5, 10, 11, 13, 23, 28	8
7	Full Presence	7, 11 , 15, 16, 17, 22, 28	7