



Trento Law and Technology Research Group

Research Paper n. 26

Copyright as Monopoly: the Italian Fire under the Ashes

Roberto Caso and Giulia Dore | February/2016

ISBN: 978-88-8443-676-4

COPYRIGHT © 2016 ROBERTO CASO AND GIULIA DORE

This paper can be downloaded without charge at:

The Trento Law and Technology Research Group Research Papers Series Index
<http://www.lawtech.jus.unitn.it>

IRIS:

<http://hdl.handle.net/11572/137906>

Questo paper © Copyright 2016 di Roberto Caso e Giulia Dore è pubblicato con
Creative Commons Attribution-NonCommercial-NoDerivatives 4.0
International licence.

Further information on this licence at:

<http://creativecommons.org/licenses/by-nc-nd/4.0/>

ABSTRACT

This essay provides an overview of some research that is in its early stages. The principal purpose of the authors is to understand whether, in a Continental European legal system such as the Italian one – traditionally led by a strong historical and normative vision of copyright (or author’s right) as natural right and nowadays influenced by the EU propertization trend – it is yet possible to foresee a different approach that is prone to interpreting the exclusivity of copyright in terms of monopoly.

The latter approach, to some extent, might in fact be more relevant to restricting copyright protection by limiting the exclusive rights (*ius excludendi alios*) while supporting the public interest. Besides, the vision of “copyright as monopoly” seems in particular to play an overriding role within the digital context, where property is less apt in terms of the promotion and sharing of knowledge and, on the contrary, monopolistic jeopardy is sensibly flourishing.

CONTENTS

1. Introduction - 2. Monopoly or property? - 3. Copyright as monopoly in the Italian literature - 4. Copyright as monopoly in the digital environment - 5. Conclusions

KEYWORDS

Intellectual property – Copyright - Comparative Law – Property - Monopoly

About the Authors

Roberto Caso (email: roberto.caso@unitn.it) Personal Web Page: <http://www.lawtech.jus.unitn.it/index.php/people/roberto-caso> - is Associate Professor of Private Comparative Law at the University of Trento (Italy) – Faculty of Law and co-director of LawTech Group. He teaches Private Law (“Diritto civile”), Comparative Intellectual Property Law, and ICT Law. Roberto Caso is author of many books and articles about Intellectual Property, Privacy & Data Protection, and Contract Law. He is President of “Associazione Italiana per la promozione della Scienza Aperta” [Italian Association for the promotion of Open Science].

Giulia Dore (email: giulia.dore@unitn.it - giulia.dore@stir.ac.uk - Personal Web Page: <http://www.lawtech.jus.unitn.it/index.php/people/giulia-dore>) holds a Ph.D. in European and Comparative Legal Studies from the University of Trento and she is currently a Postdoctoral Research Assistant in Intellectual Property Law at the School of Law, University of Stirling, Scotland (UK).

Copyright as Monopoly: the Italian Fire under the Ashes¹

Roberto Caso and Giulia Dore

1. Introduction

This essay provides an overview of some research that is in its early stages. The principal purpose of the authors is to understand whether, in a Continental European legal system such as the Italian one – traditionally led by a strong historical and normative vision of copyright (or author’s right) as natural right and nowadays influenced by the EU propertization trend – it is yet possible to foresee a different approach that is prone to interpreting the exclusivity of copyright in terms of monopoly.

The latter approach, to some extent, might in fact be more relevant to restricting copyright protection by limiting the exclusive rights (*ius excludendi alios*) while supporting the public interest. Besides, the vision of “copyright as monopoly” seems in particular to play an overriding role within the digital context, where property is less apt in terms of the promotion and sharing of knowledge and, on the contrary, monopolistic jeopardy is sensibly flourishing.

The second paragraph illustrates the typical conflict between the copyright natural right model and the monopolistic approach to copyright, with an outlay of the comparative grounds in which it further develops referring to EU experiences and highlighting the trend for propertization in the EU. The third paragraph seeks to demonstrate how the model of copyright as monopoly, which has in Italy ancient and solid foundations from an economic and legal theoretical perspective, may represent a fine contemporary instrument for the present-day challenges of copyright law, with an irrefutable tie to the methodology of both comparative law and the economic analysis of law. A *de iure condito* argument is advocated, juxtaposing the canons of copyright as natural right and of

¹ This working paper was presented and discussed at the Third Annual Private Law Consortium, July 6-7 2015, Centre for Intellectual Property Policy, McGill University, Faculty of Law. The authors wish to thank all speakers for their insightful comments and suggestions. Roberto Caso is author of the paragraphs 1, 3 and 4, Giulia Dore is author of paragraph 2 and 5.

copyright as monopoly, but also offering some concrete examples of the interpretative outcomes and operative effects that each of the two visions generate. In the fourth paragraph, such considerations are promptly translated into the digital frame, where the monopolistic effects of copyright become even more obvious and pronounced, particularly with reference to the functioning of the digital exhaustion principle and the use of technological protection measures. Finally, with these latest concerns in mind, the last paragraph presents some provisional conclusions.

2. Monopoly or property?

The English copyright and continental authors' rights systems have essentially developed around the revolutionary invention of the printing press, moving on to a legislative path that, departing from the booksellers' privileges, led to the first copyright laws in the 1700s. The printing revolution certainly established the foundation for the subsequent growth of the economics and concepts upon which public power shaped the law, which still represents the outcome of a balancing process that embraces opposing and often conflicting interests.

These interests are, on the one hand, streamlining the individual's exclusive rights to exploit his/her intellectual work, and, on the other hand, the wider interest of the public to access and use the work. Against this background, the necessary give and take between such divergent interests is achieved by imposing certain limits over the duration and scope of copyright. Moreover, exclusive rights also coexist with the lingering effectiveness of the public domain and so with a range of exceptions to the main rule of exclusivity.

However, the equally revolutionary advance of digital technology, which has been shaped in the same way as the printing revolution, if not with sturdier power and consequences, has undeniably disrupted such a layout of interests, as well as the overall structure of copyright laws in the Western tradition. Consequently, the public decision-maker has found him/herself headed for the inescapable task of reshaping the whole spectrum of interests, which in the first place requires reconsideration and amendment of the laws thus far promulgated in order to afford adequate protection to the works of the mind.

During recent decades, copyright has undeniably undergone significant expansion [see Lessig, 2004]. The sphere of exclusivity has attracted new types of work, for example, software and databases, and new mechanisms of protection have been settled in order to encompass new ways of exploiting the work, such as the imposition of levies upon the selling of devices or the incorporation in the work itself of technological protection measures (TPMs). The expansion of copyright, however, characterizes a mutual trend for the Western tradition as a whole, to the extent that many commentators have discerned some kind of convergence between common and civil law systems [e.g. Goldstein 2001].

Noticeably the United States seems to have exerted some strain on the enlargement of copyright, from the international angle, by means of conventions and through its own national legislation [e.g. Litman, 2006]. Nevertheless, the European Union has gone even further, promoting an overall far-reaching protective scope, as in the case of the *sui generis* protection of the database. The same EU legislator makes such intent abundantly clear. For example, the Directive 2001/29/EC on the harmonization of certain aspects of

copyright and related rights in the information society, in fact, establishes the highest level of protection (see recitals 4 and 9).²

Both from a scholarly and case law standpoint, the picture appears far more compound. Countless scholars have criticized the unhindered expansion of copyright. The courts, on the other hand, have been vacillating, with some pronouncements in favour of strengthening copyright protection and others preferring a more definite copyright limitation. Either way, with regard to the augmentation or contraction of copyright protection, we cannot discard the role of theoretical models that have explored the nature and justification of copyright and intellectual property in general.

As commonly understood, two main theories have been devised in this regard. One leads to the utilitarian model that considers exclusivity to be the basic instrument created by the State with the aim of incentivizing knowledge exchange; the other, on the contrary, hints at the doctrine of natural law, which favours copyright protection in terms of fair reward for the expenditure of creative labour. Indeed, although the assortment of theories is broader and has many leading to few more theoretical models, for the purpose of this article, we will be considering the two foremost above-mentioned theories.

In an attempt to simplify these arguments, we will allege that the former approach is well identified with the word “monopoly”, while the latter nowadays is rather pigeonholed by the term “property” [cf. Moyse, 1998; Strowel, 1993, 77 ff.].

Use of the word “property” appears to be undeniably dominant, not only being used regularly in a general sense or in more focused discourses on copyright, but also resulting from the explicit reference to it made by legislators and other decision-makers in

² See also Dir. 2004/48 on the enforcement of intellectual property rights (recital 21).

their lexicon, both on domestic and international grounds, for example, the World Intellectual Property Organization (WIPO) [e.g. Lemley, 2005], TRIPs and – at least from a constitutional perspective – the EU [e.g. Resta, 2011].

At the same time, one should not overlook that copyright law has its own peculiar features, which distinguish it both from a legal monopoly and from a right of property over tangible res. However, the inevitable rhetorical imprint of both terms in question plays an interesting and crucial role at the ideological, political and operational levels.

Furthermore, influential scholarly sources emphasize how common law systems, especially those of the United States, are more prone to sharing the monopolistic vision, while the Continental structure of authors' rights, as found in the Italian system, are largely inclined towards the natural right image. This is an oversimplification, largely caused by the dissimilar historical development featuring the common law copyright and the civil law *droit d'auteur* [e.g. Izzo, 2010] respectively. Many authors have underlined that both visions may have coexisted and still exist against the two legal backgrounds, also explained by the legacy of disseminated ideas and attitudes that are common to the larger Western tradition [e.g. Goldstein, 2001, 3 ff.; Ginsburg, 1990].

Nonetheless, there is an element of truth even in this oversimplification. The monopolistic vision explains certain distinctive features of the normative structure of US copyright law, while the natural right pattern better describes the typical traits of Continental legislation, such as the Italian *legge d'autore* that is henceforth considered. The twofold claim of the monopoly and natural right schemes appears confirmed by their polyvalent use by legal interpreters. The naturalistic, proprietary and individualist approach serves as a means to justify the expansion of the

protection of copyright, but the metaphor of property may also be well cast to rationalize the limits of copyright [Lametti, 2012]. The same dual attitude appears to be equally pertinent to the utilitarian design.

Nonetheless, in the view of the authors, especially with regard to the economic facets of copyright (for now leaving aside any consideration for the moral rights of the author), and particularly within the digital arena, the monopolistic vision appears to be a more suitable choice to define properly the perimeters of copyright exclusivity. The exclusive trait (monopoly) is indeed to be regarded as the instrument that the State creates to grant protection to copyright, not the intrinsic purpose of the law itself, which is instead the advancement of the learning and sharing of knowledge. Within this defined context, the core parameter for reference shall be the public domain [cf. Patterson, 1998, 443 ff.], while the monopoly of the exclusivity alias shall be the exception.

As anticipated, this is a known perspective in the United States. The historical roots of the utilitarian view have been vastly explored and continue to be investigated. For the purposes of this paper, we will not review these arguments. The foremost aim of the present research is indeed to show how, even in a typical Continental system such as the Italian one, despite the normative framework that seems to be going in the opposite direction (see Article 17, paragraph 2 of the Charter of Fundamental Rights of the European Union), the monopolistic theory of copyright is likely to make a significant contribution to the debate.

Particularly in the digital era, the overriding power that arises from granting the exclusivity of rights may sensibly challenge the fragile equilibrium that legislators and courts have been trying to establish in balancing the opposing interests of all copyright players and

stakeholders. This appears even more plausible when such power is exercised with the strength and even armed force of technology.

Moreover, even before the massive spread of digital technologies, the visualization of copyright as a monopoly has had relevant effects on the encroachment of innovation. Specifically, the Betamax decision of 1984 certainly represents a critical juncture [Samuelson, 2006]. The Court's conclusions supported the inference that the manufacturers of devices, such as home video recorders that consumers use to record copyrighted works, are not liable to copyright infringement as far as such devices allow licit and commercially relevant uses that do not violate copyright [J. Band, A. J. McLaughlin, 1993; M. Burks, 1985; J. Lawrence, B. Timberg, 1989; G. S. Lunney, 2002]. Furthermore, not only is their contributory (indirect) liability excluded, but users are also exempted as far as their use is for time shifting, with the fair use defence applying accordingly.³

Nevertheless, the Betamax vision is not absolute. On other occasions, the Supreme Court has pronounced differently.⁴ To

³ In the arguments of Justice Stevens who delivered the opinion of the Court, the US constitutional IP clause operates as follows: "The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired." *Sony Corporation of America v. Universal City Studios, Inc.*, 464 U.S. 417, 104 S. Ct. 774, 78 L. Ed. 2d 574 (1984), <<https://supreme.justia.com/cases/federal/us/464/417/case.html>>.

⁴ See, in particular, the *Grokster* decision by the Supreme Court, which certainly challenges the Betamax approach holding that "one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties". *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.* 545 U.S. 913 (2005), 380 F.3d 1154, <<http://www.supremecourt.gov/opinions/04pdf/04-480.pdf>>.

such an extent, although some traces in the proprietary perception of copyright can be found in the US system, the monopolistic canons certainly prevail and have a clear impact on the entire development of its domestic law, even thanks to the influence played by economic analysis of the law on copyright theories.

On the contrary, within the framework of the European Union, the constitutional normative approach is radically different and certainly influenced by the typically property-driven approach of the Continent. Article 17 paragraph 2 of the EU Charter of Fundamental Rights of the European Union, dedicated to the Right to property, declaims, in the English version, that “intellectual property shall be protected” [Resta, 2011; Sganga, 2015].

Accordingly, the Court of Justice of the European Union (CJEU) is creating copious case law on copyright. The emblematic questions posed by the digital era fuel the problem of balancing copyright with other fundamental rights such as the freedom of expression and information, the privacy and protection of personal data, but also the freedom to conduct business. A good example of this is provided by the Court’s judgment on the *Promusicae* case.⁵ Such urgings appear even more clear and explicit in the *Scarlet* decision and are then reaffirmed by the next CJEU ruling in the *Netlog* case,⁶ and more recently in the *UPC Telekabel* decision [Dore, 2015].⁷

⁵ As the ECJ argues in respect to the necessary fair balance among rights, or more broadly the interests of the different parties involved in copyright questions or controversies, “it should be recalled that the fundamental right to property, which includes intellectual property rights such as copyright and the fundamental right to effective judicial protection constitute general principles of Community law [However], Member States must, when transposing the directives mentioned above, take care to rely on an interpretation of the directives which allows a fair balance to be struck between the various fundamental rights protected by the Community legal order” (at 62, 63 and 68). Case 275/06 *Productores de Música de España (Promusicae) v Telefonica de Espana SAU* [2008] ECR I-271.

⁶ The Court in that case made it clear that «the protection of the right to intellectual property is indeed enshrined in Article 17(2) of the Charter of

In brief, the constitutional normative context of the European Union visibly seems to be pushing, at least for what is declared in legislative acts and court rulings, for the propertization of copyright [Resta, 2011; Sganga, 2015]. The interpretative understanding of the EU Court of Justice deliberately speaks of the need to strike a fair balance among different fundamental rights and, by so doing, applies general criteria such as proportionality and reasonableness. Therefore, it is in the offing that there will be a renewal or reconsideration of the theory of copyright as a monopoly even within the European Union and its Member States. Indeed, in the view of the authors, this is more than plausible, at least with regard to the Italian context.

3. Copyright as monopoly in the Italian literature

The Italian Constitution of 1948 does not mention either copyright or the other intellectual property rights that include patents or trademarks. Consequently, copyright and, in turn, the related principle of striking a fair balance among all interests and rights applying to copyright matters, are otherwise indirectly referred to as other existing constitutional provisions.⁸ The applicable regulatory

Fundamental Rights of the European Union ('the Charter'). There is, however, nothing whatsoever in the wording of that provision or in the Court's case-law to suggest that that right is inviolable and must for that reason be absolutely protected» (at 42 and 43). Case C-360/10 *Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM) v. Netlog* [2012] ECR I-0000.

⁷ Case 314/12 *UPC Telekabel Wien GmbH vs Constantin Film Verleih GmbH* [2014] OJ C151/2.

⁸ In particular, as the Italian Constitutional Court argued "it has to be observed that, given the public interest of both users and enterprises in that market, the interests of the authors of the works in question still matter, which the legislator considers to be of overriding importance [...] it becomes essential to acknowledge the proprietary right [sic!] of the author of the work and his/her

framework is instead devised from the 1942 Italian Civil Code and in Law No. 633 of April 22, 1941, for the Protection of Copyright and Neighbouring Rights, subsequently amended but never entirely and systematically reformed.

In terms of copyright as a scientific discipline in Italy, traditionally professors of industrial law – a branch of commercial law – have taught it.⁹ Indeed, even considering this peculiar affiliation, Italian copyright literature has proved to be quite productive and wide-ranging, with equal representation of natural law and utilitarian approaches to copyright [Auteri, 2012, 541]. Therein, some influential exponents of the Italian liberal economic theory have raised their voices against intellectual property, from 1700s illuminists to 1900s economists. Relatively recent contemporary works have expressly underlined such an important trend [Borghi, 2003], in particular focusing on the thoughts of leading economist and politician Luigi Einaudi [Resta, 2011].

consequent exclusive right to exploit the work itself, although the law does not fail to afford adequate protection to other rights and interests by pursuing a fair balance among them all. This is a necessary balance that is shielded by the Constitution's principles that concern the protection of freedom of art and science (Article 33), the defence of private property, which extends to intellectual works (Article 42), and the safeguarding of labour in any form, including intellectual creation (Article 35). Such a balance appears at the same time to be pursued through the promotion of artistic, literary and scientific outputs, to foster the full development of the human person (Article 3) and of culture (Article 9)". Judgment No. 108/1995, at 9 and 10 [translation by the authors].

The strong bond between the protection of authors and of culture has been reaffirmed by the same Italian Constitutional Court on several occasions (see Italian Constitutional Court, judgments No. 241/1990; No. 361/1998), which as yet has not failed to take into adequate consideration the freedom to conduct business (Article 41).

⁹ Recurrently, the subject of copyright law has been marginal: it may be imparted as an elective course or simply outlined in other courses. Similarly, the main textbooks and encyclopaedias are generally left to the experts in industrial law.

In a renowned 1940 essay, Einaudi reviewed his nineteenth-century precursor Francesco Ferrara to share his criticism of the so-called artistic and literary property [Einaudi, 1940]. Such criticism is indeed rather sweeping and, like Ferrara, Einaudi doubts the reasonability of an economic justification of copyright and patents. Hence, he promoted a drastic revision of the legislation in force, which should have aimed at reducing the scope and term of exclusivity, allowing everybody to reproduce and use the literary or artistic work when exclusivity had ended, by simply paying a fee. It is not by chance that Einaudi referred several times to the word “monopolio” (monopoly) to qualify the economic substance of intellectual and industrial property.

Resuming the legal theory after the Second World War, in addition to the natural law doctrines of copyright that at first prevailed, distinct discourses based on a utilitarian perspective to intangible goods and the justification of copyright protection became increasingly noteworthy. In particular, the utilitarian approach is well portrayed by the thoughts of a great Italian law scholar, who also engaged with comparative law, namely Tullio Ascarelli.

In the 1957 edition of his precious book on the theory of competition and immaterial goods, criticizing the typical approach of natural law to both copyright and patent, Ascarelli argued that the ultimate justification of exclusivity had to be located in the public interest, which is in fact fed by a proper limitation of exclusivity. Once the term exclusivity has expired, copyright works and inventions must be freely reproducible and exploitable by others. Such freedom properly and fully expresses the advancement of cultural and technical progress [Ascarelli, 1957, 244].¹⁰

¹⁰ Accordingly, so he discussed: “It seems to me that the justification of absolute rights towards intellectual creations lies precisely in the interest of promoting cultural or technical progress or to ensure that the best competitors prevail as the public consumers reputed most praiseworthy” [translation by the authors].

With explicit regard to copyright, Ascarelli adds that the justification of copyright protection cannot be referred to the protection of labour, but instead, as it is with intangible goods in general, to the general interest of promoting cultural progress. In other words, there seems to be the opportunity to shield the economic protection of the work (as it would not make sense in terms of moral rights); on the other hand, it is essential to limit its duration and to confine it to those intellectual creations that are otherwise acknowledged as original works of the mind [Ascarelli, 1957, 598].

In contemporary times, Ascarelli's theory is still somehow thriving, although with different shades and inferences, especially with regard to an understanding of exclusivity in an openly functional (yet utilitarian) view and in strict connection with the theory of competition. More specifically, nowadays the Italian scholarship appears quite sensible to theoretical approaches that consider the relevancy and uniqueness of the public interest [e.g. Ghidini, 2008]. Although with distinct perspectives, several authors criticize the excessive derivation of copyright protection, thus suggesting *de jure condendo* its severe limitations, or even the substitution of its typical mechanism (the exclusive right) with others, such as the pay-per-use model [Ricolfi, 2011; Ricolfi, 2014, Libertini, 2014].

Such renewed concerns for the public interest may effectively play an initially standing role in discussing copyright from a historical, comparative and explicitly economic standpoint, particularly in terms of economic analysis of law (hereafter EAL) [Pardolesi, Granieri, 2004; Colangelo, 2015]. Unmistakably, this favours the development of a methodology that is at the same time subject to certain ideological and political interpretations. For instance, the EAL approach is often identified with the liberal vision that is typical of the Chicago school, which is recurrently interpreted as being in favour of a strong intellectual rights protection. However,

it is known that there are other specific ideological lines of EAL that are not exactly ascribable to the above-mentioned model.

In a broader sense, criticism of the unlimited expansion of copyright, in fact, converges into a distinct slant that contrasts with legal positivism and formalism, while being inclined to consideration of a larger number of factors and dynamics – ideological, political, social and ethical – that move and influence intellectual property. However, such a modernized and multifaceted approach to the investigation of intellectual property and copyright matters still appears not quite ready to be translated into a demarcated and thorough concept of public interest.

4. Copyright as monopoly in the digital environment

The strong property-driven vision of copyright leads to a number of important conclusions.

First, either one shares the idea that intellectual property rights are *numerus clausus*, thus substantiating in patents, copyright, trademarks and other sui generis forms of protection that the exclusivity of the rights there embodied is capable of expanding within each sphere of protection and consequently extending the latter to new types of work, namely, software. Therefore, some have argued that the list of works relating to copyright subject matters is not absolute but indeed open to going beyond the traditional realm of literature, music, figurative arts, architecture, theatre and cinema [Auteri, 2012, 547].

In addition, the dominant interpretative approach to *diritto d'autore*, contrarily to the US copyright, furthermore sustains that the number of entitlements that the right-holder may exercise is wide open and therefore not limited to the right to reproduce, distribute,

perform in public and communicate the copyright work [e.g. Spada, 2012, 31]. According to this interpretation, even before EU Directive No. 1992/100 – then codified Directive No. 2005/115 – granted exclusive status to the right of renting and lending the work, denying the applicability of the exhaustion right principle, such an entitlement was already envisaged as one of the right-holder’s privileges.

Finally, whether we consider copyright to be a property right, exclusivity is the main standard, regardless of which restraint we may think is applicable. In particular, according to the predominant construal, exceptions and limitations must be interpreted strictly. Such a conclusion appears to be confirmed by the current reading of the three-step test rule of an international and UE law substance.

With these premises in mind, the risk of overprotecting copyright is real and made even more concrete by the occurrence that in the digital age copyright is enforced by contract, by means of proprietary licence, and by technology protection measures, widely endorsed by international and domestic legislations.

A good example of the consequence of such an interpretative trend is represented by neutralization of the exhaustion principle within the digital context [Perzanowski, Schultz, 2010; Spedicato, 2015]. Such neutralization implies the disappearance of secondary markets, for example, with regard to the online distribution of e-books through user licence agreements, which are clearly distinct from traditional sale even by their appearance (when they began with “this is not a sale, but a license”) [Elkin-Koren, 2011]. Moreover, such a contractual tool disproves resale, endowment and lending by the licensor. If the content of the licence is enforceable, the monopolistic effects of copyright become overwhelming, clearly shaping a serious endangerment of ancillary markets. Consequently, in the digital dimension it is unlikely to envision the resale of used e-

books, or the endowment of certain books to libraries – even loaning between private individuals. Furthermore, the extension of monopoly not only has economic effects, but in turn, it echoes over the right of information – with fewer available low-priced or gratis books – and over privacy, given that the copyright-holder will always maintain control of his/her books.

By the way, it is worth noting that when overt implications of competition law are both marked and perceptible, the ECJ has also denoted the monopolistic consequences of copyright although explicitly referring to the word monopoly. We may recall the *UsedSoft* case of 2012, which dealt with the exhaustion of the right of distribution with regard to the selling of digital copies of software distributed over the Internet.

On this matter, the ECJ in fact explained that “the objective of the principle of the exhaustion of the right of distribution of works protected by copyright is, in order to avoid partitioning of markets, to limit restrictions of the distribution of those works to what is necessary to safeguard the specific subject-matter of the intellectual property concerned [...] a restriction of the resale of copies of computer programs downloaded from the internet would go beyond what is necessary to safeguard the specific subject-matter of the intellectual property concerned”.

Another good example to explain the broad extension of monopolistic effects is provided by the application of technology-protection measures to the devices that allow the content of the copyright work to be played. In particular, we refer to the instance in which videogames right-holders often manufacture the device (console like Sony Playstation) that is required to use them. The manufacturer makes the device interoperable only with its own videogames by implementing TPMs to the latter. According to the manufacturer, TPMs find their validation in copyright law, which

also allows their enforcement, by granting manufacturers the power to sue those who modify the hardware in order to make the device interoperable. However, the aim of the technology measure is not to protect videogames from piracy, but rather to extend market power (from the market of devices to the market of their corresponding goods) and to compartmentalize the market (TMPs can in fact discriminate prices over distinct markets through regional codes). The effect is not merely economic, as a postponement of the market as a whole, but it also affects property over the device, considered *stricto sensu* as a property over tangible goods, and certainly impairs the freedom to modify technology. The liberty to interact and even modify technology indeed represents an indisputable and countless source of innovation.

The model of copyright as a monopoly challenges the dominant Italian interpretative trend. According to this approach, the public domain is the standard, while exclusivity is the exception, and the exception must be interpreted restrictively. More specifically, few distinctive consequences occur. First, only the legislator has the power to grant new exclusive rights. Without express legislative acknowledgment, any other privilege that the right-holder may claim will not be enforced in court. Second, exclusivity is not the only instrument of protection for the right-holders, since other means of equal importance are the pay-per-use domain based on a liability rule, or the automatic imposition of a charge that corresponds to a percentage of the price of sale of devices that play and record copyright works. Third, free uses, named exceptions and limitations in the European Union are subject to analogical interpretation. The three-step test is a general standard and, like fair use, it should permit the striking of a fair balance among different interests.

Such an interpretive framework allows the above-illustrated cases to be solved with regard to digital exhaustion and technological

measures that are implemented into videogames and related devices. Moreover, the principle of exhaustion articulates a general rule of protecting the public domain, meanwhile condensing the monopolistic influence of copyright. It applies to the digital context without an explicit legislative acknowledgment. If the legislator wanted to exclude such a principle from the digital worlds, he or she should have said so expressly.

Furthermore, when technical measures are employed to extend the market power and to compartmentalize the markets, a misuse of the power to apply TMPs occurs, which has nothing to do with the protection of copyright works. This is the main reason why the freedom to modify devices in order to extend and implement their functionality and interoperability should be allowed and indeed promoted.

Copyright as a monopoly scheme has historical and economic underpinning; it develops for want of legislation. It is a legal artefact that was created relatively recently, with the result of a transformation from monopoly privileges, granted to some, into a right of exclusivity that is born to concern all authors of original works of the mind.

Moving from privileges to exclusive rights, copyright has not lost its economic substance, namely the fact of being a legal monopoly. Economists see legal monopoly as one of the instruments used by public power to regulate the production of knowledge. There are, however, other tools that target the same need, such as the tutelage, direct public procurement of information, prizes and rewards, but also incentives aimed at supporting the making and spreading of information. Additionally, digital technology has freed creative energy, with the exception of precise economic inducements.

While economists deliberate over the effective significance of incentives on the development of copyright, exclusivity

unquestionably ontologically contrasts with competition. The incentivizing effect has to face the inexorable constraint of competition – a risk that appears greatly augmented when one considers that information is intrinsically cumulative and incremental. Major risks also seem to arise where intellectual property interacts with network externalities and the influence of standards. Truly, without an extensive public domain there is very little room for making and sharing knowledge, which is, and should remain, the core aim of copyright.

5. Conclusions

In This essay is not about finding a way to amend and reform copyright in order to make it more applicable to the digital context. There is a vast body of literature on this subject. Rather, the present work probes the significance of applying the strong traditional natural right and proprietary visions of copyright and attempts to suggest a different approach, based on the monopolist insight of copyright.

On the Continent, particularly in copyright systems, the first model of copyright as property has had several undesirable effects. The vision of copyright as a monopoly, instead, may appear a provocateur when visited upon the Italian system, but it has its historical and economic foundations within. Furthermore, the same Court of Justice of the European Union, although remaining consistent with the idea of property on lexical grounds, also affirms the crucial principles that copyright must be balanced with other equally important fundamental rights, such as the freedom to conduct business, the right of information and of privacy.

Such a balance, however, cannot be fully understood and fulfilled without granting adequate attention to the monopolistic substance of exclusivity, the latter being the key element of copyright. Only careful attention to the consequences that monopoly projects on the public interest for the progress of knowledge may effectively lead to the fair balance that is so frequently evoked.

Bibliography

- T. Ascarelli, *Teoria della concorrenza e dei beni immateriali. Lezioni di diritto industriale*, III ed., Milano, Giuffrè, 1957.
- P. Auteri, *Il diritto di autore*, in P. Auteri, G. Floridia, V. Mangini, G. Olivieri, M. Ricolfi, P. Spada, *Diritto industriale. Proprietà intellettuale e concorrenza*, IV ed., Giappichelli, Torino, 2012, 539.
- J. Band, A. J. McLaughlin, *The Marshall Papers: A Peek Behind the Scenes at the Making of Sony v. Universal*, in *Columbia-VLA Journal of Law & the Arts*, Vol. 17 (4), 1993, 427.
- M. Borghi, *La manifattura del pensiero. Diritti d'autore e mercato delle lettere in Italia (1801-1865)*, Franco Angeli, Milano, 2003.
- M. Burks, *Sony Corporation of America v. Universal City Studios, Inc.*, 104 S.Ct 774 (1984): *Is Copyright Law in Need of Congressional Action?*, in *Northern Kentucky Law Review*, Vol. 12 (1), 1985, 157.
- G. Colangelo, *La proprietà delle idee*, Il Mulino, Bologna, 2015.
- R. Caso, "Modchips" e tutela penale delle misure (tecnologiche) di protezione dei diritti d'autore: ritorno al passato? in *Dir. Internet*, 2008, 154, <http://eprints.biblio.unitn.it/1447/1/Roberto_Caso_Modchips_2008.pdf>.
- G. Dore, *And they lived happily ever after UPC Telekabel: a copyright fairy tale or a genuine chance to strike a fair balance for fundamental rights?* in *Queen Mary Journal of Intellectual Property*, 2015, Vol. 5 (2), 226.
- N. Elkin-Koren, *The Changing Nature of Books and the Uneasy Case for Copyright*, in *George Washington Law Review*, Vol. 79, 2011, 101, <<http://ssrn.com/abstract=1909176>>.
- L. Einaudi, *Rileggendo Ferrara – a proposito di critiche recenti alla proprietà letteraria ed industriale*, in *Rivista di storia economica*, Vol. 5 (4), 1940, 217, <<http://www.luigieinaudi.it/doc/rileggendo-ferrara-a-proposito-di-critiche-recenti-alla-proprietà-letteraria-ed-industriale/?id=3061>>.

- G. Ghidini, *Profili evolutivi del diritto industriale. Innovazione, Concorrenza, Benessere dei consumatori, Accesso alle informazioni*, Giuffrè, Milano, 2008.
- J. C. Ginsburg, *A Tale of Two Copyrights: Literary Property in Revolutionary France and America*, in *Tulane Law Review*, Vol. 64 (5), 1990, 991, <<http://www.compilerpress.ca/CW/Library/Ginsberg%20Tale%20of%20Two%20Copyrights%20TLR%201990.htm>>.
- P. Goldstein, *International Copyright. Principles, Law and Practice*, Oxford University Press, Oxford, 2001.
- U. Izzo, *Alle origini del copyright e del diritto d'autore. Tecnologia, interessi e cambiamento giuridico*, Carocci, Roma, 2010.
- A. Kur, T. Dreir, *European Intellectual Property Law. Text, Cases & Materials*, Cheltenham (UK)-Northampton (Ma), Edward Elgar, 2013.
- D. Lametti, *Laying Bare an Ethical Thread: From IP to Property to Private Law?* (June 14, 2012), in Shyam Balganesch (ed.), *Intellectual Property and the Common Law*, Cambridge University Press, 2012, <<http://ssrn.com/abstract=2084099>>.
- J. Lawrence, B. Timberg (eds.), *Fair Use and Free Inquiry: Copyright Law and the New Media*, Westport, Conn.: Greenwood, 1989.
- M. A. Lemley, *Property, Intellectual Property, and Free Riding*, in *Texas Law Review*, Vol. 83, 2005, 1031, <<http://ssrn.com/abstract=582602>> or <<http://dx.doi.org/10.2139/ssrn.582602>>
- L. Lessig, *Free Culture*, The Penguin Press, New York, 2004, <<http://www.free-culture.cc/freeculture.pdf>>.
- M. Libertini, *Funzioni e ancoraggi apicali della proprietà intellettuale*. Relazione a convegno, febbraio 2014, in *Orizzonti del diritto commerciale*, <http://orizzontideldirittocommerciale.it/media/24803/libertini_m_paper_definitivo.pdf>.

- J. Litman, *Digital Copyright*, Prometheus Books, New York, 2006.
- G. S. Lunney Jr., *Fair Use and Market Failure: Sony Revisited*, in *Boston University Law Review*, Vol. 82, 2002, 975.
- P.E. Moyses, *La nature du droit d'auteur: droit de propriété ou monopole?* in *R.D. McGill*, Vol. 43, 1998, 507.
- R. Pardolesi, M. Granieri, *Di regolazione, antitrust e diritti di proprietà intellettuale*, in *Mercato concorrenza regole*, Vol. 6 (1), 2004, 7.
- L. Ray Patterson, *The Worst Intellectual Property Opinion Ever Written: Folsom v. Marsh and its Legacy*, in *Journal of Intellectual Property Law*, Vol. 5 (2), 1998, 431, <http://digitalcommons.law.uga.edu/fac_artchop/351>.
- A. Perzanowski, J. Schultz, *Digital Exhaustion*, in *UCLA Law Review*, Vol. 58, 2010, 889, <<http://ssrn.com/abstract=1669562>>.
- G. Resta, *Nuovi beni immateriali e numerus clausus dei diritti esclusivi*, in G. Resta (ed.), *Diritti esclusivi e nuovi beni immateriali*, Utet, Torino, 2011.
- M. Ricolfi, *Making Copyright Fit for the Digital Agenda*, 12th EIPIN Congress 2011. Constructing European IP: Achievements and new Perspectives Strasbourg, February 24–25, 2011 European Parliament, <<http://nexa.polito.it/nexafiles/Making%20Copyright%20Fit%20for%20the%20Digital%20Agenda.pdf>>.
- M. Ricolfi, *The New Paradigm of Creativity and Innovation and its Corollaries for the Law of Obligations*, 2014, in *Orizzonti del diritto commerciale*, <http://www.orizzontideldirittocommerciale.it/media/24418/ricolfi_m_def.pdf>.
- P. Samuelson, *The Generativity Of Sony v. Universal: The Intellectual Property Legacy Of Justice Stevens*, in *Fordham Law Review* Vol. 74, 2006, 1831, <<http://ssrn.com/abstract=925127>>.
- C. Sganga, *EU Copyright Law Between Property and fundamental rights – A proposal to connect the dots*, in R. Caso, F. Giovanella (eds), *Balancing*

Copyright Law in the Digital Age, Comparative Perspectives, Springer, Heidelberg, 2015, 1.

P. Spada, *Parte generale*, in P. Auteri, G. Floridia, V. Mangini, G. Olivieri, M. Ricolfi, P. Spada, *Diritto industriale. Proprietà intellettuale e concorrenza*, IV ed., Giappichelli, Torino, 2012, 3.

G. Spedicato, *Online exhaustion and the boundaries of interpretation*, in R. Caso, F. Giovanella (eds), *Balancing Copyright Law in the Digital Age, Comparative Perspectives*, Springer, Heidelberg, 2015, 27.

A. Strowel, *Droit d'auteur et copyright. Divergences and convergences. Etude de droit comparé*, Bruylant-L.G.D.J., Bruxelles, Paris, 1993.

The Trento Lawtech Research Paper Series is published since Fall 2010

1. **Giovanni Pascuzzi**, L'insegnamento del diritto comparato nelle università italiane (aggiornamento dati: dicembre 2009) - The Teaching of Comparative Law in Italian Universities (data updated: December 2009), Trento Law and Technology Research Group Research Papers, October 2010.

2. **Roberto Caso**, Alle origini del copyright e del diritto d'autore: spunti in chiave di diritto e tecnologia - The Origins of Copyright and Droit d'Auteur: Some Insights in the Law and Technology Perspective, Trento Law and Technology Research Group Research Papers; November 2010.

3. **Umberto Izzo, Paolo Guarda**, Sanità elettronica, tutela dei dati personali e digital divide generazionale: ruolo e criticità giuridica della delega alla gestione dei servizi di sanità elettronica da parte dell'interessato - E-health, Data Protection and Generational Digital Divide: Empowering the Interested Party with the Faculty of Nominating a Trusted Person Acting as a Proxy when Processing Personal Health Data within an Electronic PHR, Trento Law and Technology Research Group Research Papers; November 2010.

4. **Rossana Ducato**, "Lost in Legislation": il diritto multilivello delle biobanche di ricerca nel sistema delle fonti del diritto (convenzioni internazionali, leggi europee, nazionali e regionali, softlaw) - "Lost in legislation": The Multilevel Governance of Research Biobanks and the Sources of Law (International Conventions, European, National and Regional legislations, Softlaw), Trento Law and Technology Research Group Research Papers; December 2010.

5. **Giuseppe Bellantuono**, The Regulatory Anticommons of Green

Infrastructures, Trento Law and Technology Research Group Research Papers; February 2011.

6. **Francesco Planchenstainer**, La regolamentazione dell'acqua destinata ad impiego alimentare: analisi storico comparativa dei differenti approcci sviluppati negli USA e nella UE - The Regulation Of Water For Nutritional Use: A Comparative and Historical Analysis of the Different Approaches Developed in US and EU Law, Trento Law and Technology Research Group Research Papers; April 2011.

7. **Roberto Caso, Giovanni Pascuzzi**, Valutazione dei prodotti scientifici nell'area giuridica e ruolo delle tecnologie digitali – Evaluation of Scientific Products in the Legal Field and the Role of Digital Technologies, Trento Law and Technology Research Group Research Papers; May 2011.

8. **Paolo Guarda**, L'Open Access per la dottrina giuridica e gli Open Archives: verso un futuro migliore? - Open Access to legal scholarship and Open Archives: toward a Better Future?, Trento Law and Technology Research Group Research Papers; November 2011.

9. **Thomas Margoni**, Eccezioni e limitazioni al diritto d'autore in Internet - Exceptions and Limitations to Copyright Law in the Internet, Trento Law and Technology Research Group Research Papers; January 2012.

10. **Roberto Caso**, Plagio, diritto d'autore e rivoluzioni tecnologiche - Plagiarism, copyright and technological revolutions. Trento Law and Technology Research Group Research Papers; February 2012.

11. **Giovanni Pascuzzi**, Diventare avvocati e riuscire ad esserlo:

insegnare l'etica delle professioni forensi attraverso le trame narrative - How to become lawyers and able to do so: teaching the ethics of the legal profession through narrative, Trento Law and Technology Research Group. Research Papers; July 2012.

12 **Umberto Izzo**, IL 'Contratto sulla neve' preso sul serio: due modelli di contratto (per la fruizione delle aree sciabili e per l'insegnamento sciistico) – Taking the 'Contract on the Snow' Seriously: Two Model Contracts (For Accessing and Using the Ski Area, and For the Teaching of Skiing), Trento Law and Technology Research Group Research Paper; 2012.

13. **Francesco Planchestainer**, "They Collected What Was Left of the Scraps": Food Surplus as an Opportunity and Its Legal Incentives, Trento Law and Technology Research Group Research Paper; February 2013.

14. **Roberto Caso**, I libri nella "tempesta perfetta": dal copyright al controllo delle informazioni digitali - Books into the "perfect storm": from copyright to the control of information, Trento Law and Technology Research Group Research Paper; March 2013.

15. **Andrea Rossato**, Beni comuni digitali come fenomeno spontaneo - Digital Commons as a Spontaneous Phenomenon, Trento Law and Technology Research Group Research Paper; May 2013.

16. **Roberto Caso**, Scientific knowledge unchained: verso una policy dell'università italiana sull'Open Access - Scientific knowledge unchained: towards an Open Access policy for Italian universities, Trento Law and Technology Research Group Research Paper; May 2013

17. **Valentina Moscon**, Copyright, contratto e accesso alla

conoscenza: un'analisi comparata - Copyright, contract and access to knowledge: a comparative analysis, Trento Law and Technology Research Group Research Paper; December 2013

18. **Roberto Caso**, La via legislativa all'Open Access: prospettive comparate - The legislative road to Open Access: comparative perspectives, Trento Law and Technology Research Group Research Paper; January 2014

19. **Roberto Caso**, Misure tecnologiche di protezione: cinquanta (e più) sfumature di grigio della Corte di giustizia europea, Trento Law and Technology Research Group Research Paper; March 2014

20. **Federica Giovanella**, Enforcement del diritto d'autore nell'ambito di Internet vs. protezione dei dati personali: bilanciamento tra diritti fondamentali e contesto culturale, Trento Law and Technology Research Group Research Paper; April 2014

21. **Umberto Izzo, Rossana Ducato**, The Privacy of Minors within Patient-Centered eHealth Systems, Trento Law and Technology Research Group Research Paper; June 2014

22. **Roberto Caso, Rossana Ducato**, Intellectual Property, Open Science and Research Biobanks, Trento Law and Technology Research Group Research Paper; October 2014

23. **Paolo Guarda**, Telemedicine and Application Scenarios: Common Privacy and Security Requirements in the European Union Context, Research Group Research Paper; July 2015

24. **Roberto Caso, Rossana Ducato**, Open Bioinformation in the Life Sciences as a Gatekeeper for Innovation and Development, Research Group Research Paper; December 2015

25. **Roberto Caso**, Il diritto non abita più qui: la crisi degli studi giuridici tra dati e domande, Trento Law and Technology Research Group Research Paper; February 2016