Fairness as a normative concept in EU digital policies: a mapping exercise for Fair MusE

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1. Introduction

As reflected in a political instrument such as the 2017 European Pillar of Social Rights, Europe is proud to be home to the most equal and 'fair' societies in the world.[1] Despite the uncertainties and controversies that characterise the recourse to this concept in various policy fields, the European notion of 'fairness' is increasingly used as a synonym with distributive 'justice', equal opportunities, and fair working conditions in the labour market. According to the Directorate-General for Employment, Social Affairs and Inclusion in 2020, fairness is a "broad normative concept, encompassing different ways of sharing resources or benefits."[2] Drawing on this concept, Europe can be increasingly viewed as a jurisdiction where its policies foster a 'fair' distribution of costs and

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[1] European Commission, 'European Pillar of Social Rights – Building a Fairer and More Inclusive European Union', available at https://ec.europa.eu/social/main.jsp?catId=1226&langId=en accessed 1 October 2024.

[2] See, for instance, European Commission, 'Employment and Social Developments in Europe Review' (2020), p. 56, available at https://www.etui.org/sites/default/files/2020-11/Employment%20and%20Social%20Developments_2020.pdf accessed 11 October 2024.

benefits according to normative criteria based on merit, basic needs and equality of opportunity or outcomes.[3] By seeking to address the needs of the least advantaged in society, and trying to pursue substantive (and not purely formal) equality, EU policies presuppose regulatory interventions to remove obstacles to systemic inequalities.[4]

This article argues that 'fairness' has become a consolidated normative concept in the domain of EU digital policies, where regulations address and seek to curb inequalities exacerbated by the exponential growth of services that transform large online platforms into digital gatekeepers. Before illustrating how this concept is being used in EU digital policy, Section 2 briefly recalls the historic role of fairness in the early stage of the European economic integration process and its recent resurgence as a manifestation of the EU 2015 'Digital Market Strategy'. Section 3 briefly maps EU regulatory interventions where a 'fair balance' of interests appears as a key concept aimed at (i) promoting fair competition, (ii) protecting fundamental rights, and (iii) ensuring that the enforcement of intellectual property rights and of other fundamental rights is mutually limited when they conflict with each other in digital markets. Finally, Section 4 addresses, more specifically, the EU's long-term attempt to empower individual copyright holders, especially in the music industry, by prioritising their right to obtain fair remuneration for the exploitation of their works. This section emphasises the dimension of 'fairness as data transparency' without which authors and performers cannot effectively exercise their statutory rights in a platform-dominated and data-driven digital economy.

2. An evolving concept in the European economic integration process

The concept of fairness and the goal to attain distributive justice in the allocation of scarce resources were the main reasons for starting the process of European economic integration shortly after the end of World War II. When Robert Schuman put forward a mutual pooling of resources

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[3] *Ibidem*.

[4] Here, inevitable references in the literature on political economy are RAWLS, John, *A Theory of Justice,* Harvard University Press, 1971; and, at a later stage, RAWLS, John, *Justice as Fairness: A Restatement,* Erin Kelly (ed.), Harvard University Press, Cambridge, 2001.

in 1950,[5] the entanglement of European economies should have been more than a mere mechanism to hamper a future war: it became what is today a Union of a single market that fosters economic and social progress, as well as the free movement of goods, services, capital, and persons (as much as possible).[6] The relevant literature emphasises that the normative concept of 'fairness' originates from competition-related law and policy.[7] This policy was unified at the European level as an essential instrument for the building of a Common Market since its inception.[8] Rules ensuring 'undistorted competition' have been considered an essential element of a well-functioning European 'Single Market' and a fundamental principle codified in primary European law since the Treaty of Rome in 1957 [then Article 3(f)]. Guaranteeing 'fair competition' was already listed high in this Treaty's preamble, with the imposition of 'unfair trading conditions' being recognised as a kind of prohibited abuse of a dominant market position (then Article 86). In the current version of the Treaty on the Functioning of the European Union (TFEU), fairness is still underlying the prohibition of exploitative abuses by dominant firms under Article 102 TFEU and is reflected in the 'fair share for consumers' justification in Article 101(3) TFEU.[9]

The notion of fairness in commercial practices has existed at the international level for over a century, being based on commercial

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[5] SCHUMAN, Robert, "The Schuman Declaration", 9 May 1950, available at <https://european-union.europa.eu/principles-countries-history/history-eu/1945-59/schuman-declaration-may-1950_en> accessed 11 October 2024.

[6] BARNARD, Catherine, "Competence Review: the internal market", 2018, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/226863/bis-13-1064-competence-review-internal-market.pdf accessed 11 October 2024.

[7] SCHEUERER, Stefan, "The Fairness Principle in Competition-Related Economic Law", Max Planck Institute for Innovation and Competition, 2023, Research Paper No. 23-12, p. 5, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4442652 accessed 11 October 2024.

[8] Facilitating the creation of the Single Market is, after all, listed by many authors as one of the objectives pursued by competition law: see CRAIG, Paul and DE BURCA, Gráinne, *EU Law: Text, Cases, and Materials,* 5th ed., Oxford University Press, Cambridge, 2011, p. 960; and STYLIANOU, Konstantinos and IAKOVIDES, Marios, "The goals of EU competition law: a comprehensive empirical investigation", *Legal Studies*, vol. 42, 2022, 620, 629.

[9] SCHWEITZER, Heike, "The art to make gatekeeper positions contestable and the challenge to know what is fair: A discussion of the Digital Markets Act Proposal", *Zeitschrift für Europäisches Privatrecht*, vol. 29, 2021, 503, 509.

honesty.[10] This field is regulated mainly at the national level and has been only partially harmonised under EU law through specific regulatory interventions. In the specific domain of unfair competition, the main effort to harmonise national laws was embodied in the 2016 Trade Secrets Directive, which addresses the protection of undisclosed know-how and business information (i. e., trade secrets) against their unlawful acquisition, use and disclosure.[11] On a distinct although related front, the EU has deployed the concept of commercial fairness in the domain of consumer protection, where it indirectly benefits competitors of businesses that are caught engaging in unfair practices.[12] The main legislation of the EU in this field includes the 2005 Unfair Commercial Practices Directive[13] and the 2006 Directive on Misleading and Comparative Advertising.[14]

The interest in this concept resurged, even in terms of political language and legal terminology, when EU policymakers started addressing unprecedented challenges posed by the exceptional growth of tech companies whose services ended up dominating or deeply conditioning the dynamics of web-based markets. As a regulatory concept and legal instrument, 'fairness' is historically connected with the agenda of Margrethe Vestager, who assumed the Competition Commissioner's office in the European Commission headed by Jean-Claude Juncker

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[10] See Article 10-bis(2) of the Paris Convention on the Protection of Industrial Property, which defined unfair competition as acts of competition that are "contrary to honest practices in industrial or commercial matters."

[11] See Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure OJ L 157/1. On this front see for instance Senftleben, Martin, "Protection against unfair competition in the European Union: from divergent national approaches to harmonised rules on search result rankings, influencers and greenwashing", *Journal of Intellectual Property Law & Practice*, vol. 19, 2024, 149.

[12] Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive') OJ L 149/22, Recital 8.

[13] Unfair Commercial Practices Directive (n 12).

[14] See Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising (codified version) OJ L 376/21.

in September 2014.[15] It was at that time that 'fairness' restarted being explicitly included amongst the multiple goals identified as pursued by competition law.[16] After having consolidated the structure of the new Commission with the intent to foster the implementation of a political agenda where 'fairness' appeared as a general policy criterion, Juncker launched a 'Digital Single Market Strategy' in 2015.[17] From then onwards, this concept has permeated a significant evolution that can be observed in both the case law and the legislative production of the EU.[18] On the first front, this recently gained traction has the potential to translate 'fairness' into a more mainstream concept in the actual competition enforcement practice.[19] On the second front, key EU legislative initiatives adopted from 2015 onwards evidence that 'fairness' has become a normative concept which seeks to protect the interests of competitors, consumers and individuals from the disproportionate concentration of wealth and power accumulated by a handful of tech companies. This cluster of new legislation can be interpreted as a structural, comprehensive and certainly tardive reaction of the European Union to "the threats coming from the rise of unaccountable transnational private powers, whose global effects increasingly produce local challenges for constitutional democracies."[20]

3. Fairness manifestations in the 'Digital Single Market Strategy'

From the perspective of so-called 'digital constitutionalism', we can infer that 'fairness' has become an EU normative concept that pursues different policy goals in various fields of regulation:

(i) Promoting fair competition in digital markets, with direct benefits in the protection of consumer interests;

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[15] See DUNNE, Niamh, "Fairness and the Challenge of Making Markets Work Better", *Modern Law Review*, vol. 84, 2020, 230, 233; and COLANGELO, Giuseppe, "In Fairness We (Should Not) Trust: The Duplicity of the EU Competition Policy Mantra in Digital Markets", *The Antitrust Bulletin*, vol. 68, 2023, 618, 622.

[16] STYLIANOU, IAKOVIDES (n 8) 629.

[17] European Commission, 'A Digital Single Market Strategy for Europe' (Communication) COM(2015) 192 final.

[18] This evolution is evidenced by recent cases such as the fine against Apple for its App store anti-steering practices, *Apple* (Case AT.40437) Commission Decision [2024].

[19] STYLIANOU, IAKOVIDES (n 8) 642.

[20] DE GREGORIO, Giovanni, *Digital Constitutionalism in Europe – Reframing Rights and Powers in the Algorithmic Society,* Cambridge University Press, Cambridge, 2022, 3.

(ii) Protecting fundamental rights such as privacy and freedom of expression that can be harmed by corporate actors controlling powerful technologies and, in the age of surveillance capitalism, large volumes of data, especially personal data; and
(iii) Striking a 'fair balance' between the protection of intellectual property – in particular, copyright's expectation to foster fair remuneration of authors and performers – and other fundamental rights, as prescribed in the Charter of Fundamental Rights of the European Union.[21]

The next few sub-sections briefly map the most relevant manifestations of the normative concept of fairness in the recent legislation adopted by the EU.

3.1. Fair competition in digital markets

The clearest and most tangible legislative manifestation of 'fairness' as a regulatory concept aimed at fostering fair competition in digital markets is certainly the Digital Markets Act (DMA)[22] enacted in October 2022.[23] In particular, the enactment of the DMA was justified by the intent to target economically powerful providers or 'gatekeepers' of 'core platform services', whose characteristic network effects and ability to connect many business users with many consumers, with

[21] The Nice Charter (Charter of Fundamental Rights) was initially a non-binding declaration signed in 2000 by the Presidents of the European Parliament, the Commission and the Council at the Nice European Council. After efforts to give the Charter binding legal force through the Constitutional Treaty failed in 2005, the Lisbon Treaty, which came into force in 2009, succeeded in making the Charter legally binding by incorporating it into the EU's primary law framework through Article 6 of the Treaty on the European Union, which elevates the Charter to the status of EU Treaties: see Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community [2007] OJ C306/1; Charter of Fundamental Rights of the European Union [2012] OJ C326/391.

[22] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 ('Digital Markets Act') [2022] OJ L265/1.

[23] The DMA's main purpose, under Article 1, is "to contribute to the proper functioning of the internal market by laying down harmonised rules ensuring for all businesses, contestable and fair markets in the digital sector across the Union where gatekeepers are present, to the benefit of business users and end users."

subsequent 'lock-in' effects, can easily undermine the contestability of the services and the fairness of the commercial relationship between the core platform service providers, their business users and the end users (cf. Recital 2, DMA). An unfair practice under the DMA is one where there is "an imbalance between the rights and obligations of business users and the gatekeeper obtains an advantage from business users that is disproportionate to the service provided."[24]

From this perspective, the DMA can be viewed as an evolution of the 2019 Platform-to-Business Regulation,[25] which explicitly intended to create the conditions for a fair online business environment and incentivise fairness and transparency,[26] and which, unlike the DMA, applies across all platforms operating in the EU regardless of size and type.[27]

More recently, another regulation where the element of fairness is strong is the Data Act,[28] which applies to personal and non-personal data. This Act aims to boost competitiveness in the data market and to achieve a fairer distribution of the value that data have in today's digital economy among various market operators, including small and medium-sized enterprises (SMEs) and individuals. Unlike the DMA, the Data Act does not limit itself to applying only to large digital platforms performing core platform services but to companies that, regardless of size, qualify

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[24] Cf. DMA, Article 12(5)(b). See also DMA's Recital 33. In explaining unfairness here, the DMA seems to focus only on the relationship between gatekeepers and business users, thus aiming primarily to enhance fairness in the market and prevent unequal treatment of business users: see KOENIG, Carsten, "Introduction to the Digital Markets Act (DMA)" forthcoming in EU Platform Law, Björn Steinrötter, Christian Heinze and Michael Denga (eds), Nomos, Baden-Baden, 2024, pp. 23-24. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4715147

[25] Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services [2019] OJ L186/57.

[26] See P2B Regulation, Recitals 7 and 8. See also MAZZIOTTI, Giuseppe and RANAIVOSON, Heritiana, "Can Online Music Platforms Be Fair? An Interdisciplinary Research Manifesto", *International Review of Intellectual Property and Competition Law*, vol. 55, 2024, p. 249, 251f.

[27] On the role of the P2B Regulation, see BUSCH, Christoph, "Platform regulation beyond DSA and DMA: Which role for the P2B Regulation?" *Journal of Antitrust Enforcement*, vol. 12, issue 2, 2024, pp. 201-206.

[28] Regulation (EU) 2023/2854 of the European Parliament and of the Council of 13 December 2023 on harmonised rules on fair access to and use of data and amending Regulation (EU) 2017/2394 and Directive (EU) 2020/1828 ('Data Act') OJ L 2023/2854.

as 'data holders'.[29] Essentially, the Act aims to regulate the conditions of access, sharing, and use of data generated by connected products or related services and to protect, in particular, smaller companies from unfair contractual terms imposed by companies in a stronger bargaining position.[30] In addition, the Act aims to remedy structural data-related inequalities by imposing fair, reasonable, and non-discriminatory (FRAND) terms where a data holder is legally obliged to make such data available to another business[31] and requires an 'unfairness test' to be conducted on contractual terms, such as 'take-it-or-leave-it' data access conditions, unilaterally imposed on a business in a weaker bargaining position.[32]

3.2. Protection of fundamental rights

The General Data Protection Regulation (GDPR)[33] is historically the first among the recent landmark pieces of technology regulation that sought to protect individuals' fundamental rights against the deployment of powerful surveillance and data processing technologies. The evolution of a fundamental right to personal data protection in Europe's digital society is closely related to its inclusion in Article 8 of the EU Charter of Fundamental Rights. As observed in the literature, the constitutionalisation of this right placed the Court of Justice of the European Union (CJEU) in a position to act as a judicial activist in expanding the scope of data protection and advancing its concrete enforcement in digital settings.[34]

[29] Data Act, Article 2(13).

[30] Data Act, Chapter II. In that context, the manufacturer of a connected product, for example a smart appliance, must make the data generated from the use of that product available to the user or a designated third party in the EU. Unlocked access to data from smart devices can lead, for instance, to a more competitive post-sale services market by allowing companies other than the manufacturer to access the generated data and provide related services.

[31] Data Act, Article 8.

[32] Data Act, Recital 59 and Chapter IV.

[33] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC ('General Data Protection Regulation') OJ L 119/1.

[34] See De Gregorio (n 20) pp. 60-64, where the author persuasively argues that the CJEU's case law functioned as a bridge between an initial phase of digital liberalism and today's era of digital constitutionalism in EU digital policy, especially in the codification of online privacy rights.

It is clear that the landmark judgment of the CJEU, which ended up coining new rights such as the 'right to be forgotten', was a catalyst for their codification in a new, EU-wide regulation such as the GDPR.[35] In this regard, fairness towards the individual as a 'data subject' is part of the core principles of data processing in both Article 8(2) of the above-mentioned Charter and Article 5(1)(*a*) of the GDPR. From a more practical perspective, fairness in the data protection context is also associated with procedural fairness, which concerns whether personal data are obtained and processed using fair means.[36] This is not the case, for instance, when a data subject is not made aware that their data will be processed or the processing will not be handled in a way the data subject could reasonably expect.[37]

Other prominent examples of EU regulations aimed at protecting people's fundamental rights from the implementation of platforms' algorithms, recommender systems, content moderation policies and the use of high-risk technologies are, respectively, the 2022 Digital Services Act (DSA)[38] and the 2024 Artificial Intelligence (AI) Act.[39] Although the purposes of boosting Europe's competitiveness in the digital economy and helping smaller platforms, SMEs and start-ups feature high in the list of the DSA's core goals,[40] the creation of a horizontal legal infrastructure

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[35] See *Google Spain SL, Google Inc. v. Agencia Española de Protección de Datos, Mario Costeja González* (C-131/12) [2014] ECR I-317. This 2014 ruling established that individuals have the right to request the removal of personal data from search engine results under certain conditions (note how the GDPR was only adopted in 2016).

[36] See Häuselmann, Andreas and Custers, Bart, "Substantive Fairness in the GDPR: Fairness Elements for Article 5.1a GDPR", *Computer Law & Security Review*, vol. 52, 2024.

[37] See, for instance, European Data Protection Board, "Guidelines 2/2019 on the processing of personal data under Article 6(1)(*b*) GDPR in the context of the provision of online services to data subjects" Version 2.0, 2019, para. 12.

[38] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC ('Digital Services Act') OJ L 277/1.

[39] Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 [2024] ('AI Act') OJ L, 2024/1689.

[40] European Commission, "The Digital Services Act – Ensuring a safe and accountable online environment" available at https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/digital-services-act_en accessed 11 October 2024.

for the enforcement of fundamental rights within ecosystems built and controlled by large private actors is the most obvious policy objective of this regulation.[41] From an atextual point of view, the DSA comes with abundant references to the need for online intermediaries to effectively respect, ensure the protection and enable the exercise of users' and other affected parties' fundamental rights, further including the right to respect for private and family life, right to non-discrimination, right to an effective remedy, rights of the child and – last but not least – the right to (intellectual) property.[42] Moreover, fundamental rights considerations are embodied in the Act's provisions seeking to shed light on the implementation of algorithmic decision-making and automated tools.[43] This emphasis in the DSA's language highlights the importance attributed to framing online intermediaries' engagement in content moderation, procedural mechanisms and safeguards to be made available to users. Yet, it is ultimately in the remit of public authorities to guarantee an effective enforcement of fundamental rights that, in case of conflict within an online platform or another service being subject to the DSA, shall be proportionate and strike "a fair balance between the rights concerned."[44]

As regards the AI Act, this hefty and far-reaching piece of *ex ante* regulation codifies fairness concerns in relation to several rights enshrined in the EU Charter of Fundamental Rights. Through its adoption after complex preparatory works, the European Union aimed to safeguard fundamental rights and broader societal interests while simultaneously encouraging the adoption of AI to enhance its global competitiveness. Based on a controversial risk-based approach that seeks to prevent harmful outcomes, consistent with product safety and cybersecurity law principles, the AI Act intends to make AI technologies safe and secure

[41] As emphasised by the European Parliament during the preparatory work for the adoption of this legislation, the DSA seeks to help the EU and its Member States ensure "a fair digital ecosystem in which fundamental rights as enshrined in the Treaties and the Charter of Fundamental Rights of the European Union, especially freedom of expression and information, non-discrimination, media freedom and pluralism, privacy and data protection, are respected": see European Parliament resolution of 20 October 2020 on the Digital Services Act and fundamental rights issues posed [2020/2022(INI)], point 1.

[42] See, for instance, DSA Recitals 3, 22, 39 to 41, 47, 52, 63, 81, 109 and Articles 14(4) and 34(1)(*b*).

[43] DSA, Article 27.

[44] DSA, Recital 153.

to give businesses and public institutions the legal clarity they need to innovate and deploy AI technologies.[45] Among the fundamental rights the AI Act expressly seeks to protect via *ex ante* obligations aimed to ensure safety and cybersecurity, and *ex post* liability criteria aimed at compensating potential AI-related damages, workers' right to fair and just working conditions (Article 31) and the right to a fair trial (Article 47) are relevant examples. Although not explicitly mentioning fairness, the provisions under Article 53(1)(c) and Article 53(1)(d) are important for this article because, despite their ambiguity and the unsettled issues they raise, they introduce *ex ante* copyright-related obligations for 'general-purpose' AI model developers that draw on the notion of 'fairness as data transparency' (see *infra*).[46] This notion has grown exponentially in terms of relevance under EU law to empower individual creators in the exercise of their exclusive rights. In this regard, data transparency matters in the specific domain of text and data mining activities aimed at training AI technologies, where copyright holders hold opt-out rights under Article 4(3) Directive 2019/790. To this end, the EU AI Act obliges 'general-purpose' AI model developers to (i) put in place a policy to comply with EU copyright law and make sure that developers' products identify and comply with reservations of rights expressed by copyright holders; and (ii) draw up and make publicly available a sufficiently detailed summary of the materials used for training the general-purpose AI model, according to a template provided by the AI Office.

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[45] See KRETSCHMER, Martin; KRETSCHMER, Tobias; PEUKERT, Alexander and PEUKERT, Christian, "The risks of risk-based AI regulation: taking liability seriously, 27 September 2023, pp. 3-9, available at <https://ssrn.com/abstract=4622405> accessed 12 October 2024, where the authors stress that the AI Act's risk-based approach creates "a tremendous amount of complexity. This complexity is not an unavoidable consequence of the need to regulate AI in a proportionate manner. Instead, it follows from the attempt to extend the traditional product safety approach to AI. The logic of this approach is to work backward from certain harms to measures that mitigate the risk that these harms materialize."

[46] See PEUKERT, Alexander, "Copyright in the Artificial Intelligence Act – A Primer", *GRUR International*, vol. 73, 2024, pp. 497, 499, where the author criticises the AI Act for having created a hybrid framework for the protection of fundamental rights where these individual rights, including authors' rights, are not placed in a concrete setting. Rather, they constitute "[…] objective values and general principles that the EU has to protect in an age of AI. To achieve this complex set of public interest aims, the AI Act does not establish private rights of individuals but obligations of various actors in the AI value chain."

3.3 'Fair balance' in the enforcement of intellectual property rights

As evidenced by the EU law-making activities in the past few years, industrial property continues to be a domain where fairness is expected to play a public policy function.[47] In the field of patent law, for instance, the 2023 Proposal for a Regulation of the European Parliament and of the Council on Standard Essential Patents (SEPs),[48] approved by the European Parliament in February of 2024 and subsequently withdrawn by the European Commission,[49] had 'fairness' as an explicit goal.[50] Even earlier, in the evolution of EU trademark law, 'fairness' considerations played a role in indicating that unauthorised uses of a mark by third parties can be legitimate and 'fair' if they are undertaken for purposes of artistic expression so long as they are consistent with honest practices in industrial and commercial matters."[51]

Despite the interest that 'fairness' retains in the fields originally considered by the Paris Convention, copyright law is certainly the intellectual property field where this concept has emerged, even in Europe, as a fundamental normative principle. Among the domains of copyright

[47] As recalled above, a legal definition of fairness in intellectual property law has existed for more than a century: Article 10-bis(2) of the 1883 Paris Convention for the Protection of Industrial Property defines 'unfair' competition as any act "contrary to honest practices in industrial or commercial matters."

[48] Proposal for a Regulation of the European Parliament and of the Council on standard essential patents and amending Regulation (EU) 2017/1001 [2023] COM(2023) 232 final.

[49] SEPs are patents that protect essential technologies in technical standards or specifications. See European Parliament, "Standard Essential Patents Regulation", Briefing, PE 754.578, November 2023, available at https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/754578/EPRS_BRI(2023)754578_EN.pdf accessed 11 October 2024. For more information on the Commission's withdrawal of this Regulation in February 2025, see https://ec.europa.eu/newsroom/eismea/items/871191/en

[50] Recital 2 of the Regulation Proposals stated: "This Regulation aims at improving the licensing of SEPs, by addressing the causes of inefficient licensing such as insufficient transparency with regard to SEPs, fair, reasonable and non-discriminatory (FRAND) terms and conditions and licensing in the value chain, and limited use of dispute resolution procedures for resolving FRAND disputes. All these together reduce the overall fairness and efficiency of the system and result in excess administrative and transactional costs."

[51] Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark (codification) [2017] OJ L154/1, Recital 21; Directive 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trade marks [2015] OJ L336/1, Recital 27.

where this concept has historically played a role and its importance is growing – considering also the social, artistic and commercial changes induced by the digital revolution in the past two decades – are (i) copyright exceptions and (*ii*) the implementation of online copyright enforcement measures such as site-blocking injunctions.

3.3.1 Copyright exceptions

The most relevant examples in this mapping exercise concerning copyright exceptions are certainly the doctrines of 'fair use' under U.S. law[52] and 'fair dealing' in the United Kingdom.[53] Fair use, in particular, embodies an eminently flexible, open-ended legal standard or rule of reason where 'fairness' is understood as a kind of 'equity', 'flexibility' that allows courts to pursue the public interest by continually adapting the doctrine in new technical contexts. For instance, this happened in the landmark case of *Sony Corp. of America v. Universal City Studios, Inc.*, where the Supreme Court held that home recording of television shows for personal use was not copyright infringement because it served the public interest by enabling "time-shifting" without harming the potential market for the original works.[54] Three decades afterwards, the U.S. Court of Appeals for the Second Circuit ruled in favour of Google, finding that large-scale digitisation of book collections leading to the Google Books project constituted fair use.[55]

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[52] Cf. Section 107 of the U.S. Copyright Act. Initially created by courts and later codified in the U.S. Copyright Act of 1976, fair use operates retrospectively and flexibly, with judges being able to apply this doctrine on a case-by-case basis whenever they find unauthorised use of a copyrighted work 'fair' and, therefore, legitimate. To do so, U.S. courts are bound by statutory criteria that function as guiding principles in the evaluation of potentially copyright infringing uses, namely: (i) the purpose and character of the use; (ii) the nature of the work; (iii) the amount or substantiality of the portion used; and (iv) the effect of the use on the potential market value of the work.

[53] 'Fair dealing' in the UK is distinct from the broader US 'fair use' doctrine. In the UK, fair dealing is more narrowly defined and is limited to specific purposes as set out under Sect. 29 and 30 of the Copyright, Designs and Patents Act 1988 (CDPA).

[54] See 464 U.S. 417, 1984.

[55] See *Authors Guild v. Google, Inc.*, 804 F.3d 202 (2d Cir. 2015), where the Court reached this conclusion on the grounds of the transformative character of Google's use; the limited display of snippets; the overall public benefit created a searchable digital database of millions of books; and the minimal harm caused to the market for the original works.

In Europe, instead, the concept of public interest is not explicitly defined under copyright law. Exceptions are solidly based on a principle of strict interpretation and the international standard of the 'three-step test'.[56] This standard requires that exceptions apply in certain special cases, on condition that they do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author. By providing the broadest harmonization set of measures the EU has adopted so far to integrate national copyright systems, Directive 2001/29 acknowledges the importance of a fair balance of the interests of copyright owners with the interests of users and the public at large (cf. Recital 31). To this end, Article 5 of the Directive contains a catalogue of exceptions and limitations, many of which are clearly intended to ensure that copyright does not unduly restrict fundamental rights. Yet, the exhaustive character of this catalogue and the constraints created even by the EU version of the three-step test (Article 5(5)) leave little room for courts to limit the copyright scope through an external limit to copyright enforcement.

The judicial 'activism' of the CJEU in this area is well-known. While interpreting the exceptions contained in the Directive 2001/29,[57] the CJEU has consistently emphasised the need to strike a fair balance between conflicting interests.[58] In its 2011 judgment in *Eva-Maria Painer v. Standard Verlags*, the CJEU advocated for a restrictive interpretation of the notion of 'quotation' under Article 5(3)(d) InfoSoc Directive; yet, it emphasised that copyright exceptions should be interpreted fairly

[56] See the Berne Convention for the Protection of Literary and Artistic Property, Article 9(2); and the TRIPS (Trade-Related Aspects of Intellectual Property Rights) Agreement, Article 13. For a scholarly attempt to go beyond and radically reduce the restrictiveness of the three-step test and elaborate a global doctrine of fair use based on an extensive interpretation of the mandatory copyright exception of quotation under Article 10(1) of the Berne Convention, see APLIN Tanya and BENTLY Lionel, *Global Mandatory Fair Use,* Cambridge University Press, Cambridge, 2020.

[57] Directive 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 (hereinafter 'InfoSoc Directive').

[58] The rulings on exceptions where the CJEU expressly relied on the principle of 'fair balance' include: C-145/10, *Eva-Maria Painer v. Standard Verlags GmbH and Others* [2011] ECLI:EU:C:2011:798 para. 132; C-201/13, *Deckmyn* [2014] ECLI:EU:C:2014:2132 para. 27; C-469/17 *Funke Medien v Bundesrepublik Deutschland* [2019] ECLI:EU:C:2019:623, para. 53; C-476/17, *Pelham* [2019] ECLI:EU:C:2019:624 para. 32.

and, thus, consistently with their intended purpose.[59] By adopting such teleological reasoning, the judges paved the way for more flexibility when balancing the rights and interests at stake.[60]

From the mid-2010s onwards, the CJEU increasingly acknowledged that the intended purpose of copyright exceptions was that of protecting fundamental rights, particularly freedom of expression and information.[61] In *Deckmyn*,[62] the Court found that the parody exception should have been regarded as an "autonomous concept of EU law," banning all restrictive criteria on national law, and shall be interpreted in a way that maintains a fair balance between copyright protection and freedom of expression.[63] In doing so, the CJEU effectively ended up merging the logic of the exception with that of a user's fundamental right, making the parody exception *de facto* mandatory for Member States, despite the optional character of the exceptions in the InfoSoc Directive.[64] Something similar happened in *Funke Medien* and *Spiegel Online*, where two media outlets advocated their fundamental right to use materials protected by copyright without the right-holders' authorisation.[65] The copyright claims these defendants sought to curb on the grounds of media freedom concerned – respectively – a classified military report and a pseudonymised book chapter authored by a politician, both of which were made available to the public without permission. Even if these rulings emphasised the necessity to interpret copyright exceptions broadly, to accommodate fundamental rights, the Court held that users' fundamental rights cannot justify the introduction

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[59] *Eva-Maria Painer*, paras. 109 and 133.

[60] Rendas, Tito, "Fundamental Rights in EU Copyright Law: An Overview" in The Routledge Handbook of EU Copyright Law, Eleonora Rosati (ed.), Routledge, London, 2021, p. 27.

[61] Charter of Fundamental Rights of the European Union, Article 11.

[62] C-201/13, *Deckmyn* [2014] ECLI:EU:C:2014:2132.

[63] Cf. Article 5(3)(k) InfoSoc Directive. See *Deckmyn*, para. 27.

[64] Sganga, Caterina, "A Decade of 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" *European Intellectual Property Review*, vol. 11, 2019, p. 683, 689. This point was also raised for other copyright exceptions by Snijders, Thom and Van Deursen Stijn, "The Road Not Taken – the CJEU Sheds Light on the Role of Fundamental Rights in the European Copyright Framework – a Case Note on the *Pelham*, *Spiegel Online* and *Funke Medien* Decisions" *International Review of Intellectual Property and Competition Law*, vol. 50, 2019, p. 1176, 1190.

[65] See C-516/17, *Spiegel Online [2019*] ECLI:EU:C:2019:625, para. 54 and C-469/17 *Funke Medien* [2019] ECLI:EU:C:2019:623, para. 70.

of new copyright exceptions that would expand the exhaustive, closed catalogue of exceptions set out in the InfoSoc Directive.[66]

3.3.2. Copyright enforcement

The CJEU's principle of fair balance of interests has played a relevant role in the domain of online copyright enforcement. 'Fair balance' was initially used by the Court to establish limits to the legitimacy of excessively broad enforcement measures that would not be proportionate and would unduly harm tech companies' freedom to do their business online.[67] The implementation of permanent filters requested by the Belgian collecting society SABAM, aimed to prevent a social network (Netlog) from making its members' music repertoire available to the public, is an excellent example.[68] Consistently with its bidirectional character, this principle has been used by the CJEU also the other way around, namely, to justify and uphold the adoption or even the constitutional validity of measures aimed at restoring, or at least facilitating, the exercise of copyright in ecosystems where these rights are particularly vulnerable. This was, and still is (to a lesser extent), the case of the social media industry, where a protracted implementation of the controversial liability exemption created by Article 14 of the 2000 e-Commerce Directive and the industry practice of notice-and-takedown mechanisms systematically sacrificed the integrity of authors' rights and related rights to the altar of Internet or media 'freedom'.[69]

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[66] See *Spiegel Online*, para. 49.

[67] The CJEU started using the principle of fair balance of fundamental rights to create limits to excessive copyright enforcement in C-275/06, *Promusicae* [2008] ECLI:EU:C:2008:54. It continued in cases such as C-70/10, *Scarlet Extended v. SABAM* [2011] ECLI:EU:C:2008:54 and C-314/12, *UPC Telekabel Wien* [2014] ECLI:EU:C:2014:192.

[68] See C-360/10 *SABAM v. Netlog* [2012] ECLI:EU:C:2012:85, paras. 43-47.

[69] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market. It is worth recalling that Article 14 of the e-Commerce Directive was originally designed to protect hosting service providers who had no actual knowledge of illegal activities being performed by recipients of their services. Logically, this liability exemption should *not* have applied to 'intelligent' platforms which "play an active role of such a kind as to give them knowledge of or control over those data [entered by recipients]": see C-324/09, *L'Oréal v. eBay* [2011] ECLI:EU:C:2011:474, para. 112 f.

The most important ruling evidencing that the protection of authors' rights can prevail over other fundamental rights is certainly *Poland v. Parliament and Council*.[70] In this ruling, the CJEU confirmed the full legitimacy of Article 17(4)(b) and (c) of the DSM Directive, which was challenged by Poland mainly because of its supposed conflict with users' fundamental rights to freedom of expression under Article 11 of the EU Charter on Fundamental Rights. The Court held in its ruling that, although not inviolable and absolute, the right to intellectual property embodied in Article 17(2) of the EU Charter on Fundamental Rights is a human right whose high level of protection justifies the copyright liability regime created under Article 17 of the DSM Directive.[71] To reach this conclusion, the Court considered this liability infrastructure as a whole, including the provisions aimed at preserving the effectiveness of certain copyright exceptions and offering redress and out-of-court dispute resolution mechanisms to users of each social media service falling under the definition of 'Online Content-Sharing Service Provider'.[72]

3.3.3. Constitutionalisation of authors' rights in Europe

The consolidation of the principle of a fair balance of interests in the CJEU's case law is consistent with the EU Charter on Fundamental Rights and with the idea that copyright stands at the same level as other human rights, especially after the constitutionalisation of the Charter under Article 6 TEU.[73] Yet, many legal scholars openly questioned the desirability of this principle and of the idea that intellectual property and, more specifically copyright, could be ranked at the same level as other fundamental rights.[74] Senftleben recently justified this conclusion by

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[70] See C-401/19, *Republic of Poland v. European Parliament and Council*, [2022] ECLI:EU: C:2022:297.

[71] See *Poland v. Parliament and Council*, paras. 92-99.

[72] *Ibidem*.

[73] Mazziotti, Ranaivoson (n 26) p. 257

[74] This trend in legal scholarship became particularly visible with the adoption and national transpositions of Article 17 of the Digital Single Market Directive (2019/790), as a significant number of scholars argued that this provision would disproportionately harm end users' freedom of expression and information: see, for instance, Quintais, João Pedro *et al.*, "Safeguarding User Freedoms in Implementing Article 17 of the Copyright in the Digital Single Market Directive: Recommendations from European Academics", *Journal of Intellectual Property, Information Technology and E-Commerce*, vol. 10, 2019, pp. 277-282; Geiger, Christophe and Jütte, Bernd Justin, "Platform Liability under

arguing that the CJEU has contributed to an excessive entrenchment of copyright law within the EU's constitutional framework, a phenomenon he refers to as 'overconstitutionalisation'.[75] He argues that, instead of ensuring a balanced consideration of competing fundamental rights – such as freedom of expression – provisions such as the above-mentioned three-step test function as barriers, further limiting the scope of exceptions to intellectual property protection. As a result, the above-mentioned CJEU's rulings would reinforce a legal regime that overwhelmingly favours rights holders, while restricting the ability of users to invoke their fundamental rights. This author raises a strong critique of the fair balance principle, arguing that, by confining the balancing of rights within the (too) narrow parameters of existing intellectual property frameworks, the CJEU has limited the opportunities to accommodate broader public policy concerns.[76] This has the effect of privileging copyright holders and downplaying the significance of fundamental rights for users, leading to a system where intellectual property protection is prioritised at the expense of other crucial freedoms.

Another equally authoritative voice such as Strowel's expressed a very different opinion that we find more persuasive than the one based on copyright's excessive constitutionalisation. This author conceives a balance of interests as a necessity of the EU Charter, arguing that the settlement of disputes where authors' and users' rights enter into conflict depends on a case-by-case assessment of various interests concretely at risk. To support this view, Strowel refers to CJEU rulings that reveal a careful examination of disputes where the necessity to guarantee a *high level* of protection for intellectual property, as explicitly required in European directives, made copyright claims prevail over defences

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Art. 17 of the Copyright in the Digital Single Market Directive, Automated Filtering and Fundamental Rights: An Impossible Match", *GRUR International*, vol. 70, 2021, 532-534; Reda, Felix; Selinger, Joschka and Servatius, Michael, "Article 17 of the Directive on Copyright in the Digital Single Market: a Fundamental Rights Assessment", *Gesellschaft für Freiheitsrechte*, 2020, 42.

[75] Senftleben, Martin, "The Unproductive 'Overconstitutionalization' of EU Copyright and Trademark Law – Fundamental Rights Rhetoric and Reality in CJEU Jurisprudence", *International Review of Intellectual Property and Competition Law*, vol. 55, 2024, 1471, Sect. 2.

[76] *Ibidem*, Sect. 4.

basedon freedom of expression and other fundamental rights, such as the right to privacy.[77]

Despite their dissent, these scholars agree that the explicit reference to fundamental rights in the CJEU's case law provides a stronger foundation for the qualification of authors' rights as human rights. The essence of their disagreement concerns the social desirability of this outcome. Whereas Senftleben sees this conclusion as an unfortunate legal reality that systematically stifles the protection of users' rights, Strowel welcomes its consistency with Article 27(2) of the 1948 Universal Declaration of Human Rights, which protects the *moral* and *material* interests of authors resulting from their scientific, literary, or artistic productions.[78] It is undeniable that the CJEU rulings sought to achieve fairness through harmonisation. Preliminary rulings are, at the end of the day, the most effective and institutionally fair way to prevent national legislators and courts from interpreting EU provisions too broadly, in a way that would sacrifice legal certainty, veering away from the normative benchmarks established under EU directives. However, in the specific field of copyright, the principle of fair balance does more than just ensure harmonisation: it helps restore the dimension of authors' rights as fundamental rights that aligns with their personality rights character in continental Europe and the need to protect authors' rights from increasingly pervasive AI technologies that question the notion of 'authorship' itself.[79] This dimension was completely lost when the social media industry emerged and scaled up by relying on these companies'

[77] See STROWEL, Alain, "Copyright strengthened by the Court of Justice interpretation of Article 17(2) of the EU Charter of Fundamental Rights", in POLLICINO, Oreste *et al.* (eds) Copyright and fundamental rights in the digital age. Edward Elgar, 2020, pp. 40-52, drawing upon cases such as C-275/06 *Promusicae v. Telefonica*, ECLI:EU:C:2008:54; C-160/15 *GS Media v. Sanoma et al.*, ECLI:EU:C:2016:644; Case C-161/17 *Land Nordrhein-Westfalen v. Dirk Renckoff*, ECLI: EU:C:2018:634; C-476/17 *Pelham GmbH and Others v. Ralf Hütter and Florian Schneider-Esleben*, ECLI:EU:C: 2019:624.

[78] STROWEL, pp. 40-46.

[79] As remarked by GARBEN, Sacha, "Fundamental rights in EU copyright harmonization: Balancing without a solid framework: Funke Medien, Pelham, Spiegel Online"*, Common Market Law Review*, vol. 57, Issue 6, 2020, 1909, in a broad legal order such as that of the European Union, there is no precise understanding of the actual goal and contents of the various fundamental rights. This means that the balancing of interests is likely to follow the EU members' own constitutional standards, which is an additional reason why – in our view – copyright's harmonisation process should be taken seriously and eventually protected by EU and national courts.

ability to exploit creative works without having to pay for it (or duly credit professional authors and performers for their works). At least, the principle of fair balance constitutes a source of flexibility that helps courts assess the legitimacy of unauthorised uses of protected works on a case-by-case basis.

4. Fair remuneration of creators as a fast-growing policy interest in Europe

In European copyright law, the question of 'fairness' has been a predominant topic of discussion, especially with regard to the 'fair' remuneration of right-holders, for more than three decades. A chronological analysis of the historic development and evolution of the European institutions' policy discourse in the music sector carried out within the Fair MusE project reveals that, from the early 1990s onwards, despite varied terminology, several directives aimed at fostering 'equitable' remuneration of authors and performers.[80] This happened through the harmonisation of non-waivable rights and other measures seeking to reserve a portion of the earnings from the exploitation of copyright works to individual creators, also with a view to preserving cultural diversity.[81]

With the advent of digitisation, the music sector faced substantial revenue losses with the end-to-end nature of the Internet and then the emergence of dominant online platforms that triggered heated debate on remuneration, ownership and access to knowledge. As suggested above,

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[80] Vlassis, Antonios, Psychogiopoulou Evangelia, *et al.*, "Origins, goals and effects of EU law and policy in the online music sector", D2.1 Publication within 'Fair MusE', 2024, available at https://fairmuse.eu/fairmuse-resources/.

[81] Vlassis, Psychogiopoulou, *et al.* (n 80), pp. 38-55. Drawing upon the analysis of legislation and other policy measures the EU adopted over thirty years, from 1992 to 2022, these authors show that an embryonic form of today's concept of 'fairness' can be traced already in the harmonisation of neighbouring rights pursued by Directive 92/100/EEC on rental right and lending right and on certain rights related to copyright: see, for instance, Article 4 of this directive, which introduced an unwaivable right to equitable remuneration for authors and performers who transferred their rental rights in phonograms. Similarly, Articles 5 and 8(2) of Directive 2006/115/EC of 12 December 2006, which recast the provisions contained in Directive 92/100, strengthened – respectively – authors' and performers' rights to equitable remuneration for the rental of phonograms and codified performers' and record producers' rights to a single equitable (and shared) remuneration for broadcasting and any communication to the public.

broader policy discussions on this front intensified over the course of the 2010s, with a significant acceleration after the launch of a European Commission's Communication entitled 'Digital Market Strategy' in 2015. It was in his appointment letter to the Commissioner for the Digital Single Market (2014-2019), former Estonian Prime Minister Andrus Ansip, that President Juncker mentioned for the first time the idea of a copyright reform where 'fairness' appeared with regard to the need for a "fair level-playing field for all companies offering their goods and services online and in digital form."[82] It was through the political agenda of the Juncker Commission that EU institutions started and finalised the digital copyright reform that culminated in the adoption of Directive 2019/790.

The DSM Directive embodies the normative concept of fairness in two of its key provisions, namely, Articles 17 and 18. Article 17 targets the way music streaming services and social media companies clear rights in the copyright materials that, through their users' uploads, feed their data-driven business models. Article 18 codifies a right to "appropriate and proportionate" remuneration for authors and performers, leaving Member States with the freedom to determine how, and through which mechanisms, this fair level of creators' remuneration should be achieved. Although 'fairness' is not explicitly mentioned in Article 17, both regulatory interventions seek a more equitable payment and allocation of remuneration of creators in the music sector and a reduction of the financial gap that exists between the licensing fees paid by streaming services and the (much) lower ones paid by social media platforms. Especially in the user-generated content industry, both provisions target the impact of personalised advertising on creators' remuneration and consider the impossibility for right-holders to understand platforms' algorithms and to have a financial benchmark in their bargains (as platforms' revenues are subject to secrecy).

These EU law provisions consider that, with the advent of streaming and social media, music became a service to be accessed, not a product to be owned.[83] Large online music exploiters now follow business models

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[82] See JUNCKER, Jean-Claude, 'President Juncker's Mission Letter for Andrus Ansip: Vice-President for the Digital Single Market' (11 January 2014) 4 https://carloscoelho.eu/img/site_8/dossiers/647/04/04_mission.pdf last accessed 12 October 2024.

[83] See, for instance, CROLL, Alistair, "The music science trifecta: Digital content, the Internet, and data science have changed the music industry", O'Reilly, 9 September 2015, available at <http://radar.oreilly.com/2015/09/the-music-science-trifecta.html> accessed 11 October 2024.

wherein their algorithms on music distribution and consumption strongly dictate the value of music, creating an advantageous situation for artists whose repertoires are disseminated by filter bubbles and recommender systems, and vice versa. In these data-analytics businesses where the most valuable asset tech companies seek to exploit is consumers' attention, music creators cannot properly exploit their rights in a 'fair' way without knowing, at least to a certain extent, how online music exploiters create value and extract profits and where the value of digital music comes from.

The comparative law analysis performed within the Fair MusE project shows that Article 17 is being implemented uniformly across Europe (except for Germany, Italy and Spain).[84] By implementing the provision almost verbatim, most Member States preserved Article 17's balanced approach, which, as emphasized above, the CJEU ultimately confirmed as compatible with EU law, largely due to the various safeguards designed to protect social media users' fundamental rights.[85] Fair MusE's empirical investigations consistently show that the leverage this provision has created for music right-holders is strengthening their bargaining power, especially while negotiating deals with social media platforms that were historically more reluctant (i) to pay fair levels of remuneration and (ii) to invest in content identification technologies and rights management infrastructures that can meet the Article 17 requirements of 'best efforts' in music industry standards. On Article 18's front – as expected, given the broad discretion characterising its second paragraph – Member States have adopted different criteria and mechanisms to operationalise 'fairness'. This has caused further fragmentation and proliferation of remuneration rights, including those of performers for online exploitations under Belgian law[86] and those of authors and performers in Germany[87] for social media exploitations, which are currently pending, respectively, before both Member States' constitutional courts and – in the Belgian case – even the CJEU.[88] Despite

[84] As emphasised above, Article 17's harmonised criteria to scrutinise social media's copyright liability were found fully legitimate by the CJEU in *Poland v. Parliament and Council* (n 70).

[85] See *Poland v. Parliament and Council*, paras. 93-96.

[86] Article XI.228/4 of the Belgian Code of Economic Law.

[87] Sections 4(3), 5(2), 12(1) of the German OCSSP Act.

[88] Belgian Constitutional Court, Arrêt n° 98/2024 du 26 septembre 2024 (Numéros du rôle7922, 7924, 7925, 7926 et 7927) BE:GHCC:2024:ARR.098 available at <https://

these two significant national solo efforts, the lack of a clear definition of what constitutes 'appropriate' and 'proportionate' fails to provide contracting parties with useful guidance, leaving right-holders without tools to effectively enforce their rights. Further measures to promote fair remuneration, such as limiting lump-sum payments – a persistent music industry practice to compensate session musicians – offer, at best, improvement on a mere local level. It is therefore not surprising that 87.6% of performers in 2024 still believe that streaming revenues are distributed unfairly.[89]

From a technical and contractual perspective, such a persisting (or increasing) legal fragmentation has prevented the emergence of cross-border standards of 'accurate' and 'transparent' data-sharing models without which the goal of fair (i. e., 'appropriate and proportionate') remuneration cannot become a market reality. Fair MusE's empirical investigations show that the music data infrastructures which would foster fairness in digital music licensing are still limited, missing, or kept secret within information silos. This is a clear failure in EU digital policy if one considers that a "high level of transparency" has been indicated as a general policy goal in all the EU legislative instruments targeting the European music sector in the last decade. The key copyright reform embodied in the DSM Directive contains a specific provision, namely, Article 19,[90] which supplements pre-existing transparency obligations created by Directive 2014/26 for – respectively – collective rights management organisations (CMOs) and music users.[91] All these provisions envisage transparency-driven data ecosystems across the music value chain where:

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www.const-court.be/public/f/2024/2024-098f.pdf> accessed 17 October 2024.

[89] Johansson, Daniel, "Streams and Dreams: The Impact of the DSM Directive on EU Artists and Musicians", joint study by the International Artist Organisation & AEPO-ARTIS, June 2024, 2, available at <https://www.aepo-artis.org/wp-content/uploads/2024/06/STREAMS_AND_DREAMS_PART2-1.pdf> accessed 18 October 2024.

[90] DSM Directive, Article 19(1): "Member States shall ensure that authors and performers receive on a regular basis, at least once a year, and taking into account the specificities of each sector, up to date, relevant and comprehensive information on the exploitation of their works and performances from the parties to whom they have licensed or transferred their rights, or their successors in title, in particular as regards modes of exploitation, all revenues generated and remuneration due."

[91] See CRM Directive, Articles 16, 17 and 18.

- music exploiters such as streaming and social media services are obliged to disclose all the relevant information at their disposal on the use of the musical compositions and sound recordings being licensed by right-holders through usage reports;
- right-holders shall ensure or facilitate, directly or through their CMOs, the identification of their works through effective data and metadata sets (especially in the social media industry, which is characterised by a mix of professional and amateur works); and
- music publishers and record producers shall inform individual creators about the profits generated by their works for creators to be able to better negotiate their copyright transfers.

Empirical investigations depict a business reality that is far from the high level of data transparency envisaged under EU law and supported by other horizontal EU-wide provisions such as Article 27 of the DSA. Interviews with industry experts suggest that existing laws do not ensure data transparency especially when data would be more useful for right-holders, namely, before and during negotiations. Certainly, this situation does not place most music right-holders and their respective CMOs in a position to negotiate the licensing of their rights with sufficient awareness. Accuracy and transparency would require a standardised approach to the sharing of data and metadata regarding the music works that are being exploited. Instead, the music publishing industry still embraces a proprietary, silo-based approach that makes its data subject to confidentiality, even more so after the repertoire fragmentation that has characterised the shift from territorial, multi-repertoire to EU-wide, mono-repertoire licensing. CMOs share, at least in part, their repertoire and membership databases with their sister societies in the CIS-Net portal, curated by their umbrella organisation CISAC.[92] Yet, nobody else can access this resource and CMOs are still seeking to implement reliable matching systems to accurately monitor uses of their works and allocate revenues to their members on the grounds of usage reports. Streaming and social media services rely on sound recordings data in their reports – i. e., not the musical works' – and provide very different and inconsistent data sets to right-holders, with YouTube appearing better equipped and more transparent than TikTok, among social media

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[92] See, CISAC's webpage, 'CIS-Net' section, available at <https://www.cisac.org/services/information-services/cis-net>, accessed 11 October 2024.

services. Finally, the recording industry, whose works are the primary products in the digital music market, provides the most important data and metadata for the music ecosystem to have effective benchmarks. However, whereas labels collect featured performers' data easily given their royalty-based remuneration, the session musicians' data are much poorer and inconsistent.

To conclude: it is only through data transparency that fairness, wherein appropriate and proportionate remuneration is central for music creators, can be fostered in a diverse cultural landscape where an asymmetrical distribution of bargaining power among stakeholders renders negotiations and licensing agreements very opaque.[93] The current situation is even more alarming if we consider that the EU has already built a robust legislative framework for transparency to thrive, consolidate, and reduce the aforementioned asymmetries.

As recently remarked in a resolution of the European Parliament from January 2024, fairness in the digital music economy is not only a matter of distributive justice but can also act as a catalyst for cultural diversity. A fair allocation of revenues from digital markets is a fundamental policy goal especially in a sector, such as music, which is "a major pillar of culture" and a "vital component of cultural and linguistic diversity in the Union, with the widest public outreach of any cultural and creative sector (CCS)."[94] In this normative context, data 'transparency' shall be viewed as a prerequisite for promoting fairness in EU economic and cultural policies. The music data that would make the treatment of music creators *fair* include, for instance, accurate and up-to-date music repertoire information rights; disclosure of the various right-holders involved, with the indication of their respective rights managers, and repertoires they represent; the different royalties paid to music creators because of a certain revenue distribution model (i. e., user-centred or pro-rata) implemented by a certain digital service; and the overall profits generated by music works and sound recordings as a consequence of a

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[93] Mazziotti, Giuseppe, "What is the Future of Creators' Rights in an Increasingly Platform-Dominated Economy?", *International Review of Intellectual Property and Competition Law*, vol. 51, 2020, pp. 1027-1032.

[94] European Parliament resolution of 17 January 2024 on cultural diversity and the conditions for authors in the European music streaming market [2023/2054(INI)], points 1, 19 (hereinafter 'Parliament Resolution of 17 January 2024').

given business model.[95] These data can also encompass diversity indicators (such as repertoire metadata) that would allow for the assessment of use and visibility of (European) musical works and its diversity of genres, languages and authors and other stakeholders involved in the creation and dissemination of musical works.

Conclusion

In this article, we have mapped the normative concept of fairness within the framework of EU digital policies, particularly in relation to the European music industry. We began by situating the idea of fairness within its broader historical and legal contexts, demonstrating its evolution from early European economic integration to its current centrality in policies addressing the challenges of the digital markets. Fairness, initially rooted in competition law, now extends to critical issues of platform regulation, consumer protection, and intellectual property, with fairness as a guiding principle across multiple regulatory domains.

The European Union's Digital Market Strategy (2015) marked a turning point, solidifying fairness as a core normative objective in digital markets. This has culminated in legislative measures such as the Digital Markets Act, the Data Act, and the Digital Services Act, all of which seek to correct imbalances and promote fair competition, especially in response to the dominance of large tech platforms. These frameworks aim to foster transparency, accountability, and ultimately fairness in digital environments that affect various stakeholders, including consumers, businesses, and creators.

When it comes to the European music industry, the concept of fairness has acquired remarkable prominence. The digital revolution, especially the rise of streaming platforms and social media, has significantly altered the way music is created, distributed, and monetised. This has led to new challenges for copyright holders, especially individual creators, who often face asymmetrical power dynamics in negotiating fair remuneration for the exploitation of their works. Directive 2019/790 (the DSM Directive), specifically in Articles 17 and 18, embodies efforts to address these imbalances by seeking to ensure fair and appropriate remuneration for

[95] The proper identification of authors, through data transparency, is also crucial for ensuring diversity on platforms, as highlighted by the European Parliament in its Resolution of January 2024: see Parliament Resolution of 17 January 2024, Recital R.

creators, thus embedding fairness as both a distributive and procedural objective in the digital music economy.

One of the central themes in the European music sector is certainly 'fairness as data transparency'. This concept underscores the importance of transparency in the relationship between music platforms and creators, particularly regarding the data-driven nature of modern music consumption. Without access to transparent and accurate data on how their works are being used and monetised, authors and performers are unable to exercise their statutory rights effectively. The opacity of platforms' algorithms and revenue-sharing models exacerbates the difficulties creators face in obtaining fair remuneration. Thus, data transparency is not only a matter of distributive justice but also a crucial mechanism for ensuring a fair cultural and economic ecosystem where all stakeholders, especially the least powerful, can thrive.

The European music industry's engagement with fairness, therefore, reflects broader concerns about power asymmetries in the digital economy. Fairness, as applied to this sector, extends beyond mere economic compensation; it encompasses broader cultural and societal dimensions, including the preservation of cultural diversity and the protection of creators' rights in an increasingly platform-dominated environment. The lack of standardised data-sharing models and the resulting fragmentation of copyright remuneration systems across EU member states further highlight the ongoing challenges in achieving a truly fair system.

To conclude: the European music industry's ongoing struggle for fairness is emblematic of larger debates in EU digital policy. While significant legislative strides have been made, notably with the DSM Directive, there remains much work to be done in operationalising fairness in practice. The future of fairness in the music industry will depend not only on legislative reforms but also on the development of robust, transparent, and equitable data-sharing infrastructures that can address the deep-rooted imbalances in the current system. Only by bridging these gaps can the EU's ambition for fairness be fully realised, ensuring that all creators are appropriately compensated for their contributions to Europe's cultural heritage.

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